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## **TORT NEGLIGENCE, COST-BENEFIT ANALYSIS AND TRADEOFFS: A CLOSER LOOK AT THE CONTROVERSY**

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Tort negligence, cost-benefit analysis and tradeoffs: a closer look at the controversy

by

Kenneth W. Simons\*

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\* Professor of Law, Associate Dean for Research, & The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. © Kenneth W. Simons 2007; all rights reserved. Thanks to Stan Fisher, Jim Fleming, Greg Keating, David Lyons, and participants at the Boston University School of Law faculty workshop and Loyola-Los Angeles Frontiers of Tort Law conference for valuable advice.

## I. Introduction

What is the proper role of cost-benefit analysis in understanding the tort concept of negligence or reasonable care? A straightforward question, you might think. But it is a question that manages to elicit groans of exasperation from those on both sides of the controversy.

For most utilitarians and adherents to law and economics, the answer is obvious: to say that people should not be negligent is to say that they should minimize the aggregate expected costs of their activities—specifically, they should minimize the sum of the costs of accidents and the costs of preventing accidents. In the famous Learned Hand formulation, they should take a precaution if but only if the marginal costs (or “burden,” “B”) of that precaution (in the form of the tangible costs of the precaution or the lost benefits that taking the precaution would entail) are less than its marginal benefits (in the form of reduced risks of injury, measured by multiplying the probability (“P”) of the injury times the magnitude (“L”) of the injury if it occurs). If  $B > P \times L$ , it would be absurd to require the greater expenditure, B.

For many advocates of a fairness, corrective justice, rights-based, or contractualist perspective, the answer is equally obvious: permitting a person to impose risks of harm on others merely because he would thereby obtain a benefit (or would otherwise incur a burden) greater than the discounted value of the harm he might inflict, amounts to authorizing him to dump the costs of his risky activities on innocent victims, and is morally abhorrent.<sup>1</sup>

I will suggest that a more qualified position than either of these polar views is more defensible, and also more consistent with Anglo-American tort doctrine. But before launching into my (perhaps equally exasperating) argument for moderation, I offer five examples and a question, in order to make the controversy more concrete.

### 1. Is it better not to save a life so that billions may view the World Cup live?

Consider an example offered by Professor Gregory Keating, adapted from an example from philosopher T.M. Scanlon:

#### **World Cup broadcast**

Suppose that a piece of transmitting equipment has toppled and crushed a television technician helping to broadcast [the World Cup live] to a billion viewers worldwide, and that the only way to save the technician’s life is to interrupt the broadcast for thirty minutes, effectively thwarting the transmission of the show ...<sup>2</sup>

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<sup>1</sup> “To refuse to mitigate the risk of one’s activity is to treat the world as the dumping ground for one’s harmful effects, as if it were uninhabited by other agents.” Ernest Weinrib, *The Idea of Private Law* 152 (1995).

<sup>2</sup> Gregory Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 *Vand. L. Rev.* 653, 666 (2003). Keating’s actual example is the viewing of “Baywatch,” but as he points out, nothing turns on the low (or high) value of the television show in the example: what matters is that the show is very popular. The soccer World Cup seems to fit this criterion better than “Baywatch,” which is a less likely candidate today for avid widespread viewing.

I will later discuss the original Scanlon example upon which this hypothetical is based; some of the differences might be significant. See text at notes == infra.

A utilitarian approach of aggregating total benefits and burdens would seem to require that the broadcast not be interrupted. After all, even miniscule individual benefits add up to an enormous quantity of social welfare when aggregated over a billion people. But this result, that we should not interrupt the broadcast and save the technician's life, appears to be morally abhorrent. As Keating explains:

Although the number of viewers may be vast, the harm to them is not morally comparable to the life of the technician. Inconvenience and disappointment are not morally comparable to death. No amount of inconvenience—distributed across a large number of distinct persons—sums to the loss of a single life.<sup>3</sup>

2. May a bus driver use less care when she is transporting fewer passengers?

Here is another example raising doubts about the moral and legal relevance of aggregation—and specifically, about whether, as cost-benefit analysis assumes, an aggregate increase or decrease in the risk that one poses is always relevant to the permissibility of the risk. Is it really justifiable (holding everything else constant) to create a higher level of risk if the number of persons endangered is smaller?

**Louise, driving a full or almost empty bus**

Suppose Louise is driving a bus on her usual route. On Monday, the bus is full of passengers. On Tuesday, it has only one. Is it permissible for her to drive more quickly on Tuesday?

The view that due care depends on an aggregate cost-benefit analysis, including the aggregate risks posed by one's conduct, suggests that she may. If she loses control of the bus, the expected harm to passengers is much greater on Monday than on Tuesday. Everything else being equal,<sup>4</sup> she should take more care to prevent a risk of greater aggregate injury, and conversely she may take less care to prevent a risk of lesser aggregate injury.

Yet this is counterintuitive. Isn't each of the passengers owed the same duty of care, the same consideration of her interest in safety, without regard to how many other passengers are on the bus?<sup>5</sup>

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<sup>3</sup> Id.

As stated, the example involves a harm and a set of benefits that are certain to occur. But we could readily modify Keating's example to pose the analogous issue of whether it is permissible not to take a precaution against the future risk of such a harm, notwithstanding the cost of losing the expected benefits. Thus, suppose the television station is faced with a significant chance but not with a certainty that the technician will die unless rescued. Or suppose the technician has not yet been crushed by equipment, but there is a significant danger that the equipment will fall on him unless electricity is cut off. See Alastair Norcross, Contractualism and Aggregation, 28 Soc. Theory and Prac. 303, 310 (2002). I do not believe that these factual differences would significantly alter the intuitive revulsion that most observers would feel if the decision were made to continue the broadcast in the face of these serious risks.

<sup>4</sup> I am assuming that a greater number of passengers makes no appreciable difference to her ability to control the bus.

<sup>5</sup> This example is intended to express the same essential point as an example posed by John Oberdiek:

3. Is it permissible to impose greater risks on the poor?

In a commendable display of candor, Judge Richard Posner identifies a possible difficulty with his wealth maximization account of tort law, which, roughly speaking, is a particular version of the utilitarian approach:<sup>6</sup>

**Driving faster in a poor neighborhood**

Wealth maximization, Posner concedes, “[implies] that a person should feel free to drive faster in a poor than in a wealthy neighborhood because expected accident costs are on average lower in the former.” After all, “the magnitude of the loss if an accident occurs [is] a function in part of the income of the victim, making the optimal expenditure of time and other resources on avoiding accidents in the poor neighborhood also lower.”<sup>7</sup>

These three examples support the intuition that aggregating costs and benefits of risky conduct is a morally objectionable way to determine when that conduct is permissible. Now consider two examples suggesting the contrary, that such aggregation is morally acceptable or even obligatory.

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If construction regulations were a function of consequentialist interpersonal aggregation, it would follow that apartment high-rises would be built to make their occupants safer than the occupants of single-family homes. Equally stringent construction regulations would not be justified, on this view, for the simple fact that so many more people would be at risk in the high-rise. This is a striking conclusion, and one I believe is mistaken. Under contractualist intrapersonal aggregation, in contrast, equally stringent regulations would in fact be justified. That any single person would face the same probability and level of harm whether in an apartment building or in a single family home would be dispositive. The sheer number of people at risk would be irrelevant under intrapersonal aggregation—and that can never be the case when employing interpersonal aggregation. Therefore, the theoretical basis of risk regulation does matter. Whether to ensure the equal safety of all persons or to require different levels of safety for different people is a stark choice, and one that risk regulators cannot avoid. The respective options are in turn supported exclusively by rival moral theories. And that makes the task of articulating the relevance of moral theory to risk regulation quite literally a matter of life and death.

John Oberdiek, *The Ethics in Risk Regulation: Towards a Contractualist Re-Oriented*, 36 Rutgers Law Journal 199, 203-204 (2004). See also T.M. Scanlon, *What We Owe to Each Other*, p. 236 (1998). In a footnote, Oberdiek clarifies:

...I am not suggesting that the more specific building codes should be identical for high-rises and single-family homes. Different building codes may be justified by a single regulatory standard of care. Surely, high-rises need to be built from stronger materials than single-family homes, and in this way conform to stricter building codes, in order to ensure occupants of the former the same level of safety as occupants of the latter.

Id. at 204 n. 14.

<sup>6</sup> I say “roughly speaking” because wealth-maximization shares with a utilitarian account a requirement of aggregation and an insensitivity to the distribution of risk, harm, and benefit. However, as defended by its leading exponent, wealth is narrower than social welfare. See Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *Philosophical Foundations of Tort Law* 99, 99 (David G. Owen ed. 1995).

<sup>7</sup> Posner, id. at 110 (parentheses omitted).

4. Is high-speed driving unjustifiable because it sacrifices lives for mere convenience?

Philosopher Alastair Norcross points out the intuitive plausibility of the following principle:

**High-speed driving (Lives for convenience)**

We are not morally obligated to impose a national speed limit of 50 mph (or less).<sup>8</sup>

Most people intuitively accept this principle, and do not believe that automobile drivers should drive extremely slowly (or not at all), even though we can predict with statistical certainty that slowing down will reduce the number of accidental deaths, and even if the only benefits that drivers obtain from their greater speed is the convenience of reaching their destination more quickly.<sup>9</sup> Yet the intuitive plausibility of this principle seems to suggest that consequentialist aggregation is more generally permissible, a position that is much harder to defend. Indeed, Norcross further argues that if the **High-speed driving (Lives for convenience)** principle is correct, then we are committed to other positions that are intuitively much less plausible, such as:

*Life for headaches:* there is some finite number of headaches, such that it is permissible to kill an innocent person to avoid them.<sup>10</sup>

Readers familiar with a recent article by Cass Sunstein and Adrian Vermeule in defense of the death penalty<sup>11</sup> will notice a similar argumentative strategy. The authors point to recent studies suggesting that imposing the death penalty for murder has a substantial deterrent effect. If these studies are valid, they argue, then the government is morally obliged to impose the death penalty, just as the government is morally obliged to take affirmative precautions through regulation and others means (including tort law) to assure the safety and health of its citizens.<sup>12</sup> Norcross, Sunstein and Vermeule are willing to bite the bullet and accept the more controversial conclusion (a duty to kill an innocent to prevent a number of headaches; a duty of the state to execute murderers), based on their

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<sup>8</sup> Alastair Norcross, Comparing Harms: Headaches and Human Lives, 26 Phil. & Pub. Aff. 135, 160 (1997); Alastair Norcross, Speed Limits, Human Lives, and Convenience: A Reply to Ridge, 27 Phil. & Pub. Aff. 59 (1998). Norcross's actual example is "highway" driving, but I have changed it to "high-speed" driving, in order to emphasize that a substantial number of the victims of such driving do not benefit from it in any realistic sense. On a divided highway, as opposed to a high-speed road that passes through residential areas, it is much more likely that virtually all of the victims are drivers or passengers who in some sense benefit from the activity of speedy driving.

<sup>9</sup> Norcross, Comparing Harms, id.

<sup>10</sup> Norcross, Comparing Harms, at 135. Precisely how an intentional killing would prevent innumerable headaches is not specified. Perhaps the victim's heart contains a rare type of cell that is the only possible headache cure? Or perhaps the victim's life-saving supply of antibiotics, if taken from him and redistributed, would save a billion people from headaches. Cf. Alastair Norcross, Great harms from small benefits grow: how death can be outweighed by headaches, 58 Analysis 152 (1998).

<sup>11</sup> Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 STAN. L. REV. 703 (2005).

<sup>12</sup> See id. at 721-722 (arguing that for ordinary torts, the act-omission distinction is meaningless, since whatever government does or fails to do, it will support the entitlement of one or the other party in the dispute).

belief in the inexorable logic of consequentialism. Are they correct? Or, if they are wrong, and if **High-speed driving (Lives for convenience)** is morally distinguishable from this parade of horrors (including the **World Cup** example), how do we draw and defend the distinction?

5. Is it unjustifiable to sell a product that is convenient and useful but unusually dangerous?

### **Sub-subcompact automobile**

Suppose an automobile manufacturer sells an extremely small automobile for its convenience to urban drivers interested in parking in very small spaces. (Examples include the Smart Fortwo, recently introduced in the United States;<sup>13</sup> and the extremely basic Tata Nano,<sup>14</sup> recently introduced in India.) Although part of their attraction is the low price, another significant benefit is their tiny size. At the same time, their size also makes the passengers significantly more susceptible to physical harm in the event of a collision with another automobile or with a roadside hazard.

Is it unjustifiable to sell this automobile, with a design that some consumers find attractive because of its convenience and usefulness, even though the design is unusually dangerous? Again, even though the benefits to consumers are relatively modest, and spread relatively widely, while the "costs" in the form of serious injury and death will be very severe and suffered by only very few, the activity of selling such a product intuitively seems perfectly acceptable.

Finally, the clash of moral intuitions revealed by the earlier examples is on vivid display when we confront the following question:

6. Is it wrongful for a potential injurer to explicitly consider the costs and benefits of taking a precaution?

Consider the following result of research conducted by Professor Kip Viscusi:

### **Corporate risk analysis as a reckless act**

When mock jurors are confronted with hypothetical examples of companies that conduct explicit cost-benefit studies to decide whether to adopt a precaution, they are much more likely to impose punitive damages if the company has conducted such a study, even when its decision is cost-justified and is therefore (arguably) non-negligent, than if the company has

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<sup>13</sup> See <http://www.edmunds.com/insideline/do/Features/articleId=117630>. The car, produced by DaimlerChrysler, is only 106 inches long.

