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JUSTICE AND REASONABLE CARE IN NEGLIGENCE LAW[†]

RICHARD W. WRIGHT*

I. INTRODUCTION

Negligence law holds defendants and plaintiffs legally responsible for injuries caused by their negligent conduct. Conduct was negligent if it was unreasonable, and thus should not have been engaged in, given the risks of resulting injury or loss that were foreseeable at the time of such conduct. But what makes conduct unreasonable? Exploration of this question reveals a little appreciated but clearly demonstrable disjunction between the law as it actually exists in practice and the law as it is interpreted and described in most secondary sources (e.g., treatises, casebooks, and the American Law Institute's successive Restatements) and a corresponding confusion about tort law's underlying principles.

The vast majority of legislative codes, form jury instructions, and judicial opinions, and even many secondary sources, do not provide any test or criterion for determining when conduct is unreasonably risky.¹ Instead, they merely refer, often circularly, to the care that would be exercised by the "ordinary" prudent, careful, or reasonable person in the same or similar circumstances. For example, a widely used federal jury instruction states:

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of agencies under one's control.

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1. See Stephen G. Gilles, "The Invisible Hand Formula," *Virginia Law Review* 80 (1994) 1015, 1016-1020; Patrick J. Kelley and Laurel A. Wendt, "What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions," *Chicago-Kent Law Review* 77 (2002) 587.

Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the person or property of others.²

However, most secondary sources assume that an aggregate-risk-utility test is employed to determine whether conduct was reasonable or negligent.³ This aggregate-risk-utility test seems to be a transparent implementation of the basic principle of utilitarianism and the most popular (Kaldor-Hicks) principle of economic efficiency. Thus, the test's assumed prevalence as the criterion of reasonableness in negligence law has been highlighted by legal economists

2. Edward J. Devitt, Charles B. Blackmar and Michael A. Wolff, *3 Federal Jury Practice and Instructions, Civil* (St. Paul, Minn.: West Publishing Co., 4th ed. 1987), §§ 80.03-.04, 133-135. The first sentence of this formulation, which is used widely in the common-law world, was first articulated in the English case of *Blyth v. Birmingham Water Works*:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

156 Eng. Rep. 1047, 1049 (Ex. 1856); cf. Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California, *Civil Jury Instructions* (St. Paul, Minn.: West Group, 8th ed. 1994), § 3.10 ("Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence."). The Illinois pattern jury instructions are unusually explicit concerning the lack of any definition or criterion of reasonableness:

When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

Illinois Supreme Court Committee on Jury Instructions in Civil Cases, *Illinois Civil Pattern Jury Instructions* (St. Paul, Minn.: West Group, 2000), § 10.02.

3. See, e.g., Dan B. Dobbs, *The Law of Torts* (St. Paul, Minn.: West Publishing Co., 2000), §§ 144-145 (but see text at note 54, *infra*); John G. Fleming, *The Law of Torts* (Sydney: The Law Book Co. Ltd., 8th ed. 1992), 114-119 (but see text at note 51, *infra*); Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, *3 The Law of Torts* (Boston: Little, Brown and Co., 2d ed. 1986), § 16.9, 467-77 (but see text at note 52, *infra*); W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, *Prosser and Keeton on the Law of Torts* (St. Paul, Minn.: West Group, 5th ed. 1984), § 31, 171-173 (but see text at note 53, *infra*); W.V.H. Rogers, *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 16th ed. 2002), 201-02; William J. Stewart, *Delict* (Edinburgh: W. Green and Son Ltd., 2d ed. 1993), 61-62 (Scottish law); Francis Trindade and Peter Cane, *The Law of Torts in Australia* (Oxford: Oxford University Press, 2d ed. 1993), 414-18; cf. Basil S. Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (Oxford: Hart Publishing, 4th ed. 2002), 85 ("mathematical formulae, which attempt to work out negligence on the basis of a yield-cost analysis . . . can also be found in German legal writings. It is unclear, however, whether this suggests that the German legal literature is ready for a more economic analysis of legal problems such as is found in American academic literature").

as confirmation of the utilitarian efficiency foundations of tort law,⁴ while those who think that tort law is or should be grounded on principles of justice have sought to demonstrate that, contrary to appearances, the aggregate-risk-utility test is consistent with and perhaps even best explained and justified by those principles.⁵

As will be discussed in this article, the attempts to explain and justify the aggregate-risk-utility test as an elaboration of the principles of justice are misguided and doomed to fail. As all of the leading justice theorists by now have recognized, the aggregate-risk-utility test cannot be reconciled with the principles of justice. The attempts to affect such a reconciliation were and are based on a fundamental error: treating the basic principle of utilitarianism as a basic principle of justice.

Does this mean that we are forced to the unhappy conclusion that negligence law is driven by utilitarian efficiency considerations rather than by the principles of justice? No. The aggregate-risk-utility test, although pervasive in the secondary literature and mentioned by a small minority of courts, is almost never used by the courts to decide whether particular conduct was negligent. Instead, the courts employ, explicitly or implicitly, a number of different criteria, depending on the relationships among and respective rights of the parties, that are based on the principles of justice.⁶

Why, then, is the aggregate-risk-utility test so prominent in the secondary literature? The secondary literature is primarily the province of legal academics. The aggregate-risk-utility test was created by legal academics and inserted into the first Restatement of the Law of Torts during the first part of the twentieth century, when utilitarianism was a popular moral and political theory. The test's adoption in the Restatement assured its prominence in the secondary literature and even its citation in a significant number (albeit a small minority) of judicial opinions. However, with rare exceptions, these citations have been mere lip service, as the test is not actually employed by the courts to determine whether specific conduct was negligent.

4. See, e.g., William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass.: Harvard University Press, 1987), 85-148, 229-30; Kenneth J. Abraham, *The Forms and Functions of Tort Law* (New York: Foundation Press, 2d ed. 2002), 60-65; Richard A. Posner, "A Theory of Negligence," *Journal of Legal Studies* 1 (1972) 29.

5. See Richard W. Wright, "The Standards of Care in Negligence Law," in *Philosophical Foundations of Tort Law*, David G. Owen, ed. (Oxford: Oxford University Press, 1995), 249, 252-254 (summarizing and criticizing several such attempts); text at notes 103-134, 161-169, and 179-186, *infra*.

6. See Richard W. Wright, "Hand, Posner, and the Myth of the 'Hand Formula'," *Theoretical Inquiries in Law* 4 (2003) ____ (forthcoming); Richard W. Wright, "Negligence in the Courts: Introduction and Commentary," *Chicago-Kent Law Review* 77 (2002) 425; Wright, "The Standards of Care in Negligence Law," *supra*, note 5.

In this article, I first trace the history of the aggregate-risk-utility test, focusing especially on its adoption and retention in the various editions of the Restatement. I then discuss the basic differences between the principles of utilitarian efficiency and the principles of justice. Finally, I explore the confusion of those, including the drafters of the Restatement Third, who attempt to explain and justify the aggregate-risk-utility test as an elaboration of the principles of justice. In other articles I discuss the actual case law.⁷

II. THE HISTORY OF THE AGGREGATE-RISK-UTILITY TEST

Prior to the adoption of the first Restatement, the negligence concept generally had been left unelaborated in the secondary literature as well as by the courts. The little elaboration that existed seemed to state that a defendant's conduct was negligent if it created any foreseeable, significant, avoidable risk to others.⁸ The reporter for the first Restatement, Frances Bohlen, acknowledged that the Restatement's aggregate-risk-utility test had minimal explicit support in the existing law.⁹ However, he claimed, as Richard Posner later would,¹⁰ that "[w]hile the comparison between the utility of an act and the risk involved therein is rarely stated by the courts as the basis of their decisions, in reality it is the underlying basis of substantially all of them."¹¹ Bohlen's and Posner's claims are not supported by the cases.¹² For example, in the best known nineteenth-century American negligence case, *Brown v. Kendall*,¹³ the Massachusetts Supreme Judicial Court stated:

7. See note 6, *supra*.

8. See Stephen G. Gilles, "The Emergence of Cost-Benefit Balancing in English Negligence Law," *Chicago-Kent Law Review* 77 (2002) 489, 501-504 and nn.38-40 [hereinafter "English Negligence Law"]; Michael D. Green, "Negligence = Economic Efficiency: Doubts," *Texas Law Review* 75 (1997) 1605, 1617-1623; Thomas C. Grey, "Accidental Torts," *Vanderbilt Law Review* 54 (2000) 1225, 1279 n.168; Patrick J. Kelley, "The *Carroll Towing Company* Case and the Teaching of Tort Law," *St. Louis University Law Journal* 45 (2001) 731, 747 [hereinafter "Carroll Towing"].

9. See Stephen G. Gilles, "On Determining Negligence: Hand Formula Balancing, The Reasonable Person Standard, and the Jury," *Vanderbilt Law Review* 54 (2001) 813, 845 n.104 [hereinafter "Hand Formula Balancing"] (quoting *Restatement of Torts* (Tentative Draft No. 4, 1929), § 172, Reporter's Note, 5: "The comparison between the social utility of the act and the magnitude of the risk is occasionally, but only occasionally, stated as the basis of decision in negligence cases.").

10. See Posner, "A Theory of Negligence," *supra*, note 4, at 32.

11. *Restatement of Torts* (Tentative Draft No. 4, 1929), § 172, Reporter's Note, 7 (quoted in Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, at 1624-1625).

12. See note 6, *supra*, and accompanying text.

13. 60 Mass. (6 Cush.) 292, 296 (1850).

[O]rdinary care . . . means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. . . . To make an . . . inevitable [non-negligent] accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.¹⁴

Similarly, Oliver Wendell Holmes, in his famous defense of negligence liability in his monograph, *The Common Law*, which was published in 1881, focused solely on the existence of a foreseeable, avoidable risk of harm to others:

[R]elatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid. In the language of the late Chief Justice Nelson of New York: "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility." . . . The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.¹⁵

As these statements suggest, a significant foreseeable risk generally seemed to be treated as avoidable, and thus negligent, if there was any feasible means of avoiding it. However, the courts treated some feasibly reducible significant risks associated with socially valuable activities—for example, the inherent risks involved in operating trains and other vehicles at moderate speeds—as “unavoidable” or “inevitable,” without providing any general

14. *Ibid.*, 296; see *Depue v. Flateau*, 111 N.W. 1, 2 (Minn. 1907) (stating a similar “comprehensive principle”); *Hauser v. Chicago, R.I. and P. Ry.*, 219 N.W. 60, 62 (Iowa 1928) (assuming defendant would be negligent if the risk to the plaintiff were “reasonably foreseeable”).

15. Oliver Wendell Holmes, Jr., *The Common Law* (1881), Mark DeWolfe Howe, ed. (Boston: Little, Brown and Co., 1963), 76-77 (footnotes omitted); see Grey, “Accidental Torts,” *supra*, note 8, at 1279 n.168 (stating that Holmes “held to the ‘non-balancing’ interpretation of negligence that was usual in his day, and that is still advocated by many”); Robert L. Rabin, “Law for Law’s Sake,” *Yale Law Journal* 105 (1996) 2261, 2267 (agreeing that Holmes “defined negligence as failure to avoid imposing foreseeable risks”).

criteria for determining when foreseeable risks would be deemed avoidable (and thus negligent) or inevitable (and thus not negligent).¹⁶

At the beginning of the twentieth century, legal academics attempted to articulate general criteria for determining when conduct was unreasonable and hence negligent. Henry Terry seems to have been the first to adopt an aggregate-risk-utility test of reasonableness in negligence law.¹⁷ In an influential article published in 1915, he proposed the following formulation:

The reasonableness of a given risk may depend upon the following five factors:

- (1) The magnitude [probability P1] of the risk. . . .
- (2) The value or importance [L1] of that which is exposed to the risk, which . . . may be called the principal object. . . .
- (3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct,—is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance [L2] of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.
- (4) The probability [P2] that the collateral object will be attained by the conduct which involves risk to the principal [object]. . . .
- (5) The probability [P3] that the collateral object would not have been attained without taking the risk; the necessity of the risk.¹⁸

Terry's subsequent discussion analyzed the reasonableness of a person's conduct by balancing the foreseeable risks created by the conduct (P1 times L1) against the conduct's expected utility (P2 times P3 times L2).¹⁹

As others have recounted,²⁰ Terry's formulation was adopted (with minor adjustments) in the first Restatement of Torts, which was published by the American Law Institute in 1934. The relevant sections and comments in the first Restatement were carried over virtually intact into the Restatement Second, which was published in 1965. The only significant change was the

16. See Gilles, "English Negligence Law," *supra*, note 8, at 501-504 and nn.35, 40. For useful discussions of the various elaborations of avoidability and "inevitable accident," see *Morris v. Platt*, 32 Conn. 75, 85-87 (1864); Stephen G. Gilles, "Inevitable Accident in Classical English Tort Law," *Emory Law Journal* 43 (1994) 575.

17. See Kelley, "Carroll Towing," *supra*, note 8, at 746-748.

18. Henry T. Terry, "Negligence," *Harvard Law Review* 29 (1915) 40, 42-43.

19. See *ibid.*, 43-44. Terry introduced a version of this formulation earlier in a treatise. See Gilles, "English Negligence Law," *supra*, note 8, at 504 n.41 (citing Henry T. Terry, *Leading Principles of Anglo-American Law Expounded with a View to Its Arrangement and Codification* (1884), 170-190).