<sup>14</sup> See [http://www.usatoday.com/money/autos/2008-01-15-nano\\_N.htm](http://www.usatoday.com/money/autos/2008-01-15-nano_N.htm). The Tata Nano, produced by Tata Motors, will retail for about \$2,500 (but is 16 inches longer than the Smart Two-for). It is designed as a safer replacement for mopeds. "In the developed world, we kind of miss the point," says [Rick Wagoner, CEO of General Motors]. "We think, 'How would that car do in a crash test?' But we miss the point that it's better than being in a crash in a two-wheeler." *Id.*

not conducted such a study, even when its decision is not cost-justified, i.e., is negligent.<sup>15</sup>

Similarly, Gary Schwartz, in his article examining the famous (or infamous) Ford Pinto litigation, noted that defense lawyers shy away from the argument that a cost-benefit analysis justifies a company's decision not to take a safety precaution, for they recognize that the argument can expose their client not only to compensatory but also to punitive damages.<sup>16</sup> The lesson that many people take from the Pinto case itself is that the very act of engaging in cost-benefit analysis displays morally reprehensible callousness.<sup>17</sup>

But if the previous two examples are correct in suggesting that aggregate benefits to many (even in the form of mere convenience) can justify aggregate costs to a few (even in the form of serious injury or death), then what is wrong with an individual or corporation explicitly invoking this type of justification? If lay jurors find the justification morally abhorrent, who is right?

This paper is organized as follows. After reviewing the scope and assumptions of the argument, and the underlying philosophical perspectives, I examine and reject two types of less qualified views (simple forms of consequentialist balancing and also deontological views that reject all tradeoffs between values). I then endorse two families of qualified views, one consequentialist, the other deontological. The conclusion suggests that the Learned Hand test is sufficiently flexible to accommodate both sets of qualified views, and addresses the question how we might choose between a qualified consequentialist and a qualified deontological account.

## II. Some clarifications

### A. Scope and assumptions

This paper focuses on the proper analysis of the moral and legal concept of negligence. Strict liability is considered only peripherally.

Although the paper pays some attention to the descriptive question of how the law actually defines negligence, the emphasis is on how negligence should be understood, and on underlying justifications and principles. Only brief attention is given to institutional questions (such as the role of judge and jury in articulating negligence), questions that are of course quite important for the law to resolve.

The paper concentrates on injurer negligence, on advertent rather than inadvertent negligence, and on misfeasance cases, and largely sidesteps the complexities of victim negligence.

I view negligence to be a species of fault, of deficient conduct, of conduct that should have been otherwise.<sup>18</sup> And negligence liability is, I believe, best understood as

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<sup>15</sup> See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 *Stan. L. Rev.* 547, 588 (2000) (reporting results of mock juror analysis showing that "undertaking any type of risk analysis was harmful to the corporation's prospects both with respect to the probability of punitive damages and, more importantly, with respect to the magnitude of the award").

<sup>16</sup> Gary Schwartz, *The Myth of the Ford Pinto Case*, 43 *Rutg. L. Rev.* 1013, 1038 (1991).

<sup>17</sup> See *id.* at 1035-1037, 1043-1045 (collecting numerous sources). See also Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (2004) (expressing moral objections to cost-benefit analysis as it is usually conducted).

<sup>18</sup> See Kenneth W. Simons, "Negligence," *Symposium on Responsibility*, 16 *Social Phil. & Policy* 52 (1999).

expressing a primary duty not to act negligently. Negligence liability is not merely a pricing mechanism. In Robert Cooter's terminology, it is a sanction, not a price.<sup>19</sup> (I will, however, discuss consequentialist views that do not presuppose these understandings of negligence.)

In this paper, I say little about consent and assumption of risk. These are important issues in tort law, but they are not the focus here because they do not play a necessary role in justifying risk in our legal system, nor is it plausible that they could do so. To be sure, Kantians sometimes emphasize the impermissibility of harming others unless they consent; and one could similarly argue that risking harm to others is always impermissible unless they have consented to the risk. But the argument is too broad to be plausible: innumerable risky activities are tolerated in the contemporary world even though it is unrealistic to claim or expect that all those exposed to the risk (including bystanders and even children) subjectively "consent" in any meaningful sense of the term. As we will see, however, we should (and realistically can) ask a broader, but structurally similar question: whether those exposed to a risk sufficiently benefit from the risky activity.<sup>20</sup>

What is "risk"? This is an important and complicated topic, carefully explored by Matthew Adler<sup>21</sup> and Stephen Perry,<sup>22</sup> among others. But for the purposes of this essay, I will simply assume an epistemic conception, characterized essentially as the risks that a reasonable person would deem sufficiently important to be relevant to whether to take a precaution. I do not believe that any of the arguments in this essay turn on the question of how risk is properly characterized for purposes of understanding negligence. (I do, however, address the significance of the distinction between individual and population risk.)

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<sup>19</sup> Robert Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523 (1984).

<sup>20</sup> This is not to say that subjective consent or assumption of risk is irrelevant to permissibility. To the contrary, I think a pluralistic account of tort law is plausible, one that considers consent, autonomy, special relationships, social roles, reliance, expectations, and a number of other values in determining the existence and scope of a legal duty and the permissibility of a risk. See Kenneth W. Simons, "Justification in Private Law," book review of E. Weinrib, *The Idea of Private Law*, 81 Cornell Law Review 698, 737 (1996); Kenneth W. Simons, "Deontology, Negligence, Tort, and Crime," in Symposium on the Intersection of Tort and Crime, 76 Boston University Law Review 273, 284 (1996). For other pluralist accounts of tort law, see Bruce Chapman, *Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation*, in G. Postema, *Philosophy and the Law of Torts* 276 (2004); Jane Stapleton, *Evaluating Goldberg & Zipursky's Civil Recourse Theory*, 75 Ford. L. Rev. 1529, 1557 (2006); Izhak Englard, *The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law*, in *Philosophical Foundations of Tort Law*, D. Owen, ed., Oxford University Press (1995). See generally John Kekes, *The Morality of Pluralism* (1993).

<sup>21</sup> See Matthew Adler, *Against 'Individual Risk': A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121 (2005); Matthew Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293 (2003).

<sup>22</sup> See Stephen, Perry, *Risk, Harm, Interests, and Rights*, in *RISK: PHILOSOPHICAL PERSPECTIVES* 190 (Tim Lewens ed., Routledge 2007).

Finally, this essay examines how negligence should be understood in light of underlying normative justifications for tort law, not in light of how tort law performs the functions of deterrence, compensation, and loss-spreading.<sup>23</sup>

This essay is largely normative, though I believe it also offers a plausible description of much of tort practice. It is part of a larger project in which I suggest that a nuanced version of the Learned Hand test is both morally attractive and a credible interpretation of tort practice.<sup>24</sup> To be sure, there is much controversy about the descriptive claim that the Hand test reflects Anglo-American tort law. Jury instructions (except in some products liability cases) rarely refer to Hand balancing,<sup>25</sup> and appellate decisions refer to such balancing only intermittently.<sup>26</sup> Rather, “reasonable care under the circumstances” appears to be the (remarkably vague and opaque) “standard” that many jurisdictions require juries to apply in determining negligence.<sup>27</sup> In the conclusion, I endorse a more systematic, disciplined analysis of negligence than this.

B. Philosophical framework: consequentialism v. nonconsequentialism;  
individual moral duty v. global perspective

The broad underlying normative principles that will receive discussion in this essay are consequentialism (especially utilitarianism) and nonconsequentialism (especially such deontological principles as corrective justice, “fairness,” and contractualism). But we also must attend to two distinct ways of understanding the point of a legal duty not to be negligent (and the associated duty to pay damages if one is negligent). Is the point to express or reinforce an individual moral duty not to be negligent? Or is the point to express

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<sup>23</sup> “Deterrence” and “compensation” and “loss-spreading” are often described as justifications of tort law. But the better view is that they are simply functions, effects or constitutive parts of tort law. The question of justification runs deeper. With respect to compensation, why must the injurer compensate the victim? Because the victim has a right to recovery, as a matter of corrective justice? (Or because he has a right to recourse? See John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 *Md. L. Rev.* 364, 402-03 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *Geo. L.J.* 695 (2003).) If deterrence of risky behavior occurs as a result of tort liability, does this serve at least as a partial justification of tort liability? If so, it could be because we are concerned to deter inefficient behavior (a utilitarian approach), or instead because we are concerned to deter rights-violations (a broader consequentialist approach, or a mixed approach encompassing both consequentialist and nonconsequentialist values, in which one goal is the minimization of rights-violations). See Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 *Tex. L. Rev.* 1831 (1997). And, if we applaud the loss-spreading function of tort law, we might do so because the function operates as an efficient form of insurance, or instead because of a fairness-based principle, that those who benefit from an activity, service, act, or product, should in fairness pay for at least some of the predictable injury costs that the activity inflicts on participants, users or bystanders. See Stephen Sugarman, *Doing Away with Tort Law*, 73 *Cal. Law Review* 555, 613-616 (1985).

<sup>24</sup> See Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 *Vand. L. Rev.* 901 (2001); Simons, *Deontology, Negligence*, supra note 20; Simons, *Negligence*, supra note 18.

<sup>25</sup> See Zipursky, *Sleight of Hand*, 48 *Wm & Mary L. Rev.* 1999, 2013-2017 (2007); 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); Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 *Ga. L. Rev.* 725, 735 (1992).

<sup>26</sup> See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 *Vand. L. Rev.* 813 (2001).

<sup>27</sup> See sources cited in note 25- supra; see also Ken Abraham, *The Trouble with Negligence*, 53 *Vand. L. Rev.* 1187 (2001) (underscoring the vagueness problem with negligence standards).

or implement a more global consequentialist (or nonconsequentialist) vision, of which the individual duty is just one part?

The debate between consequentialism and deontology restates at a more fundamental philosophical level the two competing modes of exasperation noted in the introduction. For consequentialists, more welfare is better than less.<sup>28</sup> Who in their right mind would want less? For deontologists, some actions are intrinsically wrong, or a violation of rights, even if they would secure more welfare. Who would seriously reject this common sense perspective?<sup>29</sup>

Utilitarianism (in its familiar law-and-economics version) is the form of consequentialism that is most frequently invoked as a rationale for the institution, and the particular doctrines, of tort law. But a consequentialist (or specifically utilitarian) analysis can interpret tort liability for negligence in two distinct ways.

First, it could view the legal duty not to be negligent, and to pay damages for negligence, as expressing or reinforcing an individual moral duty not to create unjustifiable risks. And it would spell out the moral duty in purely consequentialist terms: an actor has created an unjustifiable risk just in case the ex ante costs of taking a precaution against creating the risk are less than the ex ante benefits of the precaution, with costs and benefits defined in a purely consequentialist (or specifically utilitarian) way.

Second, a consequentialist might instead specify the scope of the legal duty not to be negligent by reference not merely to the risks that it would be justified or unjustified for an individual to take, but also to the other, second-order costs and benefits of employing the individual-focused legal rule. This global approach might sometimes still require a legal liability rule of negligence, but it also might require strict liability, or no liability, or varying versions of the standard negligence criterion, depending on the context,<sup>30</sup> on the costs and benefits of each type of tort liability rule (taking into account error, institutional,

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<sup>28</sup> See Samuel Scheffler, Introduction, *Consequentialism and Its Critics 1* (Scheffler, ed. 1988):

[A]ll [consequentialists] share ... a very simple and seductive idea: namely, that so far as morality is concerned, what people ought to do is to minimize evil and maximize good, to try, in other words, to make the world as good a place as possible.

See also Kaplan, Louis & Steven M. Shavell, *Fairness versus Welfare* 21-23, 62-81 (Harvard University Press 2002) (arguing that “fairness” principles should not be applied as independent evaluative criteria for social decisionmaking, but can play a subsidiary role in welfare-based criteria, insofar as people often have a “taste” for fairness and insofar as notions of fairness are sometimes good proxies for social norms that promote social welfare).

<sup>29</sup> Scheffler, *id.* at 2.

<sup>30</sup> Here are two examples of a disjunction between the individual and global approaches.

First, suppose that individually optimal conduct is: “Drive five mph over the speed limit except when a slower speed would obviously be required because of unusually heavy traffic conditions.” But further suppose that the following simple rule is much easier to monitor and enforce: “Drive no faster than the speed limit, and always be found non-negligent if you do so.” Then this rule (requiring greater care than what individual optimality would require) is now globally optimal in light of all costs and benefits.

But conversely, the global approach sometimes requires less care than the individual norm does. Suppose that a rule of legal liability in a particular context would be so likely to discourage desirable activity that it is better not to impose liability even on types of conduct that are suboptimal. For example, assume, as some utilitarians say, that it is optimal for individuals to perform rescues if the burden of rescuing is less than the expected benefits to the potential victim. Yet a legal rule of liability for not rescuing might discourage some people from visiting locations (the beach, the ski slope) where others might need rescue. (Or so it is said. See Richard Posner, *Economic Analysis of Law* 191 (7<sup>th</sup> ed. 2007).). Accordingly, a very limited legal duty of easy rescue might ultimately be optimal in light of these further negative incentives, even if what utilitarianism really demands is an unqualified duty to rescue.

and other costs), and on the cost-effectiveness of alternative legal approaches (including criminal law and regulation).<sup>31</sup>

Why does this distinction matter? Because these two different consequentialist approaches require very different types of analysis. A person who fails properly to weigh the expected utilitarian costs and benefits of his actions is arguably subject to blame for not properly considering the effects of his actions on others. Here we see the Kantian strand within utilitarianism. And this is a coherent understanding of negligence even if a social judgment of blame, or a legal sanction such as a liability rule, will have little or no effect on future conduct (of that person or of others).

But the global approach is quite different. Here, a primary reason for the legal rule of liability for negligence is to induce optimal care. At the same time, the global approach has to consider the costs and benefits of using tort law (or other legal or social sanctions) to stimulate potential injurers to act carefully. Thus, although the “optimal” care that the global approach actually recommends might turn out to be the same standard of care that the individual duty approach would require, it might also be some other level of care that is socially optimal in light of other costs and benefits of trying to induce a suitable level of care and in light of other effects on social welfare.

In the Anglo-American common law tradition, when courts judge whether there is sufficient evidence of an actor’s negligence, sometimes they emphasize the need to balance the advantage and disadvantage of taking a precaution. In so doing, they are often articulating the first type of consequentialist calculus, which determines whether the actor breached an individual moral duty to use reasonable care. But they are not necessarily endorsing a more global consequentialist judgment that legal liability in such a case is socially optimal. That is, we only occasionally see courts explicitly mention the deterrent effects of negligence rules. I conjecture that courts sympathetic to a consequentialist understanding of individual tort duties would continue to apply an individual, consequentialist calculus even if they were certain that the application of this criterion of negligence would not have any significant effect on whether actors in the future use reasonable care.<sup>32</sup>

Within nonconsequentialist views, such as deontological views, again it is valuable to distinguish between an individual moral duty not to create unreasonable or unjustifiable risks, and a more global perspective. Sometimes the law imposes liability on a person not merely to express or reinforce the wrongfulness of his breaching an individual moral duty to use reasonable care, but also (or instead) to embody or promote other nonconsequentialist values, such as corrective justice, retributive justice, distributive justice, or respect for rights. (Thus, one straightforward nonconsequentialist justification for punitive damages is to add a retributive sanction to especially blameworthy conduct.) And sometimes the law declines to impose liability for a breach of individual moral duty when liability would conflict with other nonconsequentialist principles. (For example, some nonconsequentialists believe that the moral principle of beneficence requires rescue, but that the law should not enforce that duty because

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<sup>31</sup>See Simons, Deontology, Negligence, supra note 20. For a similar contrast, see Murphy & Nagel, *The Myth of Ownership* 23 (2002).

<sup>32</sup> See Simons, Deontology, Negligence, supra note 20, at 278. For example, a global consequentialist approach might support imposing tort or even criminal liability on those who don’t lock their cars, while imposing no or very light tort and criminal law sanctions on car thieves, if this would better prevent theft and resulting injuries. Cf. Louis Michael Seidman, *Soldiers, Martyrs, and Criminals*, 94 *Yale L.J.* 315, 340 (1984). Here, the individual moral duty is quite complicated to articulate: must the individual calculate who else can take care, and how burdensome that would be? But it might be globally optimal to impose liability here, without regard to the feasibility of specifying the individual duty.

enforcement would seriously infringe a political value, autonomy to pursue one's own ends.)

One context that highlights the difference between these perspectives is the (supposed) problem of overprecaution. On its face, utilitarianism offers a dubious analysis of the problem of overprecaution, for the theory suggests that it is morally wrong to invest more in precaution than the benefits that the precaution would achieve. "Under the utilitarian-efficiency theory, it is as inefficient to be above the optimal level of care as to be below it: either form of divergence should therefore be considered negligent."<sup>33</sup> To be sure, the global consequentialist approach to tort liability normally need not create a special incentive rule to address this problem. Normally, the injurer will absorb the costs of excess precaution, and ordinarily, this will provide him with sufficient incentive not to overinvest in safety.<sup>34</sup> Still, the consequentialist account of individual moral duty remains problematic.

A nonconsequentialist account of tort duties will address the problem of overprecaution differently from the utilitarian account and, I believe, more persuasively. The nonconsequentialist will not see overprecaution as a general problem. If a generously inclined potential injurer decides to minimize the risks to others more than is required by the individual moral duty to be negligent (whether understood in utilitarian or nonutilitarian terms), arguably she deserves praise for her beneficence, not moral criticism. For example, if someone decides to drive extremely slowly (without thereby hindering any other drivers) in order to minimize risks to others, she hardly deserves moral blame.<sup>35</sup>

Of course, the general question of when an individual moral duty should be enforced by a legal duty or sanction (and whether it should be enforced through tort liability, regulation, or criminal liability) is complex. I cannot say much about the issue here.<sup>36</sup> But it is important to see that how we understand negligence, on either a consequentialist or nonconsequentialist account, greatly depends on whether we focus largely on the individual duty to exercise reasonable care, or instead on the place of that

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<sup>33</sup> Richard Wright, *The Standards of Care in Negligence Law* 256, in Owen, *supra* note 7=. See also Ronen Perry, *Re-Torts*, 59 Ala. L. Rev. \_ (2008), p. 11, available at SSRN: <http://ssrn.com/abstract=1021547>, and cites noted therein. (Indeed, in an early article, Richard Posner suggested that aversion to waste or the squandering of resources was the moral defect underlying the efficiency account of tort law. Richard Posner, *A Theory of Negligence*, 1 J. Legal Std. 29, 34-35 (1972).)

<sup>34</sup> See Ronen Perry, *id.*, at 11. See also Ariel Porat, *Offsetting Risks*, 106 Mich. L. Rev. 243 (2007) (arguing, on incentive grounds, that tortfeasors should only be liable for the net risks created by their wrongdoing, after offsetting the risks that their conduct reduced from the risks that their conduct increased).

<sup>35</sup> The utilitarian might reply: her slow driving demonstrates either (1) that she places very little value on getting to her destination quickly, or (2) that she obtains private psychic benefits from being considerate to others. Accordingly, her driving slowly is what the utilitarian calculus recommends, after all.

The first reply is one, but not the only, possible explanation: perhaps she cares as much as most other drivers do about getting to her destination quickly, but she cares about the welfare of others even more than most people do. The second reply is disingenuous and nonresponsive. First, it is a contentious question whether the most defensible conception of utilitarianism in the context of tort liability standards would encompass psychic benefits of this sort within "utility." Second, this type of reply is available in any case where the nonconsequentialist analysis differs from the utilitarian analysis. Take any case in which the utilitarian approach would suggest that a precaution should not be taken, notice that the actual actor did take the precaution, then explain his doing so by attributing to him a private taste or preference (that taking the precaution will satisfy) sufficiently weighty to move the needle on the "Do I take a precaution?" balance from no to yes. Unless one has independent grounds for believing that people only act for reasons of utility, this method of reconstructing reasons for action is question-begging.

<sup>36</sup> For helpful recent discussions in the context of tort law, see Goldberg & Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 Fordham L. Rev. 1563, 1585-1588 (2005).

duty within a larger institutional structure designed to promote good consequences more generally or to embody nonconsequentialist values such as rights, corrective justice, and distributive justice.

### III. Rejection of less qualified views

In this section, I suggest that two approaches to understanding negligence are both highly implausible: unqualified consequentialist cost-benefit balancing, and an unqualified deontological rejection of all tradeoffs between values. But first, I briefly examine and dispose of a seductive consequentialist argument to the effect that nonconsequentialism cannot explain why risky conduct is impermissible.

#### A. A preliminary point: “risk” analysis need not be consequentialist

Some commentators claim that the moral and legal analysis of negligence must turn on consequentialist, not nonconsequentialist, principles, because negligence by definition involves taking an unjustified risk, that is, a risk that a future bad consequence (such as physical harm to person or property) might occur.<sup>37</sup> The claim is mistaken. To be sure, we do need to examine the immediate potential consequences of the injurer’s actions to determine whether, *ex ante*, the risk was permissible or justifiable to create. But the ultimate rationale for either moral or legal sanction of such risky conduct could depend on either consequentialist or nonconsequentialist considerations.<sup>38</sup>

One way to see the fallacy in this argument is by examining the analogous issue that arises with the privilege of self-defense and with other justification defenses, such as necessity. Whether an actor can permissibly act in self-defense depends on “risks” in just the same sense that risk is relevant in negligence doctrine. In self-defense, the relevant risks include the probability that the assailant will cause serious injury or death if not resisted, the probability that the actor’s defensive force will cause serious injury or death, and the probability that the actor’s use of a lesser degree of force would be equally effective. (One might plausibly assert, for example, that if the unlawful assailant is posing at least a nontrivial risk of killing the actor, then the actor is entitled to use defensive force even if he believes it is highly probable that the only force at his disposal will kill the assailant.) And yet it is perfectly clear that one can provide intelligible nonconsequentialist as well as consequentialist accounts of the right to use self-defense.<sup>39</sup>

A related argument, similarly unpersuasive, proceeds from the controversial assumption that all deontological requirements are categorical prohibitions. On that assumption, and because risks are pervasive and are sometimes justifiable and sometimes not, deontological principles cannot explain when it is permissible to impose risks. But many deontologists reject the assumption: they endorse noncategorical principles, including

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<sup>37</sup> See Heidi Hurd, *The Deontology of Negligence*, 76 B.U. L. Rev. 249, 262 (1996).

<sup>38</sup> See Simons, *Deontology, Negligence*, *supra* note 20; Simons, *Hand Formula*, *supra* note 20. See also Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72, 80 (Gerald Postema ed., Cambridge Univ. Press 2001). (“[A] theory of corrective justice and tort law is not, merely by virtue of focusing on outcomes rather than actions as such, necessarily consequentialist in nature.”)

<sup>39</sup> See, e.g., Joshua Dressler, *Understanding Criminal Law* 222-225 (4<sup>th</sup> ed. 2006) (identifying four theories underlying defenses of justification, such as self-defense, two of which—“moral forfeiture” and “moral rights”—are nonconsequentialist).

threshold deontology.<sup>40</sup> Again, even standard doctrines of self-defense (which deontologists routinely endorse) contain probabilistic and noncategorical elements.<sup>41</sup>

## B. Reject simple cost-benefit consequentialist views

This section briefly identifies problems with wealth-maximization as a normative ideal, with simple preference-satisfaction versions of utilitarianism, and with even idealized versions of utilitarianism if they place no constraints on aggregation.

### 1. We should reject wealth-maximization as a normative ideal.

Posner's introductory example of speeding in a poor neighborhood is a telling objection to a wealth-maximization model. Just because the poor have lower wealth and income and thus will receive less compensation for injury when compensation is based in significant part on lost income, it hardly follows that they value their health and safety less than the affluent. (Indeed, Posner himself has backed away from the normative claim that he originally made for his wealth-maximization position, the claim that wealth itself is a social value that ought to be maximized.<sup>42</sup>)

As Adler and Posner point out, federal agencies, in the analogous context of government regulation, use an invariant figure for the monetized value of a statistical life, and do not modify the figure based on a prediction of the wealth of the expected victim.<sup>43</sup>

Moreover, a wealth-maximization account is also problematic insofar as it offers an illusion of precision, implausibly suggesting a rigorous, mathematical formula for determining the justifiability of risks. (One imagines a corporate accountant methodically inputting the various probabilities of harm and benefit into a spreadsheet; if the costs are \$1,000,001 and the benefits are \$1,000,000, then he will instruct the engineers or product designers not to add the safety feature.) But as Learned Hand himself acknowledged long ago, this type of precision is illusory.<sup>44</sup> At the same time, the pretense that a straightforward equation can accommodate all the necessary values for determining the permissibility of risk-creation might itself contribute to the popular misconception that any form of explicit analysis of tradeoffs is cold-bloodedly inhuman.

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<sup>40</sup> See Alexander, Larry, Moore, Michael, "Deontological Ethics", *The Stanford Encyclopedia of Philosophy*, §4 (Winter 2007 Edition), Edward N. Zalta (ed.), forthcoming URL = <<http://plato.stanford.edu/archives/win2007/entries/ethics-deontological/>>.

<sup>41</sup> Simons, *Deontology, Negligence*, supra note 20, at 290-292; Perry, *Responsibility for Outcomes*, supra note 38, at 79 (arguing that "Hurd embraces too narrow a conception of non-consequentialism" insofar as she insists that non-consequentialist prohibitions must be categorical).

<sup>42</sup> Ronald Dworkin's powerful retort to Posner's wealth-maximization approach ultimately convinced Posner that a wealth-maximization approach can only be justified on pragmatic grounds, not as an independent, normatively attractive approach. See Ronald Dworkin, *Is Wealth a Value?*, 9 *J. Legal Stud.* 191 (1980); Posner, *Wealth Maximization*, supra note 6, at 101.

<sup>43</sup> Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* (2006), p. 130. The authors clarify: "[Agencies] use a range, but they do not make their choice within the range depend on the wealth of the victim." *Id.* p. 217 note 17.

<sup>44</sup> *Moisan v. Loftus*, 178 F.2d 148 (2d Cir. 1949).

2. We should reject any simple preference-satisfaction version of utilitarianism.

Some advocates of economic analysis of law simply take it for granted that social welfare must be understood as the aggregate sum of “utility” defined as the satisfaction of human preferences. But this is only one possible understanding of utility, and a controversial one.<sup>45</sup>

Consider this example, from the Restatement (Third) of Torts:

[I]n certain negligence cases there may be burdens of risk prevention that courts properly discount or decline to acknowledge. For example, certain motorists—though hoping for and expecting a favorable outcome—may find it exciting to race a railroad train towards a highway crossing. Yet because society many not recognize that excitement as appropriate, it may be ignored by the jury in considering whether the motorist should have driven more conservatively.<sup>46</sup>

The point that private preferences do not automatically count as elements of social utility is an important one. Preferences must be “laundered” and “idealized” if they are to be a defensible element of a social utility function that is implemented as a legal norm.<sup>47</sup>

3. We should reject even idealized versions of utilitarianism if they place no constraints on aggregation

The modifications suggested thus far do not go far enough. For the idealized version of utilitarianism still permits trivial benefits for a very large number of persons to outweigh enormous costs (such as death or serious personal injury) to a few. It still permits the television station in the introductory World Cup example not to save the endangered worker, if the aggregate benefits to television viewers are great enough. (Consequentialists do have some ways to address this problem, as we will see below.)

To be sure, an apparently egalitarian norm is contained within all utilitarian views: each person’s utility counts equally. But that norm does not answer the objection to unrestricted aggregation. A comment by Stephen Perry is instructive here. The Draft Restatement Third of Torts offers this explanation of what it claims to be a corrective justice rationale for tort liability:

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<sup>45</sup> See Adler & Posner, *supra* note 43, at 28-30; Jules Coleman, *The Grounds of Welfare*, 112 *Yale L. J.* 1511, 1524-1525 (2003), noting that the analysis in Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (2002), sometimes treats the superiority of “welfare” over “fairness” in this essentially tautological way: values of “fairness” matter to the rightness of an action or the justice of an institution only insofar as people have a taste or preference for fairness.