20. See Laurence H. Eldredge, *Modern Tort Problems* (Philadelphia: G.T. Bisel, 1941), 6; Gilles, "Hand Formula Balancing," *supra*, note 9, at 825-828; Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, at 1627-1628 and n.104; Kelley, "Carroll Towing," *supra*, note 8, at 746-748.

elimination in the Restatement Second of the second subsection of section 291 in the first Restatement (but not its associated comment), which dealt with situations in which there is an “affirmative duty” to control the conduct of others or to aid others. Section 291 in the Restatement Second, which was subsection 291(1) in the first Restatement, states:

Unreasonableness; How Determined; Magnitude of Risk and Utility of Conduct
Where an act is one which a reasonable man would recognize as involving risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.²¹

Sections 292 and 293 list the factors that are important and thus should be considered in determining the utility of the actor’s conduct and the magnitude of the risk, respectively. The factors are essentially the same factors that Terry articulated.²²

Although neither Terry nor the Restatement explicitly refers to utilitarian moral theory, their risk-utility-weighting tests seem to express a utilitarian interpretation of reasonableness in negligence law. At the time, utilitarianism was a relatively new and academically popular moral theory.²³ James Barr Ames, the dean of the Harvard Law School, boldly declared in a leading article: “The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed.”²⁴ According to utilitarianism, conduct is morally proper (reasonable) if and only if the utility of the conduct (its expected benefits, including the avoidance of the burden of taking further precautions) is greater than its expected disutility (the expected costs or losses resulting from the conduct), taking into account and impartially weighing all foreseeable benefits and costs to everyone, including the actor, who might be affected by the actor’s conduct.²⁵

The Restatement sections and comments explicitly refer to the “utility” of the actor’s conduct and set forth an apparent aggregate-risk-utility test. A comment to section 283 seems to express the basic principle of utilitarianism, that a person must always be impartial between her own interests and the

21. *Restatement of Torts* (1934), § 291(1); *Restatement (Second) of Torts* (1965), § 291.

22. See Kelley, “Carroll Towing,” *supra*, note 8, at 743-748.

23. See Steven Hetcher, “Non-Utilitarian Negligence Norms and the Reasonable Person Standard,” *Vanderbilt Law Review* 54 (2001) 863, 871 n.33, 890 [hereinafter “Non-Utilitarian Negligence Norms”].

24. James Barr Ames, “Law and Morals,” *Harvard Law Review* 22 (1908) 97, 110.

25. See text at notes 81-84, *infra*.

interests of others and should act so as to maximize the aggregate satisfaction of those (impartially considered) interests:

Weighing interests. The judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires . . . that [the actor] give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others.²⁶

However, despite the apparent utilitarian influences, the risk-utility tests formulated by Terry and especially by the authors of the Restatement are subject to significant non-utilitarian qualifications and exceptions, which perhaps help explain the first Restatement's adoption of a risk-utility test of negligence notwithstanding its acknowledged absence in the decided cases. Terry cautiously stated that "[t]he reasonableness of a given risk *may* depend upon the following five factors" and that "[i]n some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk," thereby implying that in some (many?) circumstances the value or importance of the "collateral object" (the utility of the actor's conduct) should *not* be considered in deciding upon the reasonableness of the risk.²⁷

26. *Restatement of Torts* (1934), § 283 comment c; *Restatement (Second) of Torts* (1965), § 283 comment e. For a discussion of utilitarianism's aggregation and impartiality principles, see text at notes 81-92, *infra*. For further discussion of whether the "weighing interests" comment adopts utilitarianism's impartiality principle, see text at note 44, *infra*.

27. See text at note 18, *supra* (emphasis added). Terry elaborated:

Sometimes the collateral object, and therefore the utility and necessity of the risk, which relate to that object only, cannot be considered at all in deciding upon the reasonableness of the risk. There are certain objects which the law designs to protect, which may be called legal objects, and others which it does not attempt to protect, which may be called personal objects. . . . To some extent it protects pecuniary condition, *i. e.*, the avoidance of pecuniary loss is generally, but, as the decisions now stand, not always a legal object. . . .

. . . although generally a person is not excused for taking a risk which would otherwise be unreasonable because he will thereby promote his own comfort or convenience, comfort and convenience being personal objects only, yet as between a carrier and his passenger the passenger's comfort and convenience are legal objects, and a passenger may subject himself to some risk to promote his own comfort and convenience without, as against the carrier, being therefore chargeable with contributory negligence.

Terry, "Negligence," *supra*, note 18, at 44-45 (emphasis added). Michael Green has noted Terry's statement that "[w]hen the collateral object is the saving of expense, there is no doubt

Other prominent academics stated stronger and more explicit qualifications and reservations. Warren Seavey, a professor of law at Harvard, was an adviser for the first and second Restatements. In an article he wrote for the group drafting the Restatement,²⁸ of which he was a member, he listed Terry's five factors as factors that must be considered to determine whether or not a risk is "undue" (unreasonable).²⁹ However, he did not incorporate them into a balancing test. To the contrary, he warned against such use of the factors:

We must not assume that we can rely upon any formula in regard to "balancing interests" to solve negligence cases. The phrase is only a convenient one to indicate factors which may be considered and should not connote any mathematical correspondence. Thus I would assume that an actor is liable if, to save his own horse of equal value with the plaintiff's, he were to take a fifty per cent chance of killing the plaintiff's horse, while it would at least be more

that it is a legal object." See Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, 1627 n.105 (quoting Terry, "Negligence," *supra*, at 46). Terry continued:

A person, though he may be bound to go to some expense to prevent harm, need not incur an unreasonable expense. The *excessive* expense of taking certain precautions against danger, which might have been taken, has often been held a sufficient reason for not taking them. But the pecuniary condition of the person called upon to incur the expense, so that a given expenditure will be more or less onerous to him, is generally not important. . . . So the successful conduct of a business and the making of profits are legal objects *as between all persons concerned in it*; so that an employer cannot be required to take precautions for the safety of his employees in it, which would cost *more than such a business could afford*.

Terry, *supra*, at 46 (emphasis added). It seems to me that these quotes emphasize what I have previously stressed: that the nature of the relationship among the parties determines whether and how financial costs or other burdens of precaution are taken into account. Terry's successful-business example is carefully limited to a situation in which those being put at risk are seeking to benefit from the defendant's risky activity. It suggests, as I have argued and as Stephen Gilles's research on the English cases affirms, that even in that context no straight cost-benefit balancing occurs. Rather, a non-balancing, prohibitive-cost test is applied, which ordinarily requires that the risk not be too serious, be necessary for the obtaining of some benefit desired by those being put at risk or by everyone in society rather than merely a private benefit to the defendant, be reduced to the maximum extent feasible without significantly impairing the desired benefit, and be significantly outweighed by the desired benefit. See Wright, "Hand, Posner, and the Myth of the 'Hand Formula'," *supra*, note 6, sections III.C-III.E; Wright, "Negligence in the Courts: Introduction and Commentary," *supra*, note 6, at 435-441 (discussing Gilles, "English Negligence Law," *supra*, note 8); Wright, "The Standards of Care in Negligence Law," *supra*, note 5, at 260-274; text at notes 34-43, *infra*.

28. Warren A. Seavey, "Negligence—Subjective or Objective?," *Harvard Law Review* 41 (1927) 1, 1 n.1; see Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, at 1627 n.104.

29. See Seavey, "Negligence—Subjective or Objective?," *supra*, note 28, at 7-8. Although he cited Terry's 1915 article on negligence and Terry's 1884 treatise, he did not attribute the five factors to Terry.

doubtful whether he might not take a fifty per cent chance of killing another to save his own life. In either event, if the plaintiff's and defendant's interests are considered of equal value, the defendant would not be liable under the theory of balancing interests. . . . In the field of negligence, interests are balanced only in the sense that the purposes of the actor, the nature of his act and the harm that may result from action or inaction are elements to be considered. Some of these elements are not considered when the actor knows or desires that his conduct will result in interference with the plaintiff or his property.³⁰

Seavey emphasized that making the proper evaluations requires having the "moral quality" of being able "to evaluate interests; or, to put it in accord with the classical statement, the ability to distinguish right from wrong"—to make judgments "in accordance with the valuation placed upon [the interests] by the community sentiment crystallized into law" and the related "sense of justice."³¹

The belief that private interests should be taken into account only insofar as they are deemed by the law to have social value is reflected in various statements by the reporter for the first Restatement, Frances Bohlen, who was a professor of law at the University of Pennsylvania. In a tentative draft published in 1927, he suggested that juries should be instructed to consider "what a reasonable man would do with his attention centered upon the risk which his conduct involves and the gain to society *or to himself, and through himself to society*, which is likely to result from his conduct."³² He also insisted, in an article published in 1924, a year after being appointed as the reporter:

[T]he "reasonable man" is not the average man. He is an ideal creature, expressing public opinion declared by its accredited spokesman, whether court or jury, as to what ought to be done under the circumstances by a man, who is not so engrossed in his own affairs as to disregard the effect of his conduct upon the interests of others. He may be called a personification of the court or jury's social judgment. The factor controlling the judgment of the defendant's conduct is not what *is*, but what *ought to be*.³³

Furthermore, Bohlen's writings strongly suggest that he did not have in mind a strict cost-benefit test, according to which conduct would be deemed reasonable whenever the expected aggregate benefits exceeded the aggregate

30. *Ibid.*, 8 n.7.

31. See *ibid.*, 3, 10, 12.

32. Gilles, "Hand Formula Balancing," *supra*, note 9, at 838 (quoting *Restatement of Torts* (Tentative Draft No. 4, 1929), § 172, Reporter's Note (emphasis added)).

33. Frances Bohlen, "Mixed Questions of Law and Fact," *University of Pennsylvania Law Review* 72 (1924) 111, 113 (emphasis in original).

risks. His primary motivation for incorporating risk-utility language into the test for negligence seems to have been a belief that such language was needed to prevent juries from treating as negligent the inevitable, irreducible risks of activities with substantial social benefits. In the same 1924 article, he complained:

The question as to whether a defendant has been guilty of conduct, which creates an undue probability of harm to others, requires those who judge his conduct to weigh the utility of the act against the probability of harm which it contains; not the utility of the act to the actor alone, but the utility of the act to society . . . because such conduct is on the whole of social value. But the general utility of such conduct is not likely to receive much consideration from a jury who sees before them a plaintiff whose vital interests have been harmed by a particular instance of it. A court might emphasize to the jury *ad nauseam* the social value of the act, but the jury would only see one man injured by another. And only the most confirmed optimist would dare to hope that they would judge the defendant's conduct by what that ideal creature, the "reasonable man," would do.³⁴

Bohlen wanted a definition of negligence that explicitly stated that the social value of such activities should be taken into account, which would be given to juries and used by courts to review juries' decisions.³⁵ Stephen Gilles reports that "[Bohlen's] main argument that the courts implicitly balance risk and utility was an inference from the legal proposition that 'it is not negligence to carry on [risky] activities *so long as reasonable care is taken to keep the risk within the irreducible minimum inherent thereto.*'"³⁶ As we will see, it is this limited, non-balancing weighing of risks against benefits to socially recognized and legally protected interests, rather than an aggregative summation of individual interests or utilities, that Bohlen described in the few specific examples and illustrations that he included in the first Restatement.³⁷

Consistent with this qualified and limited interpretation of the Restatement's risk-utility test by those who formulated it, the first and second Restatements contain significant qualifications and exceptions to their risk-utility definition of negligent conduct, which unfortunately are generally overlooked or dismissed by modern commentators, including the drafters of the third Restatement. In certain types of situations in which the rights of the defendant are considered to be paramount, such as those involving on-

34. *Ibid.*, 118.

35. See Gilles, "Hand Formula Balancing," *supra*, note 9, at 837-839.

36. *Ibid.*, 845 n.104 (quoting *Restatement of Torts* (Tentative Draft No. 4, 1929), § 172, Reporter's Note, 7 (emphasis added)); see note 27, *supra*.

37. See text at notes 40-43, *infra*.

premises risks to non-invitees or a “nonfeasant” failure to rescue or otherwise aid a person whom the defendant did not put at risk, the Restatements adopt no-duty or limited-duty rules.³⁸ More generally, contrary to basic utilitarian theory, according to which each person’s subjective utility should be taken fully into account,³⁹ the Restatements’ primary negligence sections emphasize that the interests on both the risk and utility sides of the risk-utility test should be assessed in terms of “what the *law* regards as the utility of the act” and “the *social* value which the *law* attaches to the interest(s),” rather than the subjective value that the interests might have to the affected individuals or in transitory popular opinion.⁴⁰ Although the Restatements acknowledge that social value often attaches to the pursuit of primarily private interests as well as those with a more obvious general public benefit, the relevant comments clearly state that the focus is always on the social value of the interests as recognized by the law rather than the purely private interest. The principal relevant comments, comments *a* and *b* to section 292, state:

a. Legal valuation of actor’s interests. The most important factor in determining the utility of the actor’s conduct is the value which the law attaches to the interest which the conduct is intended and appropriate to advance or protect. The interest may be exclusively public, as [in the case of] the apprehension of an actual or reasonably supposed criminal. It may be a purely private interest of the actor or a third person. It may be an interest which is primarily of private advantage, but the public may none the less be interested, not merely as the protector of the private interest, but also because the general public good is advanced by the protection and advancement of such private interests. Thus, the idea that the interest of the public as a group can best be served by permitting the utmost freedom of individual initiative is inherent in both legal and popular thought. The irreducible minimum of risk both to employees and outsiders which is inherent in manufacture is not regarded as unreasonable, not so much because manufacture is profitable to those who carry it on, but because it is believed that the whole community benefits by it. The operation of railways and other public utilities, no matter how carefully carried on, produces accidents which kill or harm many people but the risk involved in the operation is more than counterbalanced by the service which they render the public.

38. See *Restatement of Torts* (1934), § 291 comment f (nonfeasance), § 314 and comment b (same), §§ 329-350 (on-premises risks); *Restatement (Second) of Torts* (1965) § 291 comment f (nonfeasance), § 314 and comment c (same), §§ 329-350 (on-premises risks).

39. See Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon Press of Oxford University Press, 1990), 18-19, 25-27.

40. *Restatement of Torts* (1934), § 283 comment c, § 291 and comment d, § 292(a) and comments a-b, § 293(a) (emphasis added); *Restatement (Second) of Torts* (1965), § 283 comment e, § 291 and comment d, § 292(a) and comments a-b, § 293(a) (emphasis added).

b. Deviation from popular valuation of interests. It is the value which the law attaches to the interest which is decisive of the utility of conduct which serves it. The value attached by the law to the great majority of interests is identical with the value which popular opinion attaches to them. There are, however, interests to which a persistent course of decisions has, expressly or by implication, attached a value different from that which the jury would ordinarily attach thereto. In such case, it is the legal and not the popular valuation which is controlling.⁴¹

Similarly, comment *e* to section 291 states:

The law attaches utility to general types or classes of acts as appropriate to the advancement of certain interests rather than to the purpose for which a particular act is done, except in the case in which the purpose is of itself of such public utility as to justify an otherwise impermissible risk. Thus, the law regards the free use of the highway for travel as of sufficient utility to outweigh the risk of carefully conducted traffic and does not ordinarily concern itself with the good, bad, or indifferent purpose of a particular journey. It may, however, permit a particular method of travel which is normally not permitted if it is necessary to protect some interest to which the law attaches a preeminent value, as where the legal rate of speed is exceeded in the pursuit of a felon or in conveying a desperately wounded patient to a hospital.⁴²

Consistent with Bohlen's motivation for incorporating risk-utility language in the first Restatement,⁴³ the illustrations in these comments involve activities—manufacturing, the operation of railways and other public utilities, and vehicular travel on highways—that are deemed reasonable by the members of the community “not so much because [they are] profitable to those who carry [them] on, but because it is believed that the whole

41. *Restatement of Torts* (1934), § 292 comments a-b; *Restatement (Second) of Torts* (1965), § 292 comments a-b. The bracketed words appear only in the Restatement Second, which also substitutes “nonetheless” for “none the less.”

42. *Restatement of Torts* (1934), § 291 comment e; *Restatement (Second) of Torts* (1965), § 291 comment e. Comment *b* to section 293 in the first Restatement reiterates: “A car may be driven at fifteen miles an hour through a city street upon the least important errands, but driving a car at forty or fifty miles an hour can be justified only by some errand of great importance such as the extinguishment of fire or the saving of human life.” The same language appears in the Restatement Second, except that “forty or fifty” is replaced by “sixty or seventy.” Gilles properly complains about the paucity of specific examples and illustrations in the prior Restatements (a complaint also applicable to the draft Restatement Third). See Gilles, “Hand Formula Balancing,” *supra*, note 9, at 829 n.56. However, as the discussion in the text indicates, I disagree with his statement that the few specific examples provide little or no guidance on how to identify, evaluate, and consider social value in determining what conduct is reasonable or unreasonable. See *ibid.*, 828-829.

43. See text at notes 34-37, *supra*.

community benefits" from them, the relevant risks are "inherent" in the activities and have been reduced to the "irreducible minimum" consistent with the members of the community obtaining the general public benefit, and the remaining inherent "irreducible" risks are "more than counterbalanced [greatly outweighed] by the service which they render the public."

However, the limited, non-aggregative nature of the risk-utility assessment that is suggested by the Restatements' (few) examples and illustrations is not transparent in (although also not precluded by) the "outweigh[ing]" language used in section 291, which rather suggests a balancing of the risk against the utility on a scale, so that the risk is deemed reasonable whenever it is deemed lesser in magnitude than the utility. This balancing interpretation is further suggested by the "Weighing interests" comment to section 283, which as we previously noted seems to adopt utilitarianism's impartiality principle and its concomitant aggregation-of-utilities-and-disutilities decision procedure,⁴⁴ although literally the comment only states a much more limited proposition: that a person should not place greater weight on her interests as opposed to others' interests when putting others at risk.

The common perception that the Restatement's risk-utility test is an aggregate-risk-utility test, rather than a more limited, non-aggregative, rights-based test, likely explains why the Restatement's test initially was rarely referenced and continues to be rarely applied by the courts.⁴⁵ The single prominent, early exception was Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit, who was one of the original members of the Council of the American Law Institute and an active participant in its discussions of the Restatement of Torts. He wrote a series of opinions from 1938 through 1949 in which, although not citing the Restatement, he set forth and purported to apply an aggregate-risk-utility definition of negligence. In one of these opinions, *United States v. Carroll Towing Co.*,⁴⁶ he restated the test in a mathematical formulation that has since become known as "the Hand formula." According to Hand's formula, a person's conduct is negligent if and only if the risk (P times L) created by the conduct is greater than its utility (B), where P is the probability of an injury occurring, L is the magnitude of the injury, and B is the burden or cost that would have to be borne to avoid engaging in the conduct, including the foregone benefits expected from engaging in the conduct.⁴⁷

44. See text at note 26, *supra*.

45. See Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, at 1629-1631; Wright, "Hand, Posner, and the Myth of the 'Hand Formula'," *supra*, note 6; Wright, "Negligence in the Courts: Introduction and Commentary," *supra*, note 6, at 449-463.

46. 159 F.2d 169 (2d Cir. 1947).

47. *Ibid.*, 173.

More recently, Richard Posner, first as a professor and later as a federal judge, has seized on Hand's formula in *Carroll Towing* and championed its interpretation and use as an efficiency-based test not only of negligent conduct but also of legal liability in general.⁴⁸ However, as I detail in another article, even Hand and Posner have been unable to employ the aggregate-risk-utility test to explain and justify the actual holdings in their or other judges' opinions, and their fellow circuit judges have rarely referenced the test and (with one exception) have never actually tried to apply it.⁴⁹

Yet, due to the test's apparent adoption in the Restatement, it is widely assumed that the aggregate-risk-utility test is the criterion that the courts employ to determine whether a defendant's or plaintiff's conduct was negligent. The most commonly cited sources for this test of reasonableness in negligence law are sections 291-293 of the first and second Restatements and Learned Hand's formula in the *Carroll Towing* case.⁵⁰ However, many of these sources express reservations about the test similar to those long ago stated by Seavey. For example, the late John Fleming, the author of one of the leading Anglo-American treatises on tort law, concluded his discussion of the aggregate-risk-utility test in the various editions of his treatise as follows:

But negligence cannot be reduced to a purely economic equation. . . . [I]n general, judicial opinions do not make much of the cost factor [of eliminating the risk], and for good reasons. For one thing, our legal tradition in torts has strong roots in an individualistic morality with its focus primarily on interpersonal equity rather than broader social policy. . . . [T]he calculus of negligence includes some important non-economic values, like health and life, freedom and privacy, which defy comparison with competing economic values. Negligence is not just a matter of calculating the point at which the cost of injury to victims (that is the damages payable) exceeds that of providing safety precautions. . . . The reasonable man is by no means a caricature cold blooded, calculating Economic Man.⁵¹

The leading American treatises all state similar qualifications. For example, the encyclopedic treatise by Professors Harper, James and Gray states:

It is easy to understand that the law imposes liability for failure to take precautions, even against remote risks, if the cost of the precautions would be

48. See Landes and Posner, *The Economic Structure of Tort Law*, supra, note 4, at 229-230; Richard A. Posner, *Economic Analysis of Law* (New York: Aspen Publishers, Inc., 5th ed. 1998), 27.

49. See Wright, "Hand, Posner, and the Myth of the 'Hand Formula'," supra, note 6.

50. See the treatises cited in note 3, supra.

51. Fleming, supra, note 3, at 119 (footnotes omitted).

relatively low. The obverse is more tricky. Negligence law does not condemn the failure to take precautions if the cost of those precautions would be *seriously out of proportion* to the risk. Attempts have been made to explain and justify this in terms of economic theory, e.g., that it would be undesirably wasteful to invest more in accident prevention than the accident costs that would thereby be saved. . . . It should not, however, be thought that, in the evaluation of precautions, the common law's standard of reasonableness turns on rigorous cost-benefit analyses. The tone of the common law's approach has been more moral than economic. The emphasis has been not so much on the prevention of [economic] waste as on the blameworthiness of a failure to take precautions *deemed reasonable by the community*, and within generous limits juries are given latitude in deciding precisely *how* to balance costs against risks for purposes of making this moral judgment.⁵²

The editors of the final, posthumous edition of the treatise by William Prosser, who was the reporter for the Restatement Second, note that "[s]ome commentators have been critical of the Hand risk-benefit method for rendering safety decisions and resolving accident disputes, with its emphasis on economic efficiency and its implicit denial of 'soft' or 'human' variables and individual rights," and they state that "[i]n certain contexts, courts sometimes do appear to protect 'rights' over efficiency, as, for example, by entitling an actor to rely upon the expectation that others will act with reasonable care and otherwise obey the law."⁵³ In his replacement for the Prosser treatise, Dan Dobbs states:

[F]rom a moral viewpoint, it may be that risks and utilities should be weighed and offset only in very narrow ways. It has been argued that a money cost of safety should not by itself suffice to justify serious risks of human death, for example. In this view, freedom to act might be weighed against personal security from harm, but not against financial costs alone.⁵⁴

52. Harper, James, and Gray, *supra*, note 3, § 16.9, at 477-478 (emphasis added) (footnotes omitted); see *ibid.*, 479-80 and n.37.

53. *Prosser and Keeton on The Law of Torts*, *supra*, note 3, § 31, at 173 n.46. Other qualifications, written by Prosser himself, are carried over from prior editions. See *ibid.*, 170 ("Those risks against which the actor is required to take precautions are those which society, in general, considers sufficiently great to demand preventive measures."); *ibid.*, 171 ("Chief among the factors which must be considered is the social value of the interest which the actor is seeking to advance."); *ibid.* ("if the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone").

54. Dobbs, *supra*, note 3, § 144, at 339-340; see *ibid.*, 339 n.11; *ibid.*, § 146, at 346-348.

III. THE DRAFT RESTATEMENT THIRD

The latest episode in the history of the aggregate-risk-utility test is the drafting of the Restatement Third of Torts, which, unlike the Restatement Second, is being undertaken as a complete re-ordering and re-writing of different topics in the prior Restatements. The blackletter definition of negligent conduct in section 3 of the tentative draft of the Restatement Third on Liability for Physical Injury (Basic Principles), considered by itself, might be read as a partial retreat from the aggregate-risk-utility test in the first two Restatements, in response to the qualifications and reservations expressed about the test prior to and since its initial adoption. Although the definition again focuses on the P, L, and B factors in the aggregate-risk-utility test, it describes them as “primary” rather than exclusive factors and it does not explicitly incorporate them into an aggregate-risk-utility test. Section 3 states:

A person acts with negligence if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood [P] that it will result in harm, the foreseeable severity [L] of the harm that may ensue, and the burden [B] that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm.⁵⁵

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

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

The balancing approach rests on and expresses a simple idea. Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages. The disadvantage in

55. *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* (Tentative Draft. No. 1, March 28, 2001), § 3 [hereinafter *Restatement Third Tentative Draft*].

question is the magnitude of the risk that the conduct occasions: as noted, the phrase "magnitude of the risk" includes both the foreseeable likelihood of harm and the foreseeable severity of harm, should an incident ensue. The "advantages" of the conduct relate to the burdens of risk prevention that are avoided when the actor declines to incorporate some precaution. The actor's conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention. . . .⁵⁶

The draft Restatement Third abandons the prior Restatements' emphasis on "what the law regards as the utility of the act" and "the social value which the law attaches to the interest(s)." All such language has been completely eliminated. The draft defines the legally cognizable benefits as "the advantages that the actor or others gain if the actor refrains from taking precautions . . . [including] the burdens which the precautions, if adopted, would entail," and it notes, "In many cases [the burden] is a financial burden borne originally by the actor, though likely passed on, to a substantial extent, to the actor's customers."⁵⁷ While comment *h* to section 3 admits that "in certain cases there may be burdens of risk prevention that negligence courts properly discount or decline to acknowledge," giving as an example the foregone excitement that some motorists might obtain by racing a railroad train to a highway crossing, it asserts, "In most circumstances, negligence law takes into account and credits whatever burdens of risk prevention are actually experienced by the actor and others."⁵⁸ The reporters' note to comment *h* incorrectly claims that the relevant comments in the prior Restatements "generally [equate] social value with private value" and "[deal] with 'social value' in ways that render uncertain any difference between social value and ordinary private value."⁵⁹ It asserts that "modern cases applying the negligence standard have given little or no explicit attention to the Second Restatement's distinction between 'legal opinion' and 'popular opinion' and its distinction between 'social value' and private value,"⁶⁰ adding, "To be sure,

56. *Ibid.*, § 3 comment *e*, 41.

57. *Ibid.*, 41-42.

58. *Ibid.*, § 3 comment *h*, 47.

59. *Ibid.*, § 3 comment *h*, Reporters' Note, 69-70; see text at notes 32-43, *supra*.