Coleman also points out the crucial ambiguity in the idea that preference-satisfaction is valuable: this could be a logical claim, that welfare consists in the satisfaction of preferences; or instead a psychological claim, that satisfying preferences typically brings psychological or some other type of hedonic benefit to the person holding the preference. *Id.* at 1541-1543.

<sup>46</sup> Restatement (Third) of Torts: Liability for Physical Harm, Proposed Final Draft 1 (April 6, 2005), §3, comment h, p. 44. The example is taken from Gregory Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311, 369 (1996).

<sup>47</sup> This is especially true if preference-satisfaction is treated as relevant to a consequentialist calculus that purports to justify an individual moral duty of reasonable care. On the other hand, insofar as the legal negligence rule is only designed as part of a global consequentialist calculus, all of the actor’s private preferences might bear on how great a sanction is needed to deter him.

The defendant who permits conduct to impose on others a risk of harm that exceeds the burden the defendant would bear in avoiding that risk is evidently a party who ranks personal interests or welfare ahead of the interests or welfare of others. This conduct violates the ethical norm of equal consideration, and a tort award seeks to remedy this violation.<sup>48</sup>

Perry points out that this argument expresses

the problematic idea that treating interests equally amounts to treating persons equally. After all, if you impose a cost-justified risk on someone else, you get to keep the benefits of the action while the other person incurs the costs. That does not look very much like the application of a norm of equal consideration.<sup>49</sup>

### C. Reject deontological views that reject all tradeoffs between values

Just as we should reject unqualified consequentialist views, we should reject unqualified deontological views that forbid any tradeoffs between values. Any plausible analysis of the justifiability of risky conduct must consider both the advantages and disadvantages of taking a precaution. This feature of risk analysis does not commit one to a purely consequentialist account of negligence.

Consider some straightforward examples where tradeoffs must be permitted. Suppose that taking a precaution would avoid a risk to group A but then will increase the risk even more to group B, and suppose that neither group has a greater moral claim on D. Then the risk to B is a decisive reason not to take the precaution. As the Restatement (Third) of Torts explains:

In certain situations, if the actor takes steps to reduce one set of injury risks, this would involve the burden or disadvantage of creating a different set of injury risks, and these other risks are included within the burden of precautions. For example, if the motorist takes the precaution of surveying the area next to the highway in order to identify livestock or animals that might be approaching the highway from adjacent property, the motorist is less able to detect hazards emerging on the highway itself.<sup>50</sup>

Deontologists might differ about how conflicts of duties or rights should be resolved, but the simple fact that a conflict exists and that the duties and rights must be reconciled hardly commits one to a consequentialist form of accommodation.<sup>51</sup>

Similarly, any plausible account must also engage in marginal analysis: it must consider whether moral or legal norms require a specific, discrete precaution (e.g. installing a safety guard on a piece of machinery), or a particular level of a continuous precaution (e.g. what speed it is reasonably safe to drive, or how high to build a protective fence). To be sure, marginal analysis is systematically employed, and heartily endorsed, by economic

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<sup>48</sup> Restatement (Third) of Torts: General Principles (Discussion Draft Apr. 5, 1999), §4, cmt j. The most recent Draft, PFD 1, supra note 46=, §6, comment d, employs very similar language.

<sup>49</sup> Stephen Perry, Cost-Benefit Analysis and the Negligence Standard, 54 Vand. L. Rev. 893, 896 (2001).

<sup>50</sup> PFD 1, supra note 46=, §3, comment e, p. 38.

<sup>51</sup> For a recent effort by a leading deontologists to explicate a nonconsequentialist method of accommodation, see Frances Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*, ch. 9 (pp. 285-301) (2007).

and utilitarian theorists. This association might suggest that nonconsequentialists should therefore be very skeptical of marginal analysis. But the conclusion does not follow. Surely a deontologist will, and should, have more difficulty justifying a requirement that the owner of a cricket field place a dome over the field to prevent balls from escaping the field and injuring nearby pedestrians, than a requirement that he build a fence around the field.<sup>52</sup>

In the remainder of this section, I review some “anti-balancing” arguments that have been offered by critics of consequentialism, arguments that I believe are too unqualified: that we should consider only the risks, benefits and burdens of the risky conduct to the actual injurer and actual victim; that imposing any foreseeable risk is impermissible; or that any interpersonal aggregation of benefits or burdens is impermissible.

1. We should not restrict our analysis of negligence to the risks, benefits and burdens of the risky conduct to the actual injurer and the actual victim

One superficially plausible nonconsequentialist account of negligence, especially tempting to some corrective justice scholars, begins with the fact that the individual defendant has harmed an individual plaintiff, and then concludes that the question whether the defendant breached a duty to that plaintiff must be analyzed only in terms of the risks, benefits, and burdens to those two parties.<sup>53</sup>

This is a mistake. Limiting our evaluation of the permissibility of risky conduct to the risks posed to the person who was actually injured gives undue and unnecessary weight to luck, and fails to take seriously the *ex ante* perspective that we should adopt in assessing whether an actor has breached a duty of care.

Focusing only on the *ex ante* risk to the person who was actually injured leads to highly implausible results. Consider a simple example. If I bring a group of people out on the lake on my boat, I have a duty not to overload the boat with too many passengers. The fact that only Jane drowned because of my breach of that duty hardly shows that the scope of my duty, or the question whether I breached it, depends only on the risks of injury that my actions posed to Jane. My giving Jane alone a ride on the boat would have created no serious risk of injury or death from overloading. I must consider the risks of harm (and the necessary precautions) in light of all the people who are at risk from my failure to take a precaution.

2. We cannot plausibly endorse a broad, categorical principle that imposing any foreseeable risk is impermissible

One prominent deontological account of negligence supports a truncated version of the Learned Hand test that, in essence, ignores “B,” the burden of taking a precaution. Different versions of this account have been offered by Richard Wright, Ronen Perry,

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<sup>52</sup> See *Bolton v. Stone*, *infra* note 88=. Of course, the way in which deontologists conduct marginal analysis will differ from the way in which utilitarians conduct that analysis. If, for example, the governing deontological principle is that substantial risks can only be imposed on those who sufficiently benefit from the risk, and if we view the benefit that pedestrians obtain from the presence of a neighborhood cricket field as relatively slight, then we might conclude that only a very high fence satisfies due care, although a lower fence might satisfy a utilitarian standard.

<sup>53</sup> See R. Perry, *supra* note 33=, at 44-45; see also Ernest Weinrib, *The Idea of Private Law* 142-144 (1995).

Stephen Perry (in earlier writing<sup>54</sup>), and Ernest Weinrib.<sup>55</sup> I will limit my discussion here to the views of Wright and Ronen Perry.

In Wright's words:

[G]iven the Kantian requirement of treating others as ends rather than merely as means, it is impermissible to use someone as a mere means to your ends by exposing him (or his resources) to significant foreseeable unaccepted risks, regardless of how greatly the benefit to you might outweigh the risk to him.<sup>56</sup>

Wright goes on to propose different standards of care for eight different situations, according to such factors as whether the injurer or victim benefits or whether the defendant is engaged in a socially essential activity.<sup>57</sup> This is an imaginative rethinking of the tort negligence standard, and aspects of it are normatively appealing, as we will see. Specifically, his emphasis on the critical importance of the distribution of risks and benefits is persuasive. However, I do not believe that his multiple standards accurately reflect tort doctrine, and the actual scheme that he recommends for implementing a concern with distribution is problematic.

Consider, for example, Wright's discussion of his first two categories. The first category, "defendants' treating others as means," involves case in which a defendant puts the plaintiff at risk to benefit the defendant or some third party, and the plaintiff does not seek to benefit directly from the risk-creating activity. Here, he claims, the actual test of negligence is whether defendant created "a significant, foreseeable, and unaccepted risk to the person or property of another."<sup>58</sup> (Only minimal legal authority is offered for this descriptive claim.)

Wright's second category, "defendants engaged in socially essential activities," is exemplified by a fire engine speeding to the scene of a fire in a populated area. Here, one would think, it should be permissible to impose very substantial risks on others to secure the public benefit of saving lives immediately threatened by fire. But Wright claims that

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<sup>54</sup> Stephen Perry, *The Impossibility of General Strict Liability*, 1 *Can. J. L. & Juris.* 147, 169-171 (1988). Perry has since rejected this view. Stephen Perry, *Cost-Benefit Analysis and the Negligence Standard*, 54 *Vand. L. Rev.* 893, 897 (2001).

<sup>55</sup> See Weinrib, *supra* note 52, at 148-152. For discussion, see Simons, *supra* note 20, 81 *Cornell L. Rev.* at 711-712.

David McCarthy, in a series of articles, has argued for a moral duty to compensate for imposing risks of harms on others, an argument recently defended in Handfield & Pisciotta, *Is the Risk-Liability Theory Compatible with Negligence Law?*, 11 *Legal Theory* 387 (2005). See David McCarthy, *Rights, Explanation, and Risks*, 107 *ETHICS* 205, 205-06 (1997); David McCarthy, *Liability and Risk*, 25 *PHIL. & PUB. AFF.* 238, 259 (1996).

<sup>56</sup> Richard Wright, *The Standards of Care in Negligence Law*, in Owen, *supra* note 6, at 256. In more recent writing, Wright has modified his views in certain respects. For example, he has clarified that he endorses a truncated BPL test (in which B is ignored) only when the defendant engages in risky conduct only for private benefit. 77 *Chi-Kent L. Rev.* 425, 436-437 (2002). And he agrees that "socially valuable activities" such as emergency vehicles can justifiably impose risks on others, though he still insists that those risks must be less than "substantial," an insistence I do not share. Richard Wright, Hand, Posner, and the Myth of the "Hand Formula," in Symposium, *Negligence in the Law*, 4 *Theoretical Inquiries in Law* 145, 205 (2003).

<sup>57</sup> His (non-exhaustive) categories are: (1) defendants' treating others as means, (2) defendants engaged in socially essential activities, (3) defendant occupiers' on-premise risks, (4) defendants' activities involving participatory plaintiffs, (5) paternalistic defendants, (6) plaintiffs' self-interested conduct, (7) plaintiffs' self-sacrificing conduct, and (8) defendants' failure to aid or rescue. Wright, *Standards of Care*, *id.* at 261-274.

<sup>58</sup> *Id.* at 261.

even emergency vehicles may not impose significant risks of injury on others.<sup>59</sup> This is dubious. Even when driven as carefully as the circumstances permit, consistent with very quickly reaching the scene of the fire, fire engines undoubtedly impose much greater risks than if they were driven more slowly. Police engaged in a high-speed chase of an armed, dangerous suspect, even when using the extra care appropriate to the situation (which, alas, they often do not), undoubtedly impose significant risks on passersby. I believe it is unrealistic and unpersuasive to assert that in all of these cases, the defendants act impermissibly if they impose any “significant” risk on others. As explained further below, the fact that the population as a whole shares the potential benefit of rescue from fire, or of security against the risk of harm from an escaping armed criminal, should permit rescue vehicles to impose relatively substantial risks to the public when these are necessary in order to achieve that benefit.

But what about Wright’s first category, as he circumscribes it? Is “Do not impose any significant (and unaccepted) risk” a defensible criterion, at least in those cases where the injurer unilaterally imposes risks on a group of victims who do not benefit from the activity? I will return to this question below.

Let me turn to another version of Wright’s first criterion, defended in a forthcoming article by Professor Ronen Perry. Perry advocates what he characterizes as a Kantian conception of negligence, under which an actor is liable for creating any “real,” foreseeable risk of injury.<sup>60</sup> Two features of Perry’s argument are especially noteworthy. First, he concludes that the burden of taking a precaution should be irrelevant to negligence liability. Second, he asserts that whether the actor has impermissibly created a “real” risk of injury to another is determined solely by examining “the interaction between the two parties to the action, and not on the effects of that interaction on society at large.”<sup>61</sup>

The first feature, by itself, would result in an extraordinarily broad liability rule, given that many common activities, such as driving an automobile, practicing medicine, or producing or using consumer products, create pervasive and nontrivial risks.<sup>62</sup> Nor is it clear how one would distinguish risks below the threshold from risks above it, especially in light of the difficulty of identifying the proper frame of reference for assessing the degree of the risk.<sup>63</sup>

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<sup>59</sup> In emergencies, he says, the defendant can exceed normal speed limits and other traffic controls “only if she undertakes additional precautions or warnings (such as slowing down at intersections, sounding sirens, and flashing lights) so that those put at risk can, without significant interference with their legitimate activities, avoid being exposed to a substantial or significant risk.” *Id.* at 265.

<sup>60</sup> Ronen Perry, *Re-Torts*, *supra* note 34=, at 39.

<sup>61</sup> *Id.* at 39, 45; see also *id.* at 51, 61.

<sup>62</sup> See also Simons, *Justification in Private Law*, *supra* note 20=, at 702-707 (criticizing Weinrib’s similarly broad formulation of negligence); Robert Rabin, *Law for Law’s Sake*, Book Review of Ernest Weinrib, *The Idea of Private Law*, 105 *Yale L.J.* 2261, 2274-2276 (1996)(same).

<sup>63</sup> According to Ronen Perry, one is negligent for posing real risks but not farfetched ones. “A farfetched risk is the kind of risk that every person is prepared to endure, knowing that all human activity involves such risks and that trying to eliminate them would disable action. Conversely, no one is willing to be exposed to real risks.” Perry, *supra* note 33=, at 39. This is a valiant effort, but I fear that the distinction, so understood, has little content.

For helpful discussion of these problems, especially in the context of an objectivist view of risk, see Stephen Perry, *Risk, Harm*, *supra* note 22=. To be sure, the “threshold” problem potentially exists under the Learned Hand test as well, insofar as it is sometimes interpreted as requiring the actor to incur a burden of precaution only if the risks are “foreseeable.” But the problem is less troubling here, if the requirement can be understood more flexibly, taking into account both the degree of foreseeability and the nature and extent of the burden. Perhaps even very small risks should be avoided if the burden of avoidance is extremely small; and even foreseeable or significant risks need not be avoided if the burden is quite significant.

The second feature does significantly limit the scope of the first, by insisting that we ignore the possible effects of a person's conduct on persons other than the actual victim of the harm. But this limitation is itself very difficult to justify. As explained above, limiting our evaluation of the permissibility of risky conduct to the risks posed to the person who was actually injured gives undue and unnecessary weight to luck and insufficient consideration to the ex ante perspective that we should take in assessing whether an actor has breached a duty of care. Moreover, one of Perry's reasons for imposing the second limitation is misplaced. Perry expresses concern that the duty of the actor should not depend on the effects of his interaction with the victim on society at large: he is worried, in short, that a broader conception of the actor's duty as extending beyond risks to the actual victim will improperly turn on broad consequentialist considerations. But on a plausible understanding of the extent of a tortfeasor's duty of care, that duty extends to all who might foreseeably be harmed by failure to take a precaution. This interpretation of the duty need not be consequentialist; rather, it simply reflects the ex ante perspective under which duty is defined. The class of persons foreseeably endangered by risky conduct is not precisely determinate in advance,<sup>64</sup> but it can be meaningfully described and delimited. And, as we have seen, the valid conceptual point that a "risk of harm" presupposes some degree of probability (less than one) of a future consequence (the harm) does not imply that all normative theories of risk are consequentialist theories in the morally significant sense of that term.

The rights-based claim that actors should be liable for all foreseeable risks might be understood differently, however, as a claim of strict liability, not negligence. On this view, it is not necessarily wrongful or impermissible to engage in conduct that creates foreseeable risks of harm, such as careful driving, but the driver should still pay for the harm caused by the (reasonable) risks he imposes on others.<sup>65</sup> Whether nonconsequentialist principles can support this liability rule is beyond the scope of this essay. But it is important to recognize that a very different normative justification is required for strict liability than for negligence liability for impermissible risk-imposition.<sup>66</sup>

### 3. We cannot plausibly endorse a principle that forbids all interpersonal aggregation of benefits or burdens

The philosopher T.M. Scanlon has formulated a distinctive deontological principle, contractualism, which he believes is especially powerful in countering the attractions (and remedying the defects) of utilitarian accounts of interpersonal duties. The introductory "World Cup" example is Keating's variation on a famous example by Scanlon intended to show the moral deficiency of unrestricted utilitarian aggregation.

Scanlon's approach concentrates on the burdens that a moral principle would impose on all affected individuals, considered one by one.<sup>67</sup> His highly individual-focused

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<sup>64</sup> "Foreseeability" is itself an imprecise concept, but it can be given more determinate meaning in light of the principles of corrective justice, fairness, or consequentialist aggregation that justify its use. See, e.g., S. Perry, *supra* note 22=.

<sup>65</sup> See Simons, *Justification in Private Law*, *supra* note 20=, 81 *Cornell L. Rev.* at 705.

<sup>66</sup> Negligence, in my view, connotes deficient behavior, while strict liability does not: and in principle we would enjoin negligent conduct if we could. Moreover, punitive damages would never be appropriate in strict liability cases. See Simons, *supra* note 24=, at 905-906; Simons, Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation, 15 *Harvard Journal of Law & Public Policy* 849 (1992).

<sup>67</sup> Scanlon, *supra* note 5=, at 229-231 (discussing the "Complaint Model"). Scanlon explains that "a central feature of contractualism [is] its insistence that the justifiability of a moral principle depends only on various *individuals'* reasons for objecting to that principle and alternatives to it." *Id.* at 229 (emphasis

approach explains the objection to a principle permitting unrestricted aggregation “in an intuitively appealing way.”<sup>68</sup> But it avoids this (Scylla) principle at the apparent cost of colliding with an equally objectionable (Charybdis) principle prohibiting any aggregation whatsoever. Thus, he has great difficulty explaining why a rescuer, faced with the choice of rescuing either five people from Island A who would otherwise die or one person from Island B, may permissibly save the five (rather than flip a coin or use some other method of choice).<sup>69</sup> Scanlon would have even greater difficulty explaining why it is permissible for a rescuer to save a group of people, each of whom will otherwise suffer the same type and degree of harm, rather than a single person, who will otherwise suffer a slightly greater harms than each of the group. (Suppose the five people on A will each suffer the loss of a limb if not rescued, while the one person on B will otherwise suffer both the loss of a limb and a mild headache.<sup>70</sup>) These difficulties are problematic enough for harms and benefits that are certain to occur; they are especially troublesome in the context of risks of harm. For our activities typically create multiple sets of risks and benefits, to different classes of people; and if we can never aggregate across people, it seems that we can never justify such risky conduct.

Addressing the issue of the permissible allocation of risk, though only briefly, Scanlon notes one appealing feature of his approach: it does not permit the low probability that one will be exposed to an otherwise unjustifiable risk to be determinative in situations where this is intuitively objectionable.<sup>71</sup> But he also concedes that his contractualist

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original). See generally Ashford, Elizabeth and Tim Mulgan, "Contractualism", The Stanford Encyclopedia of Philosophy (Fall 2007 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2007/entries/contractualism/>>.

For a valuable overview of the contractualist method, including the requirement that the governing moral principle be one that no affected individual could “reasonably reject,” see Kumar, Rahul, 2003. Reasonable reasons in contractualist moral argument, *Ethics*, 114, pp. 6-37.

<sup>68</sup> Id. at 230:

A contractualist theory, in which all objections to a principle must be raised by individuals, blocks such [aggregative] principles in an intuitively appealing way. It allows the intuitively compelling complaints of those who are severely burdened to be heard, while, on the other side, the sum of the smaller benefits to others has no justificatory weight, since there is no individual who enjoys these benefits and would have to forgo them if the policy were disallowed.

<sup>69</sup> In essence, Scanlon employs the following “pair-wise comparison” or tie-breaker argument: the claim to rescue of the one on B offsets the equal claim of one person on A; once these claims are put aside, the only remaining claims are those of the remaining four on A, and there is no good reason not to rescue them. This argument has been criticized as permitting a limited form of aggregation, after all. See, e.g., Michael Otsuka, Scanlon and the Claims of the Many versus the One, 60 *Analysis* 288 (2001). Frances Kamm offers an argument similar to the “tie-breaker” argument for why the numbers can count. Kamm, *supra* note 51=, at 56-61, 479-481.

<sup>70</sup> See Ashford, Elizabeth and Tim Mulgan, "Contractualism," *supra* note 67=, §6:

The following example is suggested by Derek Parfit's discussion of contractualism and aggregation. [Parfit, D., 2003. “Justifiability to Each Person”, *Ratio*, 16, pp. 368-370.]. Consider a choice between two scenarios. In the first, one person suffers agony for a hundred years; while in the second a million people suffer agony for a hundred years minus a day. An additional day of agony is a considerable burden. Therefore if we consider the situation from the perspective of the single individuals involved, it would seem that the first person's complaint (‘I will suffer for a hundred years’) outweighs the complaint of any other single individual (‘I will suffer for a hundred years minus a day’). However, a utilitarian would argue that, in this case, the second scenario is worse.

<sup>71</sup> See Scanlon, at 208-209:

Consider [a] principle licensing us to impose very severe hardships on a tiny minority of people, chosen at random (by making them involuntary subjects of painful and dangerous medical experiments, for example), in order to benefit a much larger majority. A contractualist would

approach, by condemning all aggregation, appears to have highly counterintuitive implications, including the implication that high-speed driving, construction projects, and other activities that predictably will lead to serious injuries and deaths are unacceptable if their justification depends on much smaller benefits to a larger number of people.<sup>72</sup> The numbers do sometimes count morally.<sup>73</sup> The great difficulty, on a contractualist account, is explain when they do, and why.

Nevertheless, there is some hope, as we will see, that a limited type of aggregation might be consistent with at least important aspects of the contractualist project.

#### IV. Consider more qualified views

We will now consider a range of more qualified consequentialist and deontological views that offer more plausible accounts of important aspects of negligence doctrine and of our considered intuitions about permissible risks.

##### A. Qualified (“sensitive”) consequentialism

We have already seen that any plausible version of utilitarianism must launder and idealize preferences to some extent, and thus will sometimes reject subjective valuations of benefits if they are inconsistent with a defensible conception of social utility. (Recall the example of the driver who obtains pleasure from racing a train.) And once utilitarianism is qualified in this way, it has a number of possible variants. For example, utility itself could be understood, not as preference-satisfaction at all, but as constituted by certain limited categories of objective social goods—such as Amartya Sen’s “capabilities,” or the objective lists of goods offered by Martha Nussbaum or James Griffin (including such varied goods as life, bodily health, accomplishment, autonomy, enjoyment, and deep personal relations).<sup>74</sup>

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want to keep open the possibility that such a principle could reasonably be rejected because of the severe burdens it involves. But this would be effectively ruled out [if one endorses an alternative proposal, that improbability of harm is relevant to justifiability], according to which the weight given to these burdens ... would be sharply discounted because only a very small fraction of the population would actually suffer them.

<sup>72</sup> See Scanlon, *id.*, at 238; T.M. Scanlon, *Replies*, 28 *Soc. Theory and Prac.* 337, 355 (2002). See also Ashford, E. 2003, *The Demandingness of Scanlon's Contractualism*, *Ethics* 113(2), pp. 273, 298-301 (arguing that Scanlon’s nonaggregation requirement would have dramatic implications, such as forbidding air travel).

Scanlon concedes that he views the part of his book, *What We Owe to Each Other*, devoted to the question of aggregation the “least satisfactory.” Scanlon, *Replies*, 28 *Soc. Theory and Prac.* at 354.

Gregory Keating, a tort scholar otherwise sympathetic to Scanlon’s critique of aggregation, believes that sometimes, trading risks to life for convenience is permissible. *Pricelessness and Life: An Essay for Guido Calabresi*, 64 *Md. L. Rev.* 159, 195-201 (2006); *Pressing Precaution*, *supra* note 2=, at 702-704. Implicitly, he rejects Scanlon’s pair-wise comparison approach as inadequate.

<sup>73</sup> John Taurek’s famous article has spawned a large (nonconsequentialist) literature trying to justify the consideration of relative numbers in choice situations. John Taurek, *Should the numbers count?*, 6 *Phil. & Public Affairs* 316 (1997).

<sup>74</sup> See Adler & Posner, *supra* note 43=, at 31-32. For a useful survey of some of these possibilities, see *id.* at 28-35. Adler & Posner reject a purely objective view and endorse a “restricted preference-based view” of welfare, in which subjective preference is a necessary but not sufficient condition for a state of affairs to enhance the subject’s welfare. *Id.* at 36.

The approaches of tort scholars Mark Geistfeld and Gregory Keating seem to be based at least in part on an “objective good” conception of well-being. See Mark Geistfeld, *Negligence, Compensation, and*

Let us turn, then, to some forms of qualified consequentialism that offer some hope of addressing the concerns raised by the initial examples.

1. Consider the distribution of risk in the social welfare calculus of what is permissible

The most obvious way for a consequentialist to respond to the objection that an activity may not permissibly impose enormous risks of harm on a few in order to benefit a different group is to build a concern about distribution into the social welfare calculus. Of course, a distribution-sensitive social welfare function is hardly a new idea.<sup>75</sup> However, the distributive problem we confront here is rather different from the usual concern that the ex post distribution of wealth and income that flows from a utilitarian social and economic system might lead to or accentuate the maldistribution of basic resources (or, in the Rawlsian phrase, of “primary goods”<sup>76</sup>). The usual prescription to use tax and transfer policies to correct the maldistribution after the fact will hardly do when we are addressing individual decisions whether to engage in a risky activity. Moreover, it is important to remember that the question we are addressing is what risks it is permissible to create, and not merely what to do about allocating the costs of risky activities that cause harm. In the **World Cup** example, the television studio certainly should compensate for the harm if it chooses to continue the broadcast. But it would have been much better if it had chosen otherwise; and indeed, the case is one in which punitive damages seem perfectly appropriate.

So the question remains: in determining when it is permissible for an actor to impose a risk of harm on others, is it feasible to develop a consequentialist calculus that also considers the distribution of risk and benefits (perhaps as a side-constraint on the basic maximizing, aggregative analysis)?

This does seem theoretically feasible. For example, the legal standard could endorse utilitarian maximization subject to the constraint that most or all members of the class subject to the risk must also obtain some benefit, or sufficient benefit, from the risky activity. It is no easy matter, however, to explain what type and degree of reciprocity or fairness in distributing benefits and burdens is required here (as we will see in the more extensive discussion below). Needless to say, this criterion cannot readily be expressed by any simple formula, such as the Learned Hand test.

Moreover, even this distribution-sensitive approach does not fully address the concern in Keating and Scanlon’s examples that trivial benefits could, if aggregated across enough people, outweigh very substantial harms or risks of harm, and thus could, on a consequentialist account, justify imposing that risk. Even when the distribution of benefits and burdens does not seem unfair, this concern remains. Consider this variation of **World Cup**:

#### **World Cup broadcast with random (viewer) victim**

Suppose that a piece of transmitting equipment has malfunctioned and, unless fixed, will interrupt for thirty minutes the live broadcast of the World Cup to a billion viewers worldwide. Unfortunately, the only way to

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the Coherence of Tort Law, 91 Geo. L. J. 585 (2003) (claiming that tort law prioritizes the security interest of victims over the liberty and economic interests of injurers); Keating, Reasonableness and Rationality, supra note 46= (asserting a similar claim).

<sup>75</sup> See, e.g., Kaplow & Shavell, supra note 45=, at 28-38.