60. *Restatement Third Tentative Draft*, *supra*, note 55, § 3 comment *h*, Reporters' Note, 70. The reporters overlook statements in modern cases on which they themselves rely. For example, the court in *Phillips v. Croy*, 363 N.E.2d 1283 (Ind. App. 1977), which is cited in the reporters' note to comment *d* in section 3 of the Tentative Draft (at 55) as a case that allegedly accepts the reporters' cost-benefit "balancing approach to negligence," emphasizes that "the determination of what constitutes 'reasonableness,' or the 'reasonable man' includes a law policy element," notes that "[t]he definition of 'reasonableness' includes 'just,' or 'proper,'" and (rhetorically) asks, "If it were purely a fact standard, then would not the conclusions of the trier of fact be unassailable and community polls as to what is reasonable be outcome determinative?" *Ibid.*,

this lack of attention may not be inconsistent with the Restatement Second, which recognizes the distinctions but explains them in ways that diminish their significance.”⁶¹

In sum, as commentators have universally stated in criticizing the draft Restatement Third,⁶² the draft explicitly adopts an almost totally unconstrained, reductionist, cost-benefit test of reasonableness in negligence law. Yet the reporters are understandably reluctant to admit that they have done so, and that by doing so they have rejected the common belief that the law in general, including negligence law in particular, should be and generally is based on principles of justice. The draft never explicitly refers to utilitarianism or economic efficiency. Instead, in comment *b* to section 6, it attempts to defend its aggregate-risk-utility test as being consistent with, indeed required by, an alleged basic principle of fairness and justice, “the ethical norm of equal consideration,” while also referring vaguely to the provision of “appropriate safety incentives” that “encourage the adoption of reasonable safety precautions,” “[improve] the overall welfare of society,” “[advance] economic goals,” and further “broadly humanitarian goals” by reducing negligently dangerous conduct:

1285 and nn.1-2 (citations omitted).

61. *Restatement Third Tentative Draft*, supra, note 55, § 3 comment h, Reporters’ Note, 70. Given these comments in the reporters’ notes, it is difficult to understand the response by co-reporter Michael Green, at the American Law Institute’s annual meeting in May 2001, to my criticism of the draft’s reductionist cost-benefit test of negligence. Green responded, in part:

Let me say this about § 3 and all of the commentary with it. Section 3 we don’t think expresses what Professor Wright has characterized as a reductionist cost-benefit test. It does suggest that the primary factors are often the ones that are listed in the black letter, but, if you go on and you read the commentary, you will see that the reference to particularly the burden recognizes that in some cases—I’m sorry, let me say this. It is the social value of the burden that is critical here, not the private interest, and in that sense we would certainly agree with his suggestion that the impact on profits is not what is relevant, it is the costs of whatever precaution is to be taken, wherever those costs fall.

American Law Institute, *78th Annual Meeting, The American Law Institute, Proceedings 2001* (Philadelphia: American Law Institute, 2002), 48. Contrary to Green’s response, the Restatement Third nowhere states that “the social value of the burden is critical, not the private interest.” To the contrary, as is discussed in the text, the draft is quite dismissive of the “social value” language in the prior Restatements and deliberately eliminates it. Nor is there any statement, although there certainly should be, that “the impact on profits is not what is relevant.” Again, the contrary position is strongly implied. The draft states, correctly, in section 3 comment *e*, that the costs of precaution include foregone benefits, and for any ordinary person (although perhaps not economists) foregone benefits include lost profits. See text at note 56, supra.

62. See text at notes 135-137, 139, 144, and 166, infra; *American Law Institute, Proceedings 2001*, supra, note 61, at 45-54.

Rationales. The negligence liability standard set forth in this [Restatement] can be justified in fairness terms as remedying an injustice inflicted on the plaintiff by the defendant. The risk of harm entailed by the defendant's conduct is generally a risk that is imposed on third parties, while the burden of risk prevention is frequently a burden borne at least initially by the defendant. The defendant who permits conduct to impose a risk of harm on others 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.

The negligence liability standard can also be understood as a measure for providing the defendant with appropriate safety incentives. By imposing the threat of liability, the law seeks to encourage the defendant to avoid negligence—that is, to adopt reasonable safety precautions. The defendant's adoption of these precautions improves the overall welfare of society, and thereby advances economic goals. Also, broadly humanitarian goals are furthered when the threat of liability induces the defendant to abstain from negligently dangerous conduct.⁶³

As the reporters' note on this comment indicates, their "ethical norm of equal consideration" is the impartiality principle that seems to be set forth in the "Weighing interests" comment in the first two Restatements.⁶⁴ In all three Restatements, the reporters attempt to make the impartiality principle more appealing by referring to its most attractive, risk-limiting aspect: it forbids a person from engaging in conduct that results in risks to others that exceed the benefits or utility the person expects to obtain from the conduct. They do not mention the less attractive, converse, risk-imposing aspect of the principle: that it allows, indeed requires, a person to engage in conduct that imposes even very serious risks on others as long as the benefits the person expects to obtain from the conduct outweigh the risks to those others. Nor do they note the principle's lack of congruence with the significant moral and legal distinction between "misfeasance" (engaging in conduct that creates risks to others) and "nonfeasance" (failing to act to rescue or otherwise aid others

63. *Restatement Third Tentative Draft*, supra, note 55, § 6 comment b. This comment initially was attached to the section which elaborated the aggregate-risk-utility test, and it properly belongs there. See *Restatement (Third) of Torts: General Principles* (Discussion Draft, April 5, 1999), § 4 comment j [hereinafter cited as *Restatement Third Discussion Draft*]. However, it was moved along with the former § 3 when § 3 was re-numbered as § 6, apparently because it formerly began by referring to § 3.

64. *Restatement Third Tentative Draft*, supra, note 55, § 6 comment b, Reporters' Note, 90; see text at notes 26 and 44, supra.

from a risky or needy situation that one did not create).⁶⁵ However, unlike the reporters for the draft Restatement Third, the authors of the first two Restatements did not try to label the impartiality criterion as a principle of fairness or justice. They no doubt recognized, as is further discussed in the next section, that the impartiality principle is not a principle of justice, but rather is the basic principle of utilitarianism (and of its modern offshoot, economic efficiency theory), which directly conflicts with the basic principles of justice.

IV. THE PRINCIPLES OF JUSTICE AND THE UTILITARIAN IMPARTIALITY PRINCIPLE⁶⁶

A. *The Principles of Justice*

The concept of justice is an integral part of the “natural law” (or “natural right”) theory of law, which goes back at least as far as Aristotle. Natural law theory is based on rational reflection on the nature, conditions, and experience of being a “free and equal” human being in a world with other such beings. As a rational being with the capacity to free oneself from mere animal inclinations in order to fully develop and realize one’s humanity, each person has an absolute moral dignity and worth that is equal for all persons:

[M]an regarded as a *person* [rather than a mere animal], that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.⁶⁷

The ultimate good in natural law theory is not mere pleasure, satisfaction of desires or preferences, or accumulation of wealth (as under utilitarian or efficiency theories), but rather the full development or flourishing of one’s nature and capacities as a rational human being, through a rational and

65. See text at note 38, *supra*, and notes 85-88, *infra*; cf. Hetcher, “Non-Utilitarian Negligence Norms,” *supra*, note 23, at 878 (“One thing is certain; ordinary morality bears little resemblance to utilitarianism.”) (citations omitted).

66. This section borrows from Richard W. Wright, “The Principles of Justice,” *Notre Dame Law Review* 75 (2001) 1859.

67. Immanuel Kant, *The Metaphysics of Morals* (1797), Mary Gregor, trans. (Cambridge, England: Cambridge University Press, 1991), *434-435. The asterisk (*) in front of the page numbers in the citations to Kant’s works in this article indicate citations to the pagination in the standard Academy editions. See *ibid.*, x.

integrated plan of life. This good being the same for each free and equal human being, the “common good” of a community or society is the concurrent, interdependent, and harmonious flourishing or fulfilment of each individual in the community or society, which can only be attained (given the nature and conditions of human existence) through cooperation and coordination in communities.⁶⁸

The recognition of this common good gives rise to the supreme principle of morality, which Kant stated in the form of a categorical imperative, “[a]ct only according to that maxim by which you can at the same time will that it should become a universal law,” which he then reformulated as “[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”⁶⁹ Kant’s categorical imperative is similar to the golden rule, “[d]o unto others as you would have them do unto you,” and the related injunction, “love your neighbor as you do yourself,” which appear (in various forms) as fundamental principles in many religions and moral theories.⁷⁰ However, as Kant noted, the categorical imperative is both broader in scope and more demanding than the golden rule. It is morally wrong under the categorical imperative to fail to respect the absolute moral worth of anyone, including yourself, as a self-legislating rational being, regardless of whether you would allow others to treat you without proper respect.⁷¹ All persons should be treated as *ends in themselves* (i.e., as free and

68. See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 85-86, 105, 107, 113-16, 120-22, 242-52; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press of Oxford University Press, 1980), 147-56, 168-69; Wright, “The Principles of Justice,” *supra*, note 66, at 1861-1865. Aristotle stated: “political justice . . . is found among men who share their life with a view to self-sufficiency, men who are free and either proportionately or arithmetically equal, so that between those who do not fulfill this condition there is no political justice but justice in a special sense and by analogy.” Aristotle, *Nicomachean Ethics*, W.D. Ross and J.O. Urmson, trans., bk. V, ch. 6, 1134a26-29, in 2 *The Complete Works of Aristotle*, Jonathan Barnes, ed. (Oxford: Oxford University Press, 1984), 1729. Unfortunately, Aristotle and Kant, as well as other classical philosophers, considered females to be not as fully rational, and hence not as “free and equal,” as men. See Aristotle, *Politics*, B. Jowett, trans., bk. 1, chs. 12-13, in 2 *The Complete Works of Aristotle*, Jonathan Barnes, ed. (Oxford: Oxford University Press, 1984), 1986; Leslie Bender, “A Lawyer’s Primer on Feminist Theory and Tort,” *Journal of Legal Education* 38 (1988) 3, 23-24. Aristotle also attempted to justify the enslavement of some as “natural slaves” on the ground that they lacked sufficient rationality to be free. See Aristotle, *Politics*, *supra*, bk. 1, chs. 3-7 and 13.

69. Immanuel Kant, *Foundations of the Metaphysics of Morals* (1785), Lewis W. Beck, trans. (Indianapolis: Bobbs-Merrill Co., 1959), *421, 429.

70. See H.T.D. Rost, *The Golden Rule: A Universal Ethic* (Oxford: George Ronald, 1986); Wright, “The Principles of Justice,” *supra*, note 66, at 1865-1867 and n.39.

71. Kant, *Foundations of the Metaphysics of Morals*, *supra*, note 69, at *430 n.14.

equal persons seeking to fully realize their humanity), rather than as mere means to be used to benefit others or society as a whole.

The principles of justice or Right focus on the external aspect of the exercise of freedom—the constraints on action required for the practical operation of freedom in the external world. The principles of virtue focus on the internal aspect of the exercise of freedom—a person's subjecting the maxim of her actions to the condition of qualifying as universal law.⁷² The distinction between the external and internal aspects of the exercise of freedom (which itself is inherently internal) explains the differences between Kant's supreme principle of Right and his supreme principle of virtue, each of which is a corollary of the categorical imperative. The supreme principle of Right is "so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law."⁷³ The supreme principle of virtue is "[a]ct in accordance with a maxim of *ends* that it can be a universal law for everyone to have."⁷⁴

The principles of justice are the conditions that are properly specifiable by law for the attainment of the common good (the fullest possible human flourishing or fulfilment of each person in the community).⁷⁵ The two major problems faced in attempting to attain this common good are: (1) providing for a fair distribution among the members of the society of the instrumental goods that are necessary or useful for their going about their lives and (2) assuring sufficient security of individuals' persons and existing stocks of instrumental goods in their interactions with others. The substantive principles of justice that separately address these two problems, which were first explicitly identified and distinguished by Aristotle, are the principles of distributive justice and interactive justice (usually but misleadingly referred to as "corrective justice").⁷⁶ Distributive justice deals with the first problem.

72. See Kant, *The Metaphysics of Morals*, supra, note 67, at *218-220, 379-380, 396-397, 406; Wright, "The Principles of Justice," supra, note 66, at 1876-1882.

73. Kant, *The Metaphysics of Morals*, supra, note 67, at *231.

74. Ibid., *395.

75. See Aristotle, *Politics*, supra, note 68, bk. 3, ch. 6, 1279a17-19 ("governments which have a regard to the common interest are constituted in accordance with strict principles of justice"); Kant, *The Metaphysics of Morals*, supra, note 67, at *318 ("By the well-being of a state is understood . . . that condition in which its constitution conforms most fully to principles of Right [justice]"); *The Federalist No. 51* (James Madison), Benjamin Fletcher Wright, ed. (1961), 358 ("Justice is the end of government. It is the end of civil society."); Wright, "The Principles of Justice," supra, note 66, 1871-1882.

76. Interactive justice is commonly referred to by the terms that were used by Aristotle: "corrective justice" or "rectificatory justice." However, these terms are misleading in two important ways. First, they erroneously imply that this type of justice is only concerned with correcting or rectifying wrongs, injuries, or losses after they have occurred, and not with

Its aim is a distribution of the community's resources that will give each individual an equal or sufficient opportunity to fully realize her humanity as a self-legislating moral being. Interactive justice deals with the second problem. It requires that, in one's interactions with others that may affect those others' persons or property, that one behave in a way that is consistent with those others' right to equal freedom.⁷⁷

To put it another way, distributive justice and interactive justice encompass the two different aspects of external freedom, which is the freedom to act in the external world and is distinct from the internal freedom of thought. The two principles of substantive justice focus on the necessary conditions for maximally promoting each and every person's equal external freedom. Distributive justice defines the scope of a person's *positive freedom*—her access to the resources needed to go about her life. Interactive justice defines the scope of a person's *negative freedom*—the security of her person and existing stock of resources in interactions with others. Together, distributive justice and interactive justice seek to assure the attainment of the common good (the fullest possible realization of each person's humanity) by providing each person with her fair share of the society's resources (distributive justice) and by securing her person and existing stock of resources from interactions with others that are inconsistent with her status as a rational being with equal absolute moral worth (interactive justice).⁷⁸

Given tort's law focus on interactional injuries, it falls within the domain of interactive justice. Interactive justice requires that others who interact with you in ways that may affect your person or property do so in a way that is consistent with your right to equal negative freedom, and vice versa. It does not prohibit all adverse impacts, or risks thereof, on others' persons and property. Such a prohibition would greatly decrease each person's external freedom rather than enhancing it. It rather allows a person to engage in conduct which creates risks to others' persons and property, but if and only if the allowance of such conduct by everyone in similar circumstances will increase everyone's equal freedom, rather than increasing some persons' external freedom at the expense of others' external freedom.⁷⁹

preventing them beforehand or with defining the nature of the wrong being corrected. Second, they may mislead one into thinking that the second type of justice is merely a corollary of the first—i.e., that “corrective justice” merely corrects deviations from the entitlements mandated by distributive justice. The term “interactive justice” most clearly indicates the distinct nature and focus of the second type of substantive justice. See Wright, “The Principles of Justice,” *supra*, note 66, at 1883 and n.113.

77. See *ibid.*, 1883-1888.

78. See *ibid.*, 1887-1888.

79. See Wright, “Hand, Posner, and the Myth of the ‘Hand Formula’,” *supra*, note 6;

B. The Utilitarian Impartiality Principle

The supreme principle of morality in natural law theory, in both its conception of human good and its conception of the equality of persons, stands in direct opposition to the supreme principle of morality in utilitarianism.⁸⁰ The supreme principle of morality in utilitarianism is the principle of utility or “greatest happiness,” which mandates actions that produce the greatest sum of happiness (or pleasure or preference-satisfaction) as added up for the citizenry in the aggregate.⁸¹ The principle of utility is sometimes misstated as “the greatest happiness of the greatest number.”⁸² However, as Bentham, the founder of utilitarianism, made clear, the principle focuses solely on “the greatest happiness”—maximizing the total utility for the citizenry in the aggregate—rather than focusing also or instead on maximizing the distribution of that utility to “the greatest number.” Indeed, simultaneously maximizing both the total sum and the distribution of utility is logically impossible.⁸³ Under the principle of utility, no independent consideration is given to the distribution of utility or disutility or to the promotion of individuals’ equal (positive and negative) freedom. On the contrary, each individual’s freedom and interests are subordinated to the maximization of the total happiness or preference-satisfaction of the citizenry in the aggregate.

In the calculation of total utility, each unit of utility or disutility is given equal weight, regardless of the incidence or distribution of the utility or disutility among different individuals. As John Stuart Mill emphasized in his influential exposition of utilitarianism, this impartiality principle is the foundational premise of utilitarianism:

[T]he happiness which forms the utilitarian standard of what is right in conduct is not the agent’s own happiness but that of all concerned. As between his own

Richard W. Wright, “Principled Adjudication: Tort Law and Beyond,” *Canterbury Law Review* 7 (1999) 265, 277, 282-293; Richard W. Wright, “Right, Justice and Tort Law,” in *Philosophical Foundations of Tort Law*, David G. Owen, ed. (Oxford: Oxford University Press, 1995), 159, 169-181; Wright, “The Standards of Care in Negligence Law,” *supra*, note 5.

80. See Kymlicka, *Contemporary Political Philosophy*, *supra*, note 39, at 9-44.

81. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) (London: MacMillan, 1876), 15.

82. See, e.g., *ibid.*, 17 n.1; Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* (Boulder: Westview Press, rev. ed. 1990), 72, 74.

83. See Kymlicka, *Contemporary Political Philosophy*, *supra*, note 39, at 12, 47 n.1.

happiness, and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.⁸⁴

Mill spawned generations of intellectual confusion when he attempted to make the utilitarian impartiality principle more attractive by equating it with the golden rule. He stated: "In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. 'To do as you would be done by,' and 'to love your neighbor as yourself,' constitute the ideal perfection of utilitarian morality."⁸⁵ However, the attempted equation fails. Mill erroneously assumes that to love your neighbor as yourself, or to do unto others as you would have them do unto you, requires you in everything you think or do to weigh the interests of each and every other person equally with your own interests and the interests of your family, friends, or associates, and to do whatever produces the greatest aggregate total of utility minus disutility regardless of the distribution of the utility and disutility.

On its face, this is an implausible interpretation of the golden rule. As Kant observed, thought and action conforming to such complete impartiality of interest would lead to complete self-abnegation and to the destruction of personhood, rather than to its fulfilment, and thus is not a principle that any rational person would adopt as the supreme principle of morality.⁸⁶ Will Kymlicka elaborates:

The U-agent [utilitarian agent] cannot accommodate the importance of any of our commitments. We all have commitments—to family, political causes, work—which form the focal point of our lives and give some identity to our existence. But if I am to act as a U-agent, then, in each of my decisions, my commitments must be simply added in with all the projects of other people, and be sacrificed when I can produce more utility by promoting someone else's projects. That may sound admirably unselfish. But it is in fact absurd. For it is impossible to be genuinely committed to something and yet to be willing to sacrifice that commitment whenever something else happens to maximize utility. Utilitarian decision-making asks that I consider my projects and attachments as no more worthy of my help than anyone else's. It asks, in effect, that I be no

84. John Stuart Mill, *Utilitarianism*, in *Collected Works of John Stuart Mill* 10 (1861), J.M. Robson, ed. (Toronto: University of Toronto Press, 1963), 218.

85. *Ibid.*

86. See Kant, *The Metaphysics of Morals*, *supra*, note 67, at *393 ("[A] maxim of promoting others' happiness at the sacrifice of one's own happiness, one's true needs, would conflict with itself if it were made a universal law."); *ibid.*, *451-452; Finnis, *Natural Law and Natural Rights*, *supra*, note 68, at 107-108, 112-114, 144-145, 304; Finnis, *Aquinas*, *supra*, note 68, at 117; Wright, "The Principles of Justice," *supra*, note 66, at 1869 n.55; text at notes 127-130, *infra*.

more attached to my commitments than to other people's. But that is no different from saying that I should not really be attached to my projects at all.⁸⁷

Conversely, the impartiality principle would allow (indeed, require) you to *impose* injuries or losses on others, no matter how deliberate or serious, as long as your gain in utility exceeds their loss in utility. The use of the impartiality principle to condone such "misfeasance" is subject to the same objection that is raised by Kymlicka against the alleged obligation to sacrifice one's own interests, or the interests of one's family and friends, to aid others whom one did not put at risk or in need (situations involving "nonfeasance" when no such aid is forthcoming). In each type of situation, the impartiality principle disregards "the separateness of persons."⁸⁸ It disrespects the fundamental dignity and autonomy of some people by treating them as mere means for furthering the "greater good" of others.

As Kymlicka has noted, the fundamental distinction between utilitarianism and the theory of justice (and the natural-law, equal-freedom theory of morality of which the theory of justice is a part) is the conception of equality employed in each. Each theory can claim to be implementing a conception of equality, of treating people as equals. Utilitarianism's "ethical norm of equal consideration" treats people as equals by requiring that, in deciding upon any action (or inaction), everyone's interests or preferences must be taken into account, giving equal weight to each.⁸⁹ At first glance, this may (or may not) seem appealing, but in operation it has a devastating impact upon personhood.⁹⁰ Each "person" is simply a fungible locus of equally weighted units of utility and disutility that are fed into the calculation of aggregate utility.⁹¹ It is never permissible to prefer one's own interests or projects, or

87. Kymlicka, *Contemporary Political Philosophy*, supra, note 39, at 24.

88. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971), 29.

89. Kymlicka, *Contemporary Political Philosophy*, supra, note 39, at 4, 31.

90. See *ibid.*, 35-44.

91. See Mill, *Utilitarianism*, supra, note 84, at 257 ("[O]ne person's happiness, supposed equal in degree (with the proper allowance made for kind), is counted exactly as much as another's."); *ibid.*, 258 n. ("This implication, in the first principle of the utilitarian scheme, of perfect impartiality between persons is regarded by Mr. Herbert Spencer (in his *Social Statics*) as a disproof of the pretensions of utility to be a sufficient guide to right; since (he says) the principle of utility presupposes the anterior principle that everybody has an equal right to happiness. It may be more correctly described as supposing that equal amounts of happiness are equally desirable, whether felt by the same or different persons. This, however, is not a *presupposition*, not a premise needful to support the principle of utility, but the very principle itself. . . . If there is any anterior principle implied, it can be no other than this, that the truths of arithmetic are applicable to the valuation of happiness, as of all other measurable quantities.") (emphasis in original).

those of one's family members or friends, over those of any other person, except to the extent that doing so would produce a greater total happiness for the citizenry in the aggregate. Conversely, contrary to the basic principles of justice, any individual's freedom, interests, or (what can no longer be called) rights can and should be sacrificed whenever doing so would produce a greater total of aggregate happiness or satisfaction of individual preferences. Utilitarians thus reject the idea of individual autonomy or rights, at least insofar as those rights are understood (as they usually are) as being independent of or in conflict with the principle of utility.⁹²

In sum, utilitarianism (and its modern variant, economic efficiency theory) are completely at odds with the moral premises, principles, and implications of the justice (equal freedom) theory. The moral good in the justice theory is the full realization of one's humanity as a free and equal being, while the moral good in utilitarianism is pleasure or preference satisfaction, and the moral good in (Posner's version of) economic-efficiency theory is resource wealth as measured by one's willingness and ability to pay for those resources.⁹³ The justice theory focuses on the external conditions necessary for the promotion of each person's equal freedom to pursue a morally meaningful life. It thus places primary emphasis on the equal distribution of the good. The utilitarian efficiency theories, on the other hand, focus solely on maximizing the total sum of the good (pleasure, preference-satisfaction, or wealth). There is no independent concern with how that total sum is distributed among individuals.

V. ACADEMIC CONFUSION

As the discussion in the prior part hopefully made clear, the first and second Restatements' impartiality principle, which is repackaged as "the ethical norm of equal consideration" in the draft Restatement Third, is a basic principle of utilitarianism, rather than a basic principle of justice; indeed, it directly conflicts with the equal-freedom norm that underlies the concept of justice.⁹⁴ Yet the reporters for the draft Restatement Third have persisted in

92. See Wright, "The Principles of Justice," *supra*, note 66, at 1869-1871.

93. See, e.g., Posner, *Economic Analysis of Law*, *supra*, note 49, at 12-13. For further discussion of the inadequacy of the utilitarian conception of the good, see Finnis, *Natural Law and Natural Rights*, *supra*, note 68, at 95-97, 114; Kymlicka, *Contemporary Political Philosophy*, *supra*, note 39, at 12-18.

94. I pointed this out a number of years ago, in an essay which the reporters for the draft Restatement Third have cited and discussed while ignoring this particular point. See Wright, "The Standards of Care in Negligence Law," *supra*, note 5, at 252-254 (cited in Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, at 1611 n.28, 1614 and n.38, 1615 and n.42, 1625 n.90, 1627 n.105, and Gary T. Schwartz, "Mixed Theories of Tort Law:

describing the impartiality principle (“the ethical norm of equal consideration”) as a principle of justice and, consequently, the aggregate-risk-utility test as just, even though earlier confusion on this issue has been replaced by a nearly unanimous agreement among justice theorists that the aggregate-risk-utility test cannot be reconciled with the concept of justice.

In his reporter’s notes in the 1999 Discussion Draft of the Restatement Third, for which he was the sole reporter, Gary Schwartz claimed that the aggregate-risk-utility test “is accepted as the appropriate negligence standard by most contemporary tort scholars, regardless of whether they adopt instrumental [utilitarian efficiency] or instead corrective-justice perspectives.”⁹⁵ He cited articles by four authors—Robert Rabin, Kenneth Simons, Ernest Weinrib, and David Owen—as having set forth “[t]he corrective justice rationale for the [aggregate-risk-utility] negligence liability standard.”⁹⁶

In his cited article, Robert Rabin—who I think views himself as a social-welfare theorist rather than a corrective-justice theorist⁹⁷—does not provide

Affirming Both Deterrence and Corrective Justice,” *Texas Law Review* 75 (1997) 1801, 1803 and n.14); note 118, *infra*.

95. *Restatement Third Discussion Draft*, *supra*, note 63, § 4 comment c, Reporter’s Note, 57. Schwartz’s misinterpretation of the impartiality principle as a principle of fairness first appeared in Gary T. Schwartz, “Contributory Negligence and Comparative Negligence: A Reappraisal,” *Yale Law Journal* 87 (1978) 697. Like others, he was misled by Ronald Dworkin’s initial misinterpretation of Kantian “equal concern and respect” as impartiality of interest. See *ibid.*, 702 and n.33 (citing Ronald Dworkin, “Hard Cases,” *Harvard Law Review* 88 (1975) 1057, 1077-78, reprinted in Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 81, 98-99); text at notes 118-131, *infra*.

96. *Restatement Third Discussion Draft*, *supra*, note 63, § 4 comment j, Reporter’s Note, 69 (citing David G. Owen, “The Fault Pit,” *Georgia Law Review* 26 (1992) 703, 722; Rabin, “Law for Law’s Sake,” *supra*, note 15, at 2275; Kenneth W. Simons, “Deontology, Negligence, Tort, and Crime,” *Boston University Law Review* 76 (1996) 273, 276; Ernest J. Weinrib, “Toward a Moral Theory of Negligence Law,” *Law and Philosophy* 2 (1983) 37, 53). Schwartz cited only two corrective-justice scholars, both of whom focus on existing community standards rather than the principles of justice, as having “seemingly reject[ed] the balancing approach,” and he attempted to discredit their theories by pointing out their divergence from current tort doctrines. *Ibid.* (citing Patrick G. Kelley, “Who Decides: Community Safety Conventions at the Heart of Tort Liability,” *Cleveland State Law Review* 38 (1990) 315; Michael Wells, “Scientific Policy Making and the Torts Revolution: The Revenge of the Ordinary Observer,” *Georgia Law Review* 26 (1992) 725).