<sup>76</sup> John Rawls, Justice as Fairness: A Restatement 57-61 (2001).

fix the equipment immediately is to send a corrective electronic signal that (we can confidently predict) will also randomly cause one of the television sets tuned in to the broadcast to explode, likely killing one viewer.

Here, every potential victim is also a beneficiary of the broadcast, but it hardly seems permissible to sacrifice one life in order to provide a billion people with a small benefit. It is not clear that a consequentialist can solve this problem.<sup>77</sup>

## 2. Consider the distribution of risk in determining whether to compensate

This essay focuses on how negligence should be analyzed. But it is worth considering the argument that an unjust or impermissible distribution of risk should not matter at all to whether conduct is negligent; rather, maldistribution is relevant only to the question whether the injurer should pay for the harm. (This argument is a specific version of an argument often asserted by law and economics advocates, that utilitarianism or efficiency should be the normative basis of legal rules, and that the legal system should address any problems of inequity or unjust distribution through the tax and transfer system.) Why isn't this strict liability principle an adequate response to unfair distribution of the risk of harm?

One answer is that compensation for some types of harms is impossible. No amount of money will fully compensate a dead person. In Keating's **World Cup** example, the death of the technician cannot be undone; no amount of compensation from the television studio, or from the billion people who enjoy the live broadcast, will suffice.<sup>78</sup>

But full compensation for other types of harms seems to be feasible. This is most obviously the case for harms to property and economic interests: some amount of compensation will almost always be sufficient to make the victim indifferent, after the fact, between receiving the compensation for the harm or not having suffered the harm at all.

Or consider Scanlon's original hypothetical, which differs significantly from Keating's version: in the original, if the technician is not rescued, he will suffer no permanent injury, but merely an hour of extremely painful shocks:

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<sup>77</sup>However, she could endorse a mixed theory that includes a deontological constraint—for example, the constraint that benefits below some threshold of significance will be excluded from the social welfare function. See TAN = *infra*.

<sup>78</sup>Indeed, Mark Geistfeld has argued that precisely because full compensation is infeasible for serious physical injuries and death, an unusually demanding negligence standard (rather than a cost-benefit negligence standard or a strict liability standard) is necessary in such cases in order to provide adequate deterrence and to provide potential victims with a justifiable substitute for full compensation. The more demanding negligence standards is a legitimate substitute, he argues, because it provides such victims *ex ante* benefits: they are exposed to less risk than a cost-benefit negligence test would permit. See Geistfeld, *supra* note 73=. This argument is intriguing, but the cure does not seem to match the diagnosis. After all, strict liability rules apply even when serious personal injury or death occurs. Insofar as compensation is inadequate to achieve optimal deterrence, we could address the problem more consistently and directly, for example by adding to damages (in serious physical injury cases) an extracompensatory award, part of which the state receives. Finally, the *ex ante* benefits that potential victims obtain from this requirement that the injurer use extraordinary care will help only a small number of victims (those who would have been injured if the injurer had used ordinary care but are not injured if he uses extraordinary care), and these benefits are conferred more or less randomly. It is not clear why saving this small group from harm is an apt response to the problem of undercompensation.

### Scanlon's original World Cup broadcast case:

Suppose that Jones has suffered an accident in the transmitter room of a television station. Electrical equipment has fallen on his arm, and we cannot rescue him without turning off the transmitter for fifteen minutes. A World Cup match is in progress, watched by many people, and it will not be over for an hour. Jones's injury will not get any worse if we wait, but his hand has been mashed and he is receiving extremely painful shocks. Should we rescue him now or wait until the match is over? Does the right thing to do depend on how many people are watching—whether it is one million or five million or a hundred million?<sup>79</sup>

Suppose Jones would be indifferent after the fact between some generous form of compensation and not having suffered this injury. Isn't everyone better off if we permit the injury to occur?

This argument seems to prove too much. For it would seem also to permit risky activities that we would normally consider impermissible even apart from distributive considerations. Negligence would, then, always be acceptable behavior so long as the negligent actor was willing to pay the full price.

Scanlon and other moral philosophers who have emphasized the problematic nature of aggregative principles such as utilitarianism have focused almost exclusively on permissibility—on whether an actor may permissibly impose (or choose not to prevent) serious risks of harm on a small number of persons simply because a very large number of persons will obtain small benefits. And a primary moral duty not to impose such risks would ordinarily justify a secondary moral (and, arguably, legal) duty to compensate if the risk results in harm. But does the imposition of the risk actually become permissible if full compensation, where feasible, is awarded?

I do not think so. Some kinds of risk-imposition are wrongful, whether or not the victim can be fully compensated. Suppose a wealthy thrill-seeker happily pays for the property damage that his dangerous driving causes, and suppose his compensation payments leave his victims indifferent between (a) suffering harm and being compensated or (b) not suffering harm. He is still a wrongdoer, and still should not cause the harm. (This is so even if he can be certain that the only harms he will cause are ones that can be fully compensated.) The problem is not simply the practical concern about future incentives—that a policy of allowing such a person to treat tort liability as a price of permissible activity rather than a sanction for impermissible activity will often encourage him or others to engage in wrongdoing that leaves many victims undercompensated.<sup>80</sup> Rather, the problem is deeper: in principle, an actor should not treat victims in this way, even if they would, *ex post*, be satisfied with compensation. We would certainly not be comfortable granting someone a license to steal, to assault, or to humiliate another, even if he was willing to pay the costs, and even if all the immediate victims would be satisfied *ex post* that they had been fully compensated.

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<sup>79</sup> Scanlon, *What We Owe*, *supra* note 5=, at 235.

<sup>80</sup> Often, there is no guarantee that a risky activity will create no substantial risk of serious injury or death, which are the types of injuries for which full compensation is impossible. And even if the activity risks causing only emotional harm or harm to property interests, these, too, cannot always feasibly be fully compensated. Among the difficulties with assuring full compensation even here is the inability of any legal system to compensate effectively either for all consequential economic harms or for emotional harms that are difficult to measure accurately, given problems of subjective valuation and fraud.

To be sure, impermissible risky activity does not rise to that level of wrongdoing. But sometimes it is still sufficiently wrongful that ex post compensation does not vitiate the wrong. To put this argument in utilitarian terms, all citizens suffer noncompensable harm or disutility from living in a system in which impermissible conduct can be bought for a price. From a deontological perspective, potential victims have a status of inviolability that such a practice would undermine.<sup>81</sup>

Where does this leave the argument that an act that unjustly distributes risks and benefits can always be addressed by compensation, rather than by treating the underlying conduct as negligent and impermissible? Sometimes, at least, such injustice make an otherwise permissible act negligent.<sup>82</sup> This seems to be the case in both World Cup examples.

On the other hand, perhaps when the only harms at stake are harms to property and economic interests, a distributive inequality of the sort illustrated in the World Cup examples would not be objectionable. Suppose, for example, that the World Cup scenario is modified in this way: the television equipment will cause \$1 million in damage to an adjoining property unless it is shut off, but again, if it is shut off, a billion people would lose the pleasure of watching the World Cup live. Is it not permissible to continue the broadcast, so long as the property damage is fully compensated?

## B. Qualified (“tough-minded”) deontology

In this section, I explore three broad categories of qualified deontological principles that, by comparison to more unqualified principles, more readily permit tradeoffs and limited forms of aggregation. The first category focuses on the individual put at risk and asks whether he sufficiently benefits from the risky activity. It permits aggregation of risks and benefits, but only intrapersonally. The second category is threshold deontology: it permits consequences to count, but only in a constrained or limited way. Each category has considerable promise in addressing the problems and conundrums noted at the outset. A third distinction, between individual and population risk, initially appears promising, but its practical significance for negligence law is uncertain.

### 1. Permit intrapersonal but not interpersonal aggregation of risks and benefits

Nonconsequentialists, including even contractualists, might be able to support intrapersonal aggregation of risks and benefits, without sliding all the way down that slippery slope to unrestricted interpersonal aggregation.<sup>83</sup> When those who benefit are entirely coextensive with those put at risk, many nonconsequentialists would have no objection to permitting the risky activity (so long as the benefit is sufficiently valuable to justify the risk). Straightforward examples include individual decisions to undergo surgery,

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<sup>81</sup> See Kamm, *supra* note 51=, at 26-30, 253-256.

<sup>82</sup> Other forms of distributive fairness might aptly be secured by strict liability rather than negligence liability. Consider the vicarious liability of retailers for product defects initially created by manufacturers. This type of strict liability arguably serves a loss-spreading function in order to achieve a localized form of distributive justice: it is more fair that the blameless retailer rather than the consumer absorb the risk of the manufacturer’s insolvency.

<sup>83</sup> This method is endorsed by some contractualists in recent writings. See Scanlon, *supra* note 5=, at 237; Oberdiek, *supra* note 5=; Oberdiek, J., *The Morality of Risking: On The Normative Foundations of Risk Regulation* (Ph.D. Dissertation, University of Pennsylvania (2003)).

or to take a drug with known possible side-effects, despite the risks.<sup>84</sup> Another example is **Sub-subcompact automobile** from the introduction. A manufacturer may permissibly sell a product that poses unavoidable risks of harm to consumers or users if they obtain significant benefits from the product. This approach retains contractualism's focus on the individual, and characterizes a risk as permissible only if each individual exposed to a risk of harm can be said to benefit sufficiently from the conduct or activity that creates the risk.

The intrapersonal aggregation approach also helps to make sense of the introductory Bus Driver example. Louise, it seems, should not take more or less care in driving her bus simply because she is carrying more or fewer passengers. But one possible explanation is that each of the passengers (however many there are) benefits equally from her driving a little more quickly: each arrives at his destination a bit sooner. So if the traffic and other conditions permit her to drive slightly more quickly, this provides roughly proportional benefits to one, ten, or 40 passengers. (In terms of the BPL formula, a slightly higher speed imposes a slightly greater risk of harm on each passenger, but this also is likely to provide a slight benefit to each passenger; the loss of that benefit is a marginal "burden" (B) that might exceed the marginal increase in risk to their safety (P x L).)

Compare a different bus driver case:

**Marla, driving a bus near many or few pedestrians (Parade route)**

Marla is driving a bus. A parade has just ended and there are thick crowds by the side of the road. Clearly she should drive more slowly in this scenario, than if the parade ended an hour ago and there are only a few folks still lingering. If she were to lose control of the bus, it would harm or kill many, rather than few.<sup>85</sup>

What explains the difference between this bus case and the earlier one involving Louise? Why do numbers count for Marla, but not for Louise? In both cases, after all,

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<sup>84</sup> Or consider an example offered by Benjamin Zipursky:

In some scenarios ... it would arguably comply with a norm of being reasonably careful to adopt a single metric and to adopt an aggregative analysis. For example, in *Rhode Island Hospital Trust National Bank v. Zapata Corp.*, then-Judge Breyer used an economic version of the Hand Formula in a banking case. The question was whether a bank used ordinary care to ascertain customers' check forgeries. The bank argued that its policy of random checking was reasonable, and it showed that the policy was far cheaper and only marginally less effective than—or perhaps as effective as—a system that looked at every check. Affirming a District Court judge, and using the Hand Formula and cost-benefit analysis, Judge Breyer agreed with the bank. The financial burden of examining each check's signature was not warranted by the reduction of risk of forgeries, under the Hand Formula. But note that the choice of an economic metric here was appropriate because of the nature of the interests at stake. And the aggregative method was appropriate because the bank customers—like the plaintiff in the case—would bear much of the increased cost of forgery-detection. There was thus little tension between the interests of the defendant and of the plaintiff.

Benjamin Zipursky, *Sleight of Hand*, 48 Wm & Mary L. Rev. 1999, 2025-2026 (2007), citing 848 F.2d 291 (1<sup>st</sup> Cir. 1988). For an analogous example, see Keating, *Pricelessness*, supra note 72=, at 712 (benefits and burdens of Pasteur vaccine are borne by the same class of people).

<sup>85</sup> Assume that the distance from the bus to the pedestrians is precisely the same in both cases, and similarly for all other variables affecting the risk, such as the ability of the pedestrians to protect themselves, so that the only relevant difference is the number of endangered victims.

driving more slowly would decrease risks of harm; and in both cases, driving more slowly when more people are at risk (when the bus is more full, or the sidewalk is more crowded) will reduce aggregate risk more.

Perhaps the explanation is this. The pedestrians in **Parade route** (unlike the riders on Louise's bus) clearly obtain no compensating benefit from any decision by Marla to increase her speed, and lose no benefit if she decreases her speed. So if she slows down when there is a greater aggregate risk of harm, they clearly are better off.

Notice, though, that at any given speed, the individual risk that the bus poses to each pedestrian could be precisely the same in both scenarios (crowded sidewalk v. almost empty sidewalk), yet we would still want her to slow down when the sidewalk is more crowded. (Suppose there is a 1 in 1,000 risk of injury to each pedestrian in each scenario if she is driving at 30 mph, a 1 in 2,000 risk if she is driving at 25 mph, and so on.) This example shows that we should not interpret the Louise example as demonstrating that the individual risk to each victim is always a determinative factor; aggregate risk sometimes is morally relevant even when individual risk does not vary (as it does not in the Marla examples).<sup>86</sup>

Nevertheless, the intrapersonal aggregation approach is no panacea. Trouble comes in the very common situation when the class benefited and the class endangered are not perfectly coextensive. Very often, an actor's risky conduct endangers many people, and very often, these potential victims differ significantly in how much they benefit from the activity. (Even in the Louise example, some passengers will benefit more than others from more speedily reaching their destination, and some might not benefit at all.) How much slippage, if any, is too much?

Recall the earlier example of speeding emergency vehicles (police, ambulance, or fire engines) which endanger motorists and pedestrians for a public purpose. Here, because everyone potentially benefits from the availability of life-saving ambulances and fire engines, or police vehicles that protect public security, it seems plausible to conclude that those put at risk also obtain ex ante benefits that suffice to justify the risk. (The vehicles should, of course, proceed as safely as realistically possible consistent with their need for speed.)