97. See, e.g., Rabin, “Law for Law’s Sake,” *supra*, note 15, at 2264 (referring to the efficient-compensation and efficient-deterrence goals as “widely accepted current theory”); Robert L. Rabin, “*Vosburg v. Putney* in Three-Part Disharmony,” *Wisconsin Law Review* (1992) 863, 866-873 (arguing, through the hypothetical Professors Radreform and deBunker, that the litigation in a well-known tort case demonstrated the “total bankruptcy of the tort system,” not only in its complete failure as a means of addressing the allegedly critical issues of efficient

any interactive-justice rationale for the aggregate-risk-utility test. He merely briefly asserts, correctly but without any elaboration, that a negligence system based on fairness or “promoting Kantian self-actualization” could and (in many instances) should be “sensitive to precaution costs.”⁹⁸ However, although Rabin seems to assume otherwise,⁹⁹ such *sensitivity* to precaution costs *in appropriate contexts* is not the same as the aggregate-risk-utility test, which elevates the “sensitivity” into a *mandated tradeoff* between the aggregate risks and burdens/benefits *to everyone, in all instances*, and as such is inescapably utilitarian. Moreover, like Guido Calabresi¹⁰⁰ and Richard Posner,¹⁰¹ Rabin’s notion of “fairness” seems to dissolve into utilitarian efficiency. In support of his claim that “a general fairness analysis . . . incorporate[s] the notion of requiring cost-effective safeguards,” he quotes one of Posner’s many attempts to portray all moral arguments as efficiency arguments:

Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. . . . If indignation has its roots in inefficiency, we do not have to decide whether regulation, or compensation, or retribution, or some mixture of these best describes the dominant purpose of negligence law.¹⁰²

compensation and efficient deterrence, but also in its failure to satisfactorily implement tort law’s traditional yet “archaic” rationale—the “bizarre interpersonal morality play” or psychological desire for retribution that is the “cornerstone of the notion of corrective justice”). See generally Marc A. Franklin and Robert L. Rabin, *Tort Law and Alternatives: Cases and Materials* (New York: Foundation Press, 7th ed. 2001).

98. See Rabin, “Law for Law’s Sake,” *supra*, note 15, at 2275-2276; cf. Wright, “Hand, Posner, and the Myth of the ‘Hand Formula,’” *supra*, note 6, part III (discussing the courts’ appropriate consideration of precaution costs, consistently with the justice theory but not with the aggregate-risk-utility test, in various types of situations).

99. Rabin claims, “Long before *Carroll Towing* was decided, common law judges were speaking the prose version of the Learned Hand formula without knowing it. . . . They were, in other words, sensitive to the ‘B’ term in Learned Hand’s famous formula.” Rabin, “Law for Law’s Sake,” *supra*, note 15, at 2275. The sole support that he offers for this claim is Cardozo’s opinion in *Adams v. Bullock*, 125 N.E. 93 (N.Y. 1919). He claims that Cardozo “was relying on a general fairness analysis that incorporated the notion of requiring cost-effective safeguards.” *Ibid.* Neither claim is correct. See Wright, “Hand, Posner, and the Myth of the ‘Hand Formula,’” *supra*, note 6, sections I and III.E.

100. See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970), 291-308.

101. See Posner, *Economic Analysis of Law*, *supra*, note 49, at 29-30; Landes and Posner, *The Economic Structure of Tort Law*, *supra*, note 4, at 8-9, 14, 19.

102. Rabin, “Law for Law’s Sake,” *supra*, note 15, at 2275 and n.63 (quoting Posner, “A Theory of Negligence,” *supra*, note 4, at 33-34).

In the relevant lines in his cited article, Kenneth Simons states “that when courts employ some form of a cost-benefit test of negligence . . . they are often relying upon a deontological norm such as the norm that the injurer must show impartiality and consider the interests of potential victims with at least as much regard as she considers her own interests.”¹⁰³ He does not identify the alleged deontological norm as an interactive-justice principle, rather than a distributive-justice principle or some other supposed deontological principle. He merely quotes the “Weighing interests” comment in the Restatement Second¹⁰⁴ and states that “[o]thers have noted this Kantian element within the ostensibly utilitarian norm,” citing Ronald Dworkin’s book, *Law’s Empire*.¹⁰⁵ Yet the parenthetical in his citation to Dworkin correctly states that “Dworkin notes that *utilitarian* theory requires that we always treat others’ interests ‘as equally important to our own,’”¹⁰⁶ and on the cited pages in *Law’s Empire* Dworkin explicitly *rejects* the alleged impartiality requirement. Dworkin observes, “We think we are normally free, morally as well as legally, to prefer our own interests and projects, and those of a small number of other people to whom we feel special associative responsibilities and ties, in the day-to-day decisions we make using our own property,”¹⁰⁷ and he recognizes that if there were a generally applicable impartiality requirement, “[p]ersonal autonomy would almost disappear.”¹⁰⁸ Thus Dworkin, upon whom Simons relies, now rejects the impartiality principle, which he correctly identifies as a utilitarian principle rather than a principle of justice.

In his cited article, Ernest Weinrib also relied on an allegedly Kantian impartiality principle (the “impermissibility of self-preference”) to explain and justify the Hand-formula interpretation of negligence, as part of his early interactive-justice theory of tort law.¹⁰⁹ He cited Dworkin’s earlier development of this argument in *Taking Rights Seriously*,¹¹⁰ which is

103. Simons, “Deontology, Negligence, Tort, and Crime,” *supra*, note 96, at 280.

104. *Ibid.*, 280 n.29 (quoting *Restatement (Second) of Torts* (1965), § 283 comment e); see text at notes 26 and 44, *supra*.

105. Simons, “Deontology, Negligence, Tort, and Crime,” *supra*, note 96, at 280 n.30 (citing Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1987), 291-292).

106. *Ibid.* (emphasis added).

107. Dworkin, *Law’s Empire*, *supra*, note 105, at 292.

108. *Ibid.*, 294; see text at notes 85-91, *supra*.

109. Weinrib, “Toward a Moral Theory of Negligence Law,” *supra*, note 96, at 52-54; see Ernest J. Weinrib, “Causation and Wrongdoing,” *Chicago-Kent Law Review* 63 (1987) 407, 428 and n.35; Ernest J. Weinrib, “The Special Morality of Tort Law,” *McGill Law Journal* 34 (1989) 403, 409-411.

110. Weinrib, “Toward a Moral Theory of Negligence Law,” *supra*, note 96, at 54 n.26

discussed below¹¹¹ and which preceded *Law's Empire* (in which, as we have just seen, Dworkin ended up rejecting his prior argument¹¹²). He also adopted Dworkin's initial (now rejected) argument that the allegedly Kantian impartiality principle is distinguishable from utilitarianism since the "Kantian" version merely compares the interests of the plaintiff and the defendant, rather than aggregating the interests of all potentially affected persons.¹¹³ As so restricted, Weinrib's allegedly "Kantian" version of the risk-utility test is much narrower than the draft Restatement Third's unlimited aggregate-risk-utility test, and therefore even if (contrary to fact) it were truly Kantian, Weinrib, as he himself declared, could not properly be cited as an interactive-justice supporter of the draft Restatement's aggregate-risk-utility test. Moreover, as he himself subsequently realized, Weinrib erred in treating his impartiality principle as a Kantian principle of justice. Many years prior to Schwartz's citation of his article, Weinrib reversed position, rejected the impartiality principle as a supposed principle of justice, and rejected all risk-utility balancing tests.¹¹⁴

That leaves David Owen's article. Owen also apparently adopts Dworkin's initial argument, in *Taking Rights Seriously*, that the Kantian obligation to conduct oneself with "'an equality of concern and respect' for the interests of other persons" requires a balancing of the parties' interests in negligence cases.¹¹⁵ However, unlike Dworkin and Weinrib, Owen would take into

(citing Dworkin, *Taking Rights Seriously*, supra, note 95, at 98, and Schwartz, "Mixed Theories of Tort Law," supra, note 94, at 703).

111. See text at notes 121-131, *infra*.

112. See text at notes 105-108, *supra*.

113. Weinrib, "Toward a Moral Theory of Negligence Law," supra, note 96, at 54-55; see text at notes 125-126, *infra*.

114. See Ernest J. Weinrib, "Understanding Tort Law," *Valparaiso University Law Review* 23 (1989) 485, 518-520 (asserting that the proper standard of reasonableness is the one stated by Lord Reid in *Bolton v. Stone*, [1951] A.C. 850, 865-868: the creation of a substantial foreseeable risk to another, regardless of the burden of precaution). Weinrib now states that the burden of precaution cannot be taken into account under his formalist conception of interactive justice, which abstracts away from all welfare effects. See *ibid.*, 518-20; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995), 147-152. However, by ignoring the defendant's burden of precaution while taking into account the level of risk to which the plaintiff is exposed, Weinrib seems to be violating his own injunction against focusing solely on one side of the defendant-plaintiff relationship rather than giving formal equal status to each side. As others have noted, Weinrib's formalist abstraction disables him from justifying any specific standard of reasonable care. For a critical summary of Weinrib's formalist theory of law and justice, see Richard W. Wright, "Substantive Corrective Justice," *Iowa Law Review* 77 (1992) 625, 631-664.

115. See Owen, "The Fault Pit," supra, note 96, at 720-22 and nn.74-75. This is not entirely clear, however. Owen cites Dworkin's discussion of the concept of "equality of concern and

account the interests of everyone, rather than only the interests of the plaintiff and the defendant, and he treats the impartiality principle as a utilitarian-efficiency principle as well as a supposed principle of interactive justice.¹¹⁶ The treatment of the impartiality principle as an elaboration of Kantian equality or justice is erroneous. Owen apparently senses this, although not very clearly. He significantly qualifies his acceptance of the impartiality principle and the associated aggregate-risk-utility test of negligence by treating the latter as a backup “default rule” that is secondary to the primary “freedom and vested rights analysis.” He states:

As helpful as it is, however, if aggregate interest balancing of this type were used as the *primary* definition of liability for accidental harm, it could be faulted for denying value to important individual rights of the parties to an accident. For this reason, risk-benefit analysis generally should be resorted to only as a “default rule,” for use when a freedom and vested rights analysis fails to provide an adequate resolution of a dispute. Even in such a default role, however, risk-utility principles are powerful tools for determining responsibility. Principles of freedom and vested rights alone frequently are unable to resolve the complex questions of accountability in such cases, . . . and risk-benefit analysis often provides the most helpful guide for determining moral and legal responsibility for accidental harm.¹¹⁷

Summing up, the four articles that Schwartz cited in the 1999 Discussion Draft to support his claim that most interactive-justice scholars accept the aggregate-risk-utility test as the appropriate negligence standard provide minimal support for that claim. Rabin is a social-welfare theorist rather than an interactive-justice theorist, and he did not discuss any interactive-justice rationale for the aggregate-risk-utility test. Simons’ brief discussion, which erroneously treated the impartiality principle as a Kantian deontological principle, contradicted the work by Dworkin upon which he relied (which in fact rejects the impartiality principle) and moreover did not claim to be an

respect” in *Taking Rights Seriously*, but not Dworkin’s conversion of the concept into an impartiality principle in negligence cases. See *ibid.*, 720 n.75 (citing Dworkin, *Taking Rights Seriously*, *supra*, note 95, at 182). He also cites Dworkin’s discussion of different possible distributive-justice interpretations of “equality of concern and respect” in *Law’s Empire*, but not Dworkin’s rejection of the impartiality interpretation of “equality of concern and respect” nor Dworkin’s tortured use of the “equality of resources” interpretation of distributive justice to try to explain the Hand formula. See *ibid.*, 720 n.74 (citing Dworkin, *Law’s Empire*, *supra*, note 105, at 295-301); text at notes 121-134, *infra*.

116. Owen, “The Fault Pit,” *supra*, note 96, at 721-722.

117. *Ibid.*, 722-723 (footnote omitted). Owen provides no coherent explanation of when rights are “vested” or (as he also states) “established.” Although his few examples primarily involve intentional torts, some (such as a doctor’s failure to obtain informed consent) do not, and the language quoted in the text explicitly refers to “accidental harm.”

interactive-justice argument. Although Weinrib once argued that the Hand formula is based on Kantian interactive-justice principles, he even then could not legitimately be cited as a supporter of the aggregate-risk-utility test, since he precluded consideration of any interests other than those of the two immediate parties to an interaction. Moreover, he subsequently realized that his argument was erroneous and, ten years before the Discussion Draft was published, he rejected the aggregate-risk-utility test. He should have been listed, along with others not listed, as an interactive-justice scholar who explicitly rejects the aggregate-risk-utility test rather than as a supporter. Finally, Owen, who also erroneously treated the impartiality principle as a principle of justice, made it secondary to a rights analysis.

Although Schwartz did not cite Dworkin's argument in *Taking Rights Seriously* in the 1999 Discussion Draft, I will discuss it at this point, since it is the argument that originally misled Simons, Weinrib, Owen and the reporters themselves,¹¹⁸ it continues to mislead others,¹¹⁹ and Schwartz

118. See Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, at 1614 ("[T]he Learned Hand formula can also be understood noninstrumentally to reflect the Golden Rule. . . . In other words, treat others—with regard to risks resulting from your activities—as if they were of equal value and respect as yourself. Thus, many adherents of the corrective justice school . . . might posit that what judges who adhere to a risk-benefit formula are doing is furthering corrective justice."). Green cites Dworkin, Owen, Schwartz, and Weinrib, and he notes my listing of other examples in a 1995 essay. *Ibid.* (citing Wright, "The Standards of Care in Negligence Law," *supra*, note 5, at 1614 and n.38). He fails to note that, in the cited essay, I pointed out Weinrib's reversal of position and the fundamental mistake involved in equating the Hand formula's impartiality principle with any principle of justice. Schwartz's reliance on Dworkin's initial argument is discussed in note 95, *supra*.

119. See, e.g., Abraham, *The Forms and Functions of Tort Law*, *supra*, note 4, at 62-63. Before devoting several pages to an attempt to defend the admittedly morally unattractive ("what many view as repulsive") economic-efficiency interpretation of the aggregate-risk-utility test of negligence, Abraham says the following about a possible (presumably non-utilitarian) interpretation of the test:

One view of the negligence calculus is that it adopts a highly moral perspective. The calculus requires that the interests of others (the probability and gravity of the injury that may result from an act) be given equal weight when compared with one's own interests (the burden of precaution). At the core of this requirement is the norm of equal concern and respect for others that is the hallmark of at least certain conceptions of morality. On this view, the calculus provides a method of striking an appropriate balance between the liberty of potential injurers and the security of potential victims.

Ibid. I say "presumably non-utilitarian" since Abraham states that he discusses justice arguments as well as efficiency views, see *ibid.* at 1, 14-20, and this is the only part of his negligence discussion that is not explicitly efficiency-oriented. See also Dobbs, *The Law of Torts*, *supra*, note 3, at 339 and n.11 (explaining the inclusion in the risk-utility analysis of purely private utility to the defendant as treating plaintiffs and defendants equally, but noting that "[t]his statement has now become controversial"), 344 (stating that "the Hand formula . . .

subsequently cited it in the 2001 Tentative Draft, despite Dworkin's having abandoned it more than ten years earlier.¹²⁰

In *Taking Rights Seriously*, Dworkin identified a foundational assumption in John Rawls' highly influential book, *A Theory of Justice*, which is based on Kant's moral philosophy,¹²¹ and adopted it as the fundamental assumption in his own rights-based theory:

[T]he right to equal respect . . . , [Rawls] says, is "owed to human beings as moral persons", and follows from the moral personality that distinguishes humans from animals. It is possessed by all men who can give justice. . . .

We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.¹²²

Dworkin wanted to employ this basic assumption to elaborate a normatively attractive and descriptively plausible theory of law and legal adjudication. However, he faced a serious problem, which also confronted Weinrib, Simons, Owen and other scholars attempting to provide a justice-based account of tort law.¹²³ The problem is the generally accepted view (among academics) that

may be better at protecting everyone's rights and freedoms to act in the world than a more rigorous approach"), 347-48 and nn.15-17 (stating that "part of [the Hand formula's] operation can be viewed as a moral proposition that you should treat others as you would treat yourself," citing articles by Simons and Owen but noting my rejection of the impartiality principle); Gregory C. Keating, "Reasonableness and Rationality in Negligence Theory," *Stanford Law Review* 48 (1996) 311.

120. See text at notes 106-108, *supra*, and notes 131-134 and 170-171, *infra*.

121. See Rawls, *A Theory of Justice*, *supra*, note 88, § 77.

122. Dworkin, *Taking Rights Seriously*, *supra*, note 95, at 181-182 (quoting Rawls, *A Theory of Justice*, *supra*, note 88, "ch. 77"); see text at note 67, *supra*.

123. See, e.g., Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge, Mass.: Harvard University Press, 1970), 41-44, 183-191, 196-200 (purporting to find an impartiality requirement in Kantian morality that not only explains and justifies the aggregate-risk-utility test of negligence, but further justifies the construction of a social risk pool from which persons can draw, within certain unclear limits, to expose others to minor or major risk). Fried subsequently argued against attempts to explain the law as a branch of morality rather than a "relatively autonomous subject." See Charles Fried, "The Artificial Reason of the Law or: What Lawyers Know," *Texas Law Review* 60 (1981) 35, 38-39, 49-58.

Jules Coleman's views have changed considerably over the years. He became known as an interactive-justice theorist long before his theory gained a recognizable interactive-justice form or content. For a critical summary of his initial disjunctive annulment-of-losses-and-gains theories, see Wright, "Substantive Corrective Justice," *supra*, note 114, at 665-683. For his initial weak-content interactive-justice theories, see Jules L. Coleman, *Risks and Wrongs* (Cambridge, England: Cambridge University Press, 1992), 348-350, 489 n.23 (interactive justice must be filled in with a substantive theory of wrongfulness, which may be utilitarian

negligence in tort law is defined by the Hand formula, which, given its embedded impartiality and aggregation principles, is a transparently utilitarian formula.

Dworkin developed a (too) sophisticated argument to resolve this apparent problem. He took Rawls's basic Kantian principle—the obligation to equally respect every person as a free and equal individual, broadened this obligation to include equal concern for each person's welfare as well as equal respect for his or her autonomy, and used this broadened principle in conjunction with a theory of "abstract" and "concrete" rights (which apparently was developed specifically to handle the negligence and nuisance issues in tort law) to explain and justify the Hand formula of negligence. He argued that in negligence and nuisance cases there are competing claims of "abstract right," which he also described as mere "interests," that must be resolved by using the basic principle of "equal concern and respect" to balance the competing claims so as to maximize the "collective utility" of the parties:

In certain kinds of cases the argument from competing abstract principles [rights] to a concrete right can be made in the language of economics. Consider the principle that each member of a community has a right that each other member treat him with the minimal respect due a fellow human being. That is a very abstract principle: it demands some balance, in particular cases, between the interests of those to be protected and the liberty of those from whom the principle demands an unstated level of concern and respect. It is natural, particularly when economic vocabulary is in fashion, to define the proper balance by comparing the sum of the utilities of these two parties under different conditions. If one man acts in a way that he can foresee will injure another so that the collective utility of the pair will be sharply reduced by his act, he does not show the requisite care and concern. If he can guard or insure against the injury much more cheaply or effectively than the other can, for example, then he does not show care and concern unless he takes these precautions or arranges that insurance.¹²⁴

efficiency); *ibid.*, 356-360, 436-437 (apparently denying that efficiency or distributive justice can directly provide the relevant notion of wrongfulness or reasonableness in interactive justice, which instead allegedly is a matter of varying local convention which need not be either just or efficient yet however tends to be "efficient" in the sense of being mutually advantageous); Jules L. Coleman, "Risks and Wrongs," *Harvard Journal of Law and Public Policy* 15 (1992) 637, 645-646 (claiming that theoretically "[c]orrective justice is compatible with an economic theory of wrongdoing or wrong" but actually is "layered" on varying local conventions regarding reasonable risk-taking). For his recent (current?) theories, see Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), part one; Jules Coleman and Arthur Ripstein, "Mischief and Misfortune," *McGill Law Journal* 41 (1995) 91.

124. Dworkin, *Taking Rights Seriously*, *supra*, note 95, at 98-99 (footnote omitted); see *ibid.*, 93-94, 97-100; cf. George P. Fletcher, "Corrective Justice for Moderns," *Harvard Law Review*

Dworkin attempted to distinguish his argument from the utilitarian argument by claiming that, under his approach, only the competing “abstract rights” of the immediate parties are “compromised,” rather than also those of other potentially affected persons or the community at large, so that no utilitarian aggregation occurs.¹²⁵ But no such restriction is coherently possible or justifiable under his argument. As Dworkin now seems to acknowledge, there is no principled basis for restricting the obligation to treat others with “equal concern and respect” to the immediate parties to a lawsuit rather than extending it to all those whose interests might be affected by one’s actions.¹²⁶ Moreover, even if the comparison or aggregation is limited to the two parties, it reflects an impartiality-of-interest interpretation of “equal concern and respect” that conflicts with the principles of justice and the underlying equal-freedom norm. It fails to respect the “separateness” or autonomy of the interacting parties, instead treating one party as a mere means to the end of the other by impartially aggregating their respective interests or utilities.¹²⁷

Dworkin’s argument in *Taking Rights Seriously* misinterpreted and misapplied the Kantian principles that underlie Rawls’s (or any proper) theory of justice. Kant also emphasized proper respect and concern for others, but he distinguished between the *equal respect* due as a matter of justice or Right and the *proper concern* due solely as a matter of virtue.¹²⁸ Kant’s principle of Right mandates proper *respect* for the equal freedom of others by requiring, as legal as well as ethical duties: (1) that resources be distributed so as to promote each person’s equal positive freedom (distributive justice) and (2)

106 (1993) 1658, 1677, 1678 (arguing that a “collaborative principle” underlies the law of negligence: “By entering into certain spheres of risk-taking, plaintiff and defendant both come under duties to act with a view to the costs and benefits of their actions. They become a unit, acting under an implicit obligation to optimize the consequences of their actions” and have “a shared duty to find the optimal level of harmful activities.”). Previously, Fletcher had argued that negligence and tortious conduct in general should be understood in terms of a paradigm of nonreciprocal risk-creation and lack of excuse, as an alleged implementation of the right to “equal security” that is embodied in interactive justice, rather than in terms of the utilitarian efficiency paradigm of reasonableness. See George P. Fletcher, “Fairness and Utility in Tort Theory,” *Harvard Law Review* 85 (1972) 537, 537-543, 550, 556-557, 560, 569-571.

125. See Dworkin, *Taking Rights Seriously*, supra, note 95, at 99-100.

126. See *ibid.*, 306-308; Dworkin, *Law’s Empire*, supra, note 105, at 304.

127. See text at notes 85-92, supra.

128. See Kant, *The Metaphysics of Morals*, supra, note 67, at *488: “All moral relations of rational beings, which involve a principle of the harmony of the will of one with that of another, can be reduced to *love* and *respect*; and, insofar as this principle is practical, in the case of love the basis for determining one’s will can be reduced to another’s *end* [the focus of the doctrine of virtue], and in the case of respect, to another’s *right* [the focus of the doctrine of justice or Right].”

that conduct that might affect another's person or existing stock of resources be consistent with that other's equal negative freedom (interactive justice). Kant's doctrine of virtue requires—as a solely ethical duty—proper *concern* for the equal freedom of others as well as yourself by making their happiness one of your own ends.¹²⁹ It does not, however, require that you weigh others' interests equally with your own in everything you do. As Kant stated, such a requirement would completely undermine individual freedom.¹³⁰

As we have already noted, Dworkin now acknowledges that a duty to always weigh others' interests equally with your own is a utilitarian principle rather than a principle of justice, is not an accepted part of ordinary morality, and if adopted would completely undermine personal autonomy.¹³¹ Nevertheless, still driven by the perceived need to explain tort law's supposed aggregate-risk-utility test of reasonableness, he continues to assert, in *Law's Empire*, that a duty of "equal concern and respect" exists in negligence and nuisance cases, which he continues to describe as situations involving conflicts in individuals' "abstract legal rights" that must be resolved by applying the preferred conception of "equality of concern" to define individuals' "concrete rights" in particular situations.¹³² However, rather than, as before, using the impartiality principle to fill in the content of the required "equality of concern," he now views the issue as a distributive-justice issue, and therefore uses his preferred conception of the required equality in distributive justice, "equality of resources." He employs a highly implausible set of assumptions along with the "equality of resources" criterion to achieve a Hand-formula type result in most but not all negligence and nuisance cases.¹³³ I will not provide a full description or critique of his argument, since it is an argument based on distributive justice rather than interactive justice, and it is so extremely implausible that not even Schwartz was willing to cite

129. See text at notes 72-78, *supra*.

130. In his explanation of why the moral duty of beneficence is a solely ethical duty of virtue, rather than also a legal duty of Right, Kant stated:

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

Kant, *The Metaphysics of Morals*, *supra*, note 67, at *393; see *ibid.*, *390, 452-454; text at notes 85-88, *supra*.

131. See text at notes 106-108, *supra*.

132. See Dworkin, *Law's Empire*, *supra*, note 105, at 292-293.

133. See *ibid.*, 301-309.

it. The beginning assumption should suffice to indicate the unreality of the argument: "Suppose [the interacting parties] have roughly equal wealth, and neither is handicapped or otherwise has special needs or requirements."¹³⁴

Schwartz's treatment of the negligent-conduct issue in the 1999 Discussion Draft of the Restatement Third, which was retained with no significant revision in the 2001 Tentative Draft, has been subjected to considerable criticism. The criticisms came to a head at the Wade Conference at Vanderbilt University in September 2000, when many of the leading tort scholars gathered to discuss actual and pending provisions in the draft Restatement Third.¹³⁵ As the Introduction to the symposium states, the four papers (by Stephen Gilles, Steven Hetcher, Stephen Perry, and Kenneth Simons) on the Discussion Draft's treatment of negligent conduct "evinced a substantial consensus that [the negligent conduct section] is problematic because it effects, or at least encourages, the reduction of fault to a narrow version of risk-utility balancing."¹³⁶

Steven Hetcher and Stephen Perry are each very critical of the negligent-conduct section in the draft Restatement Third. Hetcher accuses Schwartz of misrepresenting actual negligence law and seeking to shift it to a utilitarian mode of reasoning not currently employed by juries, by eliminating the reasonable person standard and relying solely on the cost-benefit analysis of the Hand formula:

The reasonable person standard is an empty vessel that jurors fill with community norms. Jurors do this rather than performing cost-benefit analyses. The proposed [draft Restatement Third] . . . dramatically overstates the role of utilitarian, cost-benefit analysis in the reasonable person standard, and it dramatically understates the role of non-utilitarian negligence norms in this standard.¹³⁷

Hetcher also dismisses Schwartz's attempt to pass off the "ethical norm of equal consideration" as a principle of justice. He observes, correctly, that the draft Restatement's equal-consideration norm is the utilitarian impartiality principle rather than a principle of justice:

[Under this norm] it is possible for the individual victims to be sacrificed to the utilitarian whole. The Discussion Draft's notion of "equal consideration" is then an *ex ante* conception. . . . [T]he notion of fairness as understood by the

134. *Ibid.*, 302.