And yet, on closer inspection, this argument of potential benefit is inconclusive. Relatively few people will actually need to be rescued or protected by emergency vehicles. So we are really comparing possible benefits with possible risks; and of course the distribution of actual benefit and actual harm will (ex post) not be to the net benefit of every person (especially those killed or seriously injured by the speeding vehicles).

Still, it might be enough that people value the chance of a benefit sufficiently highly that it outweighs the risk of harm. Obviously it can be justifiable to market a drug that will definitely benefit me, but has a small chance of causing me serious side-effects which (if they were to occur) would outweigh that benefit. But it also seems quite justifiable to market a drug that will offer users only a possible benefit, if that benefit is sufficiently great to justify the risks.<sup>87</sup>

If all this is true, however, then the "potential benefit" argument seems to have a much broader implication. Perhaps otherwise troubling cases of unilateral risk-imposition ("unilateral" in the sense that one party obtains all or almost all of the benefit from the interaction) are now justifiable, after all, if people have a sufficient ex ante chance to

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<sup>86</sup> For more discussion of individual v. population risk, see TAN = infra.

<sup>87</sup> Notice that in Zipursky's bank example, although the correlation of risk and benefit intuitively seems sufficient to make the bank's level of precaution permissible, some bank customers will actually be worse off under the bank's system than they would have been if the bank had taken the suggested precaution.

benefit either from that unilateral risk-imposition, or from some other unilateral risk-imposition. Let me explain.

Consider some relatively clear cases of unilateral risk imposition: drivers creating risks to pedestrians; product manufacturers creating risks to non-users of their products (for example, a bystander injured when a product explodes, crashes, or otherwise causes harm)<sup>88</sup>; the activity of a sports team or facility results in balls being hit out of the field or park into the surrounding community.<sup>89</sup> In these cases, where the potential victims do not benefit from the risky activity, many nonconsequentialists would object that a simple benefit/risk or cost/benefit analysis is inadequate to justify the risk, insofar as one party benefits at the other party's expense. They would insist, for example, that in building a fence to protect people outside the park from harm, greater care is required than in building a fence to protect spectators inside the park who benefit from the activity.<sup>90</sup>

Yet it seems that we could invoke the "potential benefit" argument even here. After all, life is full not only of risky activities, but of activities that benefit one party to the interaction a little more, or a lot more, than they benefit the other. We all engage in multiple activities. Sometimes we will be more at risk, sometimes less so. Sometimes we benefit more, sometimes less. Sometimes we will be the unilateral imposers, sometimes the imposees. It all works out in the wash.

This argument, if persuasive, appears to justify a straightforward utilitarian analysis of negligence, even in unilateral risk cases. The constraint that intrapersonal aggregation was supposed to place upon interpersonal aggregation has evaporated. Where did we go wrong?

We went awry in permitting much too broad a conception of "potential benefit" in this last argument. The conception essentially says: "You live in a society in which utilitarian risk/benefit analysis governs all interactions, a society which therefore will achieve greater utility than another criterion of negligence would achieve, therefore your ex ante chance of utility is greatest in this society." This understanding of "potential benefit" justifies far too much: for it will clearly tolerate very significant distributional variations in many specific interactions. Even the World Cup examples might, on this view, be cases of "potential benefit" and thus of permissible risk-imposition.

So "potential benefit" must be understood more restrictively. Just how we should draw the line between permissible and impermissible inequalities in benefit and risk distribution, however, is a daunting question. Is it a serious injustice that some bystanders who do not benefit from using a particular type of consumer product suffer injury from it? Presumably they use other consumer products; is that similar enough to count as benefiting

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<sup>88</sup> In each case, the risk imposition is not entirely unilateral: pedestrians make decisions about how closely to approach traffic, and bystanders injured by products might similarly make decisions that affect their probability of injury. But the driver or product manufacturer (and product user) obtain almost all of the benefit from the risky interaction, so it is appropriate to characterize the benefits derived in the cases as substantially unilateral.

<sup>89</sup> The classic illustration here is the English cricket case, *Bolton v. Stone*, [1951] A.C. 850, [1951] 1 All E.R. 1078, in which a cricket ball was hit over the fence and struck the plaintiff. Litigation over stray golf balls is also plentiful. E.g., *Rinaldo v. McGovern*, 587 N.E.2d 264 (N.Y. 1991) (sliced golf ball "soared" off the course and shattered plaintiff's windshield as she was driving by).

<sup>90</sup> "Greater care" here could mean placing a thumb on the cost-benefit or BPL scale. See TAN =. The important point is that, everything else being equal, nonbeneficiaries of the activity are entitled to greater protection from risks of harm than are beneficiaries. Everything else will often not be equal, of course. Most obviously, if the potential victim is a spectator, he will likely have a much greater ability to protect himself from harm than if he is a pedestrian strolling outside the park. (But imagine that the potential victim is a five year old child, with little ability to protect himself in either case; here, greater care might still be owed to the child walking outside the stadium than to the child sitting in the stands.)

from “the activity”? Neighbors of golf courses (who, let us assume, purchased their land before the golf course was built) benefit if the presence of the golf course increases the value of their homes. These complexities exist in virtually every context.

Others who have explored these questions endorse some degree of generalization of the nature of the risky activity, for the purpose of determining who benefits from “that type” of risky activity, or of determining how burdensome it would be to forbid “that type” of risk.<sup>91</sup> I offer no solution here,<sup>92</sup> but simply point out the need to define any category of “unilateral benefit from risk-imposition” with care, and, perhaps, narrowly.

## 2. Apply threshold deontology to risky activity

One way to make deontology more “hard-nosed” and more accommodating of tradeoffs is to permit consequences to count, or even to dominate, after (but only after) one has surpassed some threshold. Even the relatively absolutist libertarian approach of Robert Nozick, for example, has a “catastrophe” exception.<sup>93</sup> Other threshold deontologists place the threshold much lower. In the context of judging when it is impermissible to create a risk of harm, the threshold must be much lower than “catastrophe” if this approach is to make any sense of our actual social practice of accepting a broad range of risky activities.

Some believe that threshold deontology is incoherent.<sup>94</sup> Others find this form of moderate deontology perfectly defensible.<sup>95</sup> Rather than engage this difficult, more general debate, I will try to identify versions of threshold deontology in the context of negligence that are intuitively attractive.

These versions are not as simple as usual threshold deontology principles of the form, “don’t violate a right or duty (don’t suppress speech, don’t torture, don’t punish or kill an innocent person) unless the consequences of respecting the right or duty are unusually bad.” Rather, some of them might be interpreted instead as instances of “threshold consequentialism,” an acceptance of consequentialism but only up to a point or subject to certain limits: for many of them require significant variations on a straightforward consequentialist calculus of the basic form, “take a precaution if  $B < P \times L$ .”

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<sup>91</sup> See Keating, Pricelessness, *supra* note 72=, at 704-718; Oberdiek, *supra* note 5=; Oberdiek, The Morality of Risking, *supra* note 83=; Scanlon, *supra* note 5=, at 239-241 (discussing the possibility that aggregation is permitted for “relevant” but not “irrelevant” risks while acknowledging the difficulty of drawing the distinction); S. Perry, *supra* note 38=, Responsibility for Outcomes, *supra* note 38=, at 110-15.

<sup>92</sup> “Explaining the role and limits of aggregation is a difficult problem for moral theory generally, not just for contractualism.” T.M. Scanlon, Replies, 28 Soc. Theory and Prac. 337, 354 (2002).

<sup>93</sup> Robert Nozick, Anarchy, State and Utopia 30 n.\* (1974). See also John Rawls, Political Liberalism 356 (1993)(the state may restrict a basic liberty such as speech, but only in order to prevent a greater loss to basic liberties).

<sup>94</sup> See Larry Alexander, Deontology at the Threshold, 37 San Diego Law Review 893 (2000); Alexander, Larry, Moore, Michael, “Deontological Ethics”, The Stanford Encyclopedia of Philosophy, §4 (Spring 2008 Edition), Edward N. Zalta (ed.), forthcoming URL =

<<http://plato.stanford.edu/archives/win2007/entries/ethics-deontological/>>. See also Adler, Matthew D., “Why De Minimis?” (June 8, 2007). U of Penn, Inst for Law & Econ Research Paper No. 07-12 Available at SSRN: <http://ssrn.com/abstract=992878>.

<sup>95</sup> See Shelly Kagan, Normative Ethics 78-84 (1998). Cf. Kamm, Intricate Ethics, *supra* note 51=. Kamm does not admit to being a threshold deontologist, but she does permit aggregation, and does give weight to the relative numbers of victims and the relative size of burdens; indeed, she does so surprisingly often, for a deontologist.

In very general terms, at least three techniques are available to a deontologist who wishes to consider consequences without fully endorsing a consequentialist analysis of permissible risk. A fuller exploration of these methods must await another day.

**First**, she can ignore trivial benefits.<sup>96</sup> This is one possible explanation of the World Cup examples: the aggregate benefits to even a billion people are morally and legally irrelevant if the benefit to each person is tiny. This approach also helps explain why highly refined marginal analysis sometimes seems objectionable.<sup>97</sup>

**Second**, she can place a thumb on the usual scale, at least in certain cases, such as clear instances of unilateral risk imposition. This is the “disproportionate risk” approach that (some believe) the English courts followed until recently.<sup>98</sup> Instead of finding D negligent if  $B < P \times L$ , a “thumb” is added to the scale as follows:

$$D \text{ is negligent if and only if } B < n \times (P \times L), \text{ where } n > 1.^{99}$$

<sup>96</sup> See Kamm, *supra* note 51=, at 34 (discussing the Principle of Irrelevant Goods). Consider Kamm’s Sore Throat case. If we are choosing between preventing a serious harm to A or an equally serious harm to B, she says that we should flip a coin. What if B also has a Sore Throat? That is insufficient reason in this context, she says, to save B; we should still flip a coin. *Id.* See also T.M. Scanlon, *Replies*, 17 *Ratio* 424, 433 (2003) (tentatively endorsing Parfit’s suggested Triviality Principle).

<sup>97</sup> Recall the earlier image of a corporate accountant methodically inputting the various probabilities of harm and benefit into a spreadsheet; if the costs are \$1,000,001 and the benefits are \$1,000,000, then he will instruct the engineers or product designers not to add the safety feature. Following Kamm’s “Irrelevant Utilities” argument, wouldn’t it be better if he flipped a coin?

On the other hand, once we recognize that the situation is a highly repetitive one, in the sense that relatively close calls will often occur given how often we need to make decisions about the level of precaution, perhaps it is more defensible to adopt a consistent strategy of choosing the less costly option, at least if the costs have been properly valued in the first place. In the original Sore Throat case, by contrast, the situation appears to be extraordinary and very unlikely to repeat.

<sup>98</sup> Stephen G. Gilles, *The Emergence of Cost-Benefit Balancing in English Negligence Law*, 77 *CHI.-KENT L. REV.* 489 (2002).

Mark Geistfeld has endorsed a version of this approach. See Geistfeld, *supra* note 73=; Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 *N.Y.U. Law Review* 114 (2001). See also Keating, *Pricelessness*, *supra* note 72= (endorsing, in special situations, statutory standards that require risk reduction risk (1) to greatest extent feasible or (2) until activity is safe). Philosopher Derek Parfit, in an effort to make sense of Scanlon’s argument against aggregation, discusses the “Disproportional View”: “Lesser burdens should be discounted, since their moral importance is less than proportional to their size.” Parfit, D., *Justifiability to Each Person*, 16 *Ratio* 368, 379 (2003). Parfit ultimately rejects this view, and concludes, more generally, that Scanlon “rejects utilitarianism for the wrong reason. Utilitarians go astray, not by letting the numbers count, but by ignoring or rejecting all principles of distributive justice.” *Id.*, 379-380.

<sup>99</sup> For example, suppose  $n=2$ :

$$D \text{ is negligent if and only if } B < 2 \times (P \times L)$$

Compare this with the ordinary BPL test:

B	PL	B<PL	B<2PL Thumb
49	50	Negl	Negl
60	50	Not negl	Negl
80	50	Not negl	Negl

**Third**, she can employ a hierarchy of interests. This approach might express deontological principles even if the interests that are balanced are the Learned Hand factors B, P, and L. Thus, with respect to “L,” arguably property matters less than physical integrity, and economic interests matter the least.<sup>100</sup> With respect to “B,” we might value loss of important social benefits more highly than loss of private benefits or more than financial costs.<sup>101</sup> Insofar as we employ deontological criteria to prioritize interests within BPL, we depart from a simple utilitarian calculus. On the other hand, prioritization can also express a pluralist, idealized conception of “utility.”

Each of these possible solutions creates its own set of problems, however. Ignoring trivial benefits presents the problem of defining the threshold of triviality; presumably we need to relate triviality to some defensible baseline level of risk.<sup>102</sup> The “thumb on the scale” prompts several questions: How heavy a “thumb”? Why that precise weight? For what categories of cases? Would it not be better to start with a more justifiable set of social values that we then should directly balance, without any “thumb”?<sup>103</sup>

With respect to hierarchies of interests, tort law does, and arguably should, also address less important interests, including economic harms, especially when they follow from physical harms to person or property. Moreover, to say that “in general” interest X is more important than interest Y is problematic. Even if this is often true, nevertheless a much greater infringement on Y (the less weighty interest) can be more significant, morally and legally, than a much lesser infringement on X (the more weighty interest).<sup>104</sup> Losing a life due to another’s tort is indeed worse than losing a finger, which is worse than losing a day’s wages. But the loss of a day, or an hour, of one’s life need not be valued more than the physical destruction of a factory. And once we consider the very realistic possibility of precautions that avoid a tiny risk of infringing (more weighty interest) X in order to preserve a higher probability of not infringing or of furthering (less weighty) interest Y, this approach becomes even less plausible. (Suppose the only medicine that will relieve a headache has a very tiny risk of causing personal injury or death. Or consider carbonated beverages, which serve the drinker’s modest interest in quenching his thirst while enjoying the pleasurable sensation of carbonation, but at the risk of a tiny, practically unavoidable risk of death from the bottle exploding.) Unless one endorses the extreme (and implausible) position that preventing any infringements of X should have absolute lexical priority over preventing any infringements of Y, these difficult questions of comparative value will persist.

Finally, a critical question for any of these possible solutions is the question of when they should apply. Are they understood to be a pervasive criterion of negligence, applicable in all contexts? Or are they to be employed only in a subset of cases? One

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100	50	Not negl	Not negl
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For a similar analysis, see Geistfeld, *Reconciling Cost-Benefit Analysis*, supra note 97=, at 147-149 (concluding that the “thumb,” n, should be precisely 2).

<sup>100</sup> See sources cited in note = supra. Of course, tort doctrine itself relegates economic and emotional interests to a lesser status, insofar as negligent infliction of (only) these types of harms is not actionable (although they are sometimes recoverable incident to physical harms).

<sup>101</sup> Cf. Restatement (Third) of Torts: Products Liability §2 cmt f (1998) (declaring that whether liability would have a “negative effect on corporate earnings” or merely “would reduce employment in a given industry” should not be considered in the risk/utility calculus for design defect).

<sup>102</sup> See, e.g., Keating, *Pricelessless*, supra note 72=. For the argument that this type of “triviality” or “irrelevant utilities” argument ultimately collapses, see Norcross, supra note 3=; Parfit, supra note 97=.

<sup>103</sup> See Simons, *Negligence*, supra note 18=, at 78-81.

<sup>104</sup> See Ronen Perry, supra note 33=, at 41; Simons, *Negligence*, supra note 18=, at 81-82.

plausible view is as follows. We should first identify the cases in which the presumptive negligence criterion should apply (and either a qualified deontological or a qualified consequentialist criterion might be employed here). This presumptive criterion might, for example, apply to all interactions in which there is either strict or approximate reciprocity of benefit and burden. But then we would identify cases in which a more stringent criterion should apply—for example, cases in which one party clearly obtains a unilateral benefit from the interaction. Recall the question whether the owners of an athletic field must use greater care in building a fence to protect people outside the park from harm, than in building a fence to protect spectators inside the park who benefit from the activity. On the view just suggested, a qualified consequentialist or qualified deontological criterion is appropriate for determining the requisite degree of safety for those inside the park, while a “thumb on the scale” test (or some other more stringent variant) is appropriate for determining the requisite degree of safety that we should guarantee to those outside the park who do not obtain any significant benefit from the activity.

### 3. Consider individual risk but not population risk

A third possible deontological answer to the problem of permissible tradeoffs is to allow tradeoffs but only if the required precaution lowers the individual risk to those endangered; it is not sufficient that the precaution will lower the aggregate population risk. As we will see, this approach is promising but seems to have only limited practical relevance in tort law.

One important difference between some rights-based and contractualist approaches to risk, on the one hand, and a consequentialist approach, on the other, is the way in which regulatory policy addresses individual rather than population risk. Suppose an agency has sufficient funds to do only one of the following:<sup>105</sup>

(1) Eliminate toxic chemicals that are present in high concentrations in Smallville, a small town with a population of 1000, and that create an incremental fatality risk for each resident of 1 in 1000; or

(2) Eliminate toxic chemicals that are present in lower concentrations in an urban waste dump in Big City, and that create an incremental fatality risk for each individual, in the much larger population of 100,000, of 2 in 100,000.

“In this sort of case, it is standardly suggested, ‘population risk’ considerations weigh in favor of cleaning up the [Big City] urban dump, while ‘individual risk’ considerations weigh in favor of cleaning up the [Smallville] town dump.”<sup>106</sup> If we clean up Big City, we can expect to save more lives in the total population (two rather than one). By contrast, if instead we clean up Smallville, we protect those who are at much higher individual risk (1 in 1000 rather than 1 in 50,000). Regulators might take one or the other, or both, of these types of risk into account (depending on the particular statutory mandate).

Consequentialists tend to favor the population risk approach: what ultimately matters, they believe, is the bottom-line “body count,” the total number of injuries or deaths

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<sup>105</sup> The example is from Matthew Adler & Chris Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. Penn. L Rev. 279, 355 (2006).

<sup>106</sup> *Id.* See also Adam M. Finkel, *Comparing Risks Thoughtfully*, 7 Risk: Health, Safety & Environment 325 (Fall 1996).

that could be prevented. Nonconsequentialists might also or instead value individual risk.<sup>107</sup>

This debate has some relevance for tort law, and the articulation of standards of permissible risk-imposition. A consequentialist will again support the population risk approach, while a contractualist is more likely to support some version of the individual risk approach.

For example, suppose I am driving an ambulance and must get to the hospital promptly in order to save my passenger's life. And I must take either Road A or Road B. I happen to know (this is an academic paper, after all) the following:

### **Road A or Road B?**

Road A: Four pedestrians are on the sidewalk, and each has a 10% chance of dying if I speed by them fast enough to save the person in the back of the ambulance.

Road B: Twenty pedestrians are on the sidewalk, and each has a 3% chance of dying if I speed by them.

The expected death toll on Road A is 0.4; on Road B, it is 0.6. What should I do?

If population risk controls, I should take Road A; for Road B can be expected (over enough similar cases) to result in a 50% higher death rate. If individual risk controls, I should take Road B, since it is morally more problematic to impose a 10% risk of death on a population than to impose a 3% risk on a population. Because contractualists focus on the burden for each individual, they are likely to support the individual risk approach.<sup>108</sup>

This example might not be a terribly compelling one: if it is purely a matter of chance whether I happen to be on Road A or Road B, and if the risk of harm is relatively low in either case, would I really care whether the ex ante risk happens to be much higher in one location? Is the slight difference in risk really enough to trouble me? But imagine this variation, where I must take either Road C or Road D:

### **Road C or Road D?**

Road C: Two pedestrians are on the sidewalk, and each has a 50% chance of dying if I speed by them fast enough to save two people in the back of the ambulance.

Road D: Twelve pedestrians are on the sidewalk, and each has a 10% chance of dying if I speed by them (again, in order to save two people).

The expected death toll on Road C is 1.0; on Road D, it is 1.2. What should I do?

Here, the intuition seems especially strong that taking Road D is preferable to taking Road C, and this seems to support the individual risk approach. Indeed, not only is Road C the less acceptable of the two road options, it might well be an impermissible option even if the other route, Road D, did not exist, because creating such a high,

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<sup>107</sup> But cf. Adler, *Against 'Individual Risk': A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121 (2005) (arguing that even a deontological perspective cannot justify the individual risk approach).

<sup>108</sup> However, if a contractualist considers morally relevant only the ex post burden each individual suffers, not the ex ante chance of being burdened, she will reject this analysis.

concentrated risk to the two pedestrians might not justify the benefit of saving the life of the two ambulance passengers.<sup>109</sup>

These examples suggest that at least when the individual risk is especially high, respect for the individual (on a contractualist or other nonconsequentialist account) might permit or even require a choice to minimize individual risk even at the expense of increasing population risk, i.e., even at the expense of increasing aggregate expected bad consequences.

But how often do these considerations make a difference in negligence law? Not often, I suspect. For with the more typical, low-level risks characteristic of most tort negligence cases, it is often plausible to assume that, for each individual, the aggregate benefits she obtains from all activities that expose her to approximately that level of risk exceed the aggregate risks. If intrapersonal aggregation of this sort is a justifiable basis for permitting risky activity, then it will justify most low-level risks, whether understood as individual or population risk. That is, the choice between the risk approaches is unlikely to matter when the risks are extremely small, as in the *Smallville v. Big City* contrast; for the benefits to the people at risk are unlikely to vary enough to make the differential in risks decisive. But when the difference in individual risks between the two endangered groups is great and the risks themselves are quite substantial, e.g. at least 5%, then a differential in benefits between the groups might indeed make a difference to permissibility.

## V. Conclusion

In conclusion, let me say a few words about the Learned Hand test, then about the choice between qualified consequentialist and qualified deontological accounts of negligence.

### A. Liberating the Learned Hand test

Advocates of efficiency analysis have hijacked the Learned Hand test, treating it as a self-evident formula for aggregating costs and benefits, often presuming a market valuation of the relevant interests, and typically ignoring distribution. But the Hand formula can be rescued from this sordid fate.

How can it be rescued? I have explored the question more fully elsewhere,<sup>110</sup> so the answer here is brief. To a significant extent, the formula can accommodate both sensitive consequentialist and tough-minded deontological accounts of negligence, each of which is much more plausible than unqualified consequentialist or deontological accounts. The formula is sufficiently general to accommodate these different justifications for tort negligence liability.

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<sup>109</sup> If the reader does not share the view that taking Road C is impermissible even if there is no alternative Road D, he will likely consider it impermissible for the ambulance to take Road C\* (a more extreme version of Road C), even if there is no alternative road:

Road C\*: Two pedestrians are on the sidewalk, each of whom has a 90% chance of dying if the ambulance speeds by.

For further discussion, see Simons, *supra* note 18=, at 65.

<sup>110</sup> See Simons, *supra* note 24=.

However, as articulated, the formula should emphasize the social value of the relevant interests; to be defensible, the utilitarian account should be idealized—and to a greater extent than the current Restatement Third draft provides.<sup>111</sup>

Moreover, in cases of advertent negligence, the Hand formula factors should be part of a jury instruction, in order to discipline and guide decision-making more effectively than the widely used, extremely vague “reasonable care under the circumstances” standard. In the context of corporate liability for negligence, it might be appropriate to require even more specific criteria, as the Restatement Third and many jurisdictions now do when defining products liability design and warning defects.

At the same time, an acontextual, abstract BPL test is often highly misleading. Where possible, more context-specific criteria should be articulated, as a specification either of duty or of criteria for breach. Moreover, the distribution of risks and benefit is absolutely essential to understanding the permissibility of risky activity. In suitable cases, the jury instruction should also require explicit consideration of who benefits from the activity, and who is most exposed to its risks.

Once we develop a defensible formula or criterion for when tradeoff is permissible, then we should not only allow tradeoffs but, in a significant range of cases, encourage actors to make the tradeoffs explicitly. To this extent, Viscusi’s complaint, noted in the introduction, is correct: if an explicit tradeoff of values is what the most defensible moral and legal theory requires, then it is often sensible to require the actor to make that tradeoff explicitly. (The notorious Ford Pinto case is not a persuasive counterexample, for it does not prove the moral unacceptability of all forms of analysis that trade off the advantages and the disadvantages of taking a precaution. Instead, it reveals the problems with an unduly low valuation of human life.<sup>112</sup>)

If the explicit decision to proceed with a risky activity or to omit a precaution is made properly, with a socially acceptable balancing of the relevant factors, then the activity or omission is permissible, and the fact that a conscious tradeoff decision was made does not amount to fault. Even if the explicit decision to proceed with the activity or to omit a precaution is made improperly, for example by giving undue (excessive or insufficient) weight to certain factors or by not exploring alternatives carefully enough, the additional fact that the risk was created advertently rather than inadvertently does not necessarily mean that the actor is more at fault.

#### B. Choosing between qualified consequentialist and qualified deontological accounts of negligence

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<sup>111</sup> See *id.* at 925, 936-939.

Notice that L (the harm to the victim, if the precaution is not taken) is especially difficult to value when it refers to loss of life. But given the impressionable and imprecise nature of any actual balancing test in the tort context, this is not too problematic. Still, it might be appropriate for government to approve a presumptive value of life for regulatory purposes, and employ it in the tort context as well, subject to modification in light of qualitative aspects of the risk. (Of course, this value would be employed *ex ante*, in judging whether the precaution should have been taken; it is a separate question how the law should compensate for loss of life *ex post*.)

<sup>112</sup> The 1972 government study upon which the cost-benefit analysis was based assigned only \$200,000 to the loss of a life, a low figure even adjusting for inflation since 1972. See Schwartz, *supra* note 16, at 1022. Moreover, there is some question whether the cost of a precaution was also overstated, since the precaution that was quantified in the cost-benefit analysis, a post-sale installation of a shield, almost certainly produced higher aggregate costs over the entire fleet of Pintos than would the pre-sale precaution of properly investigating the proposed fuel tank placement in the first place and then developing and producing a safer initial design.

I have argued that we should reject unqualified consequentialist or deontological accounts of negligence, and should endorse qualified versions instead. But what difference does it make whether we incorporate qualifications within a consequentialist or instead a deontological approach?

Even if we idealize or qualify a value (such as B, P, or L) in the consequentialist analysis, the analysis still commits us to maximizing aggregate “amounts” of the value. And some would still find that objectionable. On the other hand, incorporating a distributive constraint within the consequentialist criterion partially addresses this concern. (However, if we adopt this solution, we might find it difficult to create a simple verbal formulation for the distribution-sensitive criterion.)

At the same time, even a qualified deontological account might be unable to justify at least some risky activities that intuitively appear to be perfectly acceptable. For example, if the deontological account permits only a narrow type of intrapersonal aggregation (permitting an act or activity to endanger someone only if his expected benefits from each act or activity, considered separately, exceed the ex ante risks), there remain activities in which at least some of the people exposed to the risk do not obtain a net benefit, even ex ante. If we believe (as most of us do) that such activities can still be permissible, so long as the proportion of individuals who “lose out” on balance from the activity is sufficiently small, then we seem to be committed, to that extent, to a consequentialist justification.

In the end, perhaps our considered intuitions about which instances of risk creation and risk imposition are permissible, and which are impermissible, commit us to some sort of mixture or mutual accommodation of deontological and consequentialist principles. But is such an accommodation theoretically incoherent? If so, then perhaps we should revise some of our intuitions, or even abandon our commitment to coherence. Better still, we should work even harder on developing a subtle, coherent, principled, and persuasive answer to this extraordinarily challenging question: when is it permissible to create a risk of harm to others?