135. See "Symposium: The John W. Wade Conference on the Third Restatement of Torts," *Vanderbilt Law Review* 54 (2001) 639.

136. John C.P. Goldberg, "Introduction," *Vanderbilt Law Review* 54 (2001) 639, 643.

137. Hetcher, "Non-Utilitarian Negligence Norms," *supra*, note 23, at 864.

Discussion Draft is completely reducible to utilitarianism. . . . Fairness just means that, *ex ante*, liability rules are as likely to promote one's welfare as the welfare of others. This conception has no connection to leading conceptions of fairness that animate modern tort theory. . . . Nor, of course, does it take account of broader conceptions of corrective justice that do not reduce to fairness.¹³⁸

Stephen Perry also criticizes the draft Restatement Third's discarding of the traditional reasonable-person standard and its adoption of a pure cost-benefit test of negligent conduct. He observes:

[I]t is not obvious that a *pure* cost-benefit approach corresponds very well to the law. . . . [T]here are many appellate opinions stating that the magnitude of the risk and the cost of preventative precautions are factors that are *relevant* to the determination of whether or not the actor was negligent. But the number of opinions which explicitly state that negligence is just a matter of costs exceeding benefits are relatively few.¹³⁹

Turning to Schwartz's attempt to use the "ethical norm of equal consideration" to justify the cost-benefit test as an alleged interactive-justice test, Perry states:

[T]his particular argument is weak. Arguments along similar lines have been offered by corrective justice theorists in the past, and they have almost always been abandoned. The argument is subject to a number of difficulties, not the least of which is 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 benefit 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.¹⁴⁰

Perry concludes:

The "equal consideration" argument that the Discussion Draft deploys in support of a thoroughgoing cost-benefit characterization of negligence thus cannot do the work that is being asked of it, and, so far as I am aware, there is no other non-consequentialist argument that can. This does not mean, however, that a non-consequentialist understanding of the negligence standard would never countenance Hand-style balancing. It seems to me that a plausible non-consequentialist account would, for reasons having to do with autonomy and

138. See *ibid.*, 872 n.38 (citations omitted).

139. Stephen R. Perry, "Cost-Benefit Analysis and the Negligence Standard," *Vanderbilt Law Review* 54 (2001) 893, 895.

140. *Ibid.*, 896 (footnote omitted). Perry notes that Dworkin's attempt, in *Law's Empire*, to provide "a non-consequentialist argument in support of a cost-benefit approach to negligence . . . is not ultimately successful either." *Ibid.*, 897 (footnote omitted).

reciprocity among persons, call for a weighing of costs and benefits in a large range of circumstances, as, for example, when the relevant risks are common and/or relatively low in magnitude. But an understanding of negligence that permitted one person to unilaterally impose substantial risks on others simply because the costs of prevention were too high is very unlikely to be acceptable from a non-consequentialist perspective.¹⁴¹

Stephen Gilles, who presented the principal paper on the negligent-conduct issue at the Wade Conference, is a legal economist who supports a broadly inclusive, social-welfare-maximizing, risk-utility balancing test of negligence.¹⁴² He argues that a risk-utility balancing test, as stated in the first and second Restatements and the Hand formula, can encompass a wide range of normative views on what constitutes good and bad consequences and merely requires that the good consequences outweigh the bad.¹⁴³ However, he criticizes the draft Restatement Third's treatment of the negligence standard for "inviting a reductionist approach to the entire enterprise" by eliminating the traditional "reasonable person" standard, relying solely on the Hand formula, and failing to have any language emphasizing the need to infuse the Hand formula with the appropriate social valuation of the affected interests.¹⁴⁴ Nevertheless, although his position is not entirely clear, he seems to accept the draft Restatement Third's claim that its aggregate-risk-utility balancing test can be justified on grounds of fairness and justice as well as efficient deterrence.

141. *Ibid.*, 897 (footnotes omitted).

142. See Gilles's articles cited in notes 1, 8, 9, and 16, *supra*.

143. See Gilles, "Hand Formula Balancing," *supra*, note 9, at 818-821, 840, 852.

144. *Ibid.*, 854. However, Gilles questions the emphasis placed by the drafters of the first and second Restatements on the social value of the affected interests *as recognized in or by the law*. He contends that statements in legislation and judicial opinions about the legal or social value of specific interests are too few and too general to be of any use, and he ends up equating legal and social values with popular or community values made accessible through jury deliberation. See *ibid.*, 829-834. Yet the drafters of the prior Restatements clearly distinguished the legal valuation of interests from the popular valuation and insisted on the priority of the former. See text at notes 31-42, *supra*. The prior Restatements also declared: "The law attaches utility to general types or classes of acts as appropriate to the advancement of certain interests rather than to the purpose for which a particular act is done." See text at note 42, *supra*. These statements suggest that the interests that the drafters of the prior Restatements had in mind were neither affected individuals' subjective interests nor popular opinion polls but rather the "common good" equal-freedom rights and interests that are the proper focus of law, which are or should be explicitly or implicitly recognized, protected, and furthered by the existing law, and with which both judges and juries ordinarily could be presumed to be familiar or about which judges can and do instruct juries. See Wright, "Principled Adjudication in Tort Law and Beyond," *supra*, note 79, at 269-278.

When he first refers to the Restatement's argument, he repeats its reference to fairness but not justice and then makes a rapid progression from the "ethical norm of equal consideration" to a "norm of equal respect for the welfare of others by taking precautionary measures that improve overall social welfare" to a hypothesis that the draft Restatement Third "invites us to conclude that the foundation of negligence law is, broadly speaking, an ethic of social welfare."¹⁴⁵

Subsequently, he quotes an extract from an opinion by Judge Learned Hand in a labor law case. Hand remarked:

The question [on appeal] is what is often called a "mixed question of law and fact"; and it is true that it comprises, or should comprise, two quite different determinations: (1.) what in fact will be the prejudice to the interests of the employer in allowing electioneering to go on during lunch hours, and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it; (2.) whether the benefits shall prevail over the prejudice, or vice versa. The language of § 8 is too indefinite to allow the tribunal which enforces it to avoid the second of these inquiries; it is the same question that often arises in the law of torts; e.g. negligence, trade-marks, unfair trade, indeed all questions which depend on what conduct is "reasonable." In all these cases the court balances the interests against each other, and awards priority as seems to it just.¹⁴⁶

Gilles comments: "Hand's theory seems strikingly similar to the *Restatement's*: the question of reasonable conduct requires the tribunal to balance conflicting interests as it thinks just, in light of 'commonly accepted standards.'"¹⁴⁷

Both Hand's statement and Gilles's comment are intriguing. As Seavey declared with respect to the risk-utility factors in the first Restatement,¹⁴⁸ Hand states that the ultimate judgment involved in making proper evaluations of reasonableness in negligence law, as well as in other areas, is not based on a simple balancing of risks against utilities, but rather is based on considerations of justice. Moreover, Hand's phrasing is significantly different than Gilles's. Gilles speaks of the court's "*balancing the interests as it thinks just,*" while Hand speaks of "*balancing the interests, and awarding priority as seems to it just.*" An "award of priority" suggests at the least a different rather than an equal weighting of the interests being "balanced," based on justice

145. See Gilles, "Hand Formula Balancing," *supra*, note 9, at 855-856.

146. *Ibid.*, 846 (quoting *Republic Aviation Corp. v. N.L.R.B.*, 142 F.2d 193, 196 (2d Cir. 1944)).

147. *Ibid.*, 846 (emphasis added) (footnote omitted).

148. See text at notes 30-31, *supra*.

considerations, and thus a departure from the equal weighting called for by the utilitarian impartiality principle. Indeed, considered along with the grammatical structure of his statement, it suggests an absolute or lexical priority for the justice considerations, after the (not necessarily utilitarian) “balancing”(weighing or assessment) of the relevant affected interests has been completed. Even Gilles’s comment seems to imply that, after assessing the various interests, a consideration of what justice requires is undertaken independent of or in addition to the straightforward (utilitarian or other) balancing of interests. Otherwise the wording should be “a balancing to *determine or obtain* the just result.”

However, toward the end of his article, Gilles seems to equate (or confuse?) justice with a utilitarian balancing under the impartiality principle. Although he acknowledges that “[t]he claim that Hand Formula instructions would provoke jury nullification is supported by considerable evidence,” he asks, “But why is this a decisive objection for the ALI’s constituencies—law professors, judges, and lawyers—all of whom profess an unwavering commitment to the rule of law?”¹⁴⁹ Suggesting “that juries would find Hand formula instructions more congenial if those instructions were linked to community values and the jury’s sense of justice,”¹⁵⁰ he adds:

For example, juries could be told that the reasonable person gives equal weight to the interests of others in matters of safety, and takes the same care with regard to others’ safety that a reasonably careful person would take of his or her own person or property. Under this approach, a defendant could raise cost-benefit analysis comfortably by pointing out to the jury that we all make tradeoffs with respect to our own safety and that of our property, and arguing—with explicit support from the jury instruction—that making similar tradeoffs with regard to the safety of others does not constitute negligence.¹⁵¹

These few lines illustrate several of the all-too-common flaws in legal economists’ arguments. Gilles indicates that the proposed instruction links the Hand formula to “community values and the jury’s sense of justice.” Yet, reading through the immediately following example instruction, we find no principle of justice but only three different versions of the utilitarian impartiality principle.

(1) *Equal consideration*: “[T]he reasonable person gives equal weight to the interests of others in matters of safety.”

149. Gilles, “Hand Formula Balancing,” *supra*, note 9, at 859.

150. *Ibid.*, 860.

151. *Ibid.*, 860 n.152.

(2a) *Single-owner heuristic*: “[T]he reasonable person . . . takes the same care [but no more] with regard to others’ safety that a reasonably careful person would take of his or her own person or property.”

(2b) Gilles quotes a clearer statement of this heuristic from David Friedman’s book: “A more intuitive way of putting [the Hand Formula] is that a party who imposes costs on others does so negligently if [but only if] he has failed to take precautions that a reasonable person would have taken if he himself were the one bearing the cost of the accident.”¹⁵²

(3a) *Rationality*: “[W]e all make tradeoffs with respect to our own safety and that of our property, [so] making similar tradeoffs with regard to the safety of others does not constitute negligence.”

(3b) The implicit argument, usually made explicitly in law-and-economics seminars for judges and law faculty (I’ve heard it many times), is: “Isn’t it rational to consider the expected costs and benefits to you of engaging in some conduct or activity? Don’t we all do that? Then (‘rationality’ having being defined as cost-benefit reasoning) it must be rational for the same cost-benefit decision procedure to be applied to all social decisions.”

If jurors are told that one or more of these principles is a principle of justice, they are being deceived. Indeed, as Gilles implies, that is the purpose: to make the Hand formula and its impartiality principle more palatable by portraying it as fair and just, rather than utility-maximizing or efficient. Each of the arguments actually authorizes and facilitates injustice. Even if jurors are not deceived on the justice issue, they are likely to be misled by the argument. There is just enough of a hint of a fairness argument in each of these statements to seduce the unwary. But the fairness aspect inheres in the situation that does not exist, the “single owner” situation, to which the actual situation is being improperly analogized.

Like a street hustler’s shell game, each argument tries to shift the listener’s focus so she’ll lose sight of what is really going on. Each of the arguments is simply a different way of stating the impartiality principle, made more attractive through misdirection: look over here where everything seems fine, not over there where someone is being sacrificed. The arguments treat situations in which the same person is getting the benefits as well as the costs (the fair scenario) as being equivalent to situations in which one person is getting the benefits and the other person is suffering the costs (the unwilling sacrifice scenario). Although under utilitarianism and economic efficiency the only thing that matters is the total sum of gains and losses, not their distribution (except insofar as it affects the total sum), even legal economists no doubt view an activity very differently depending on whether they get the gains as well as suffer the losses from the activity, or only the gains, or only

152. Ibid., 857 n.146 (quoting David D. Friedman, *Law’s Order: What Economics Has to Do with Law and Why It Matters* (Princeton, N.J.: Princeton University Press, 2000), 198).

the losses. I am reminded of Holmes' adage: "[E]ven a dog distinguishes between being stumbled over and being kicked."¹⁵³ The point is even sharper under the proper analogy: Everyone (including economists, I assume) distinguishes between being kicked and being petted or hugged. With the pet or hug you get the benefit as well as the burden of the physical contact.

The best antidote to the economists' misdirection arguments is a good counterexample. Is it alright for me to push you in front of a train if necessary to save myself and my wife and children, assuming I would jump in front of the train to save them if I could? To demand that as a true-believing utilitarian Gilles jump in front of the train if necessary to save myself and my wife and children? To use your car without asking or paying you when I discover that you are away and unreachable on an African safari and your car is sitting idle in your driveway, since I certainly would use my own idle car? To drive recklessly on the highway endangering you in your oncoming car if doing so is necessary for me to get to a business meeting that is crucial for the continued operation of my company, which employs 1,000 people who each have families dependent on them? To operate on you without your permission despite your religious or other objections, if doing so is necessary to save your life, so that the company you run will not fold and I and 1,000 other workers won't lose our jobs and income?

If you are willing to work hard all week to make something for yourself or to earn pay, you should also be willing to work hard all week to make something for me without pay? And if you aren't willing, I can sue you for negligence? If I am willing to cut down my tree to get lumber for a project or to obtain a view, you can cut down my tree to get lumber or to obtain a view, without my consent and without paying me? If I am willing to have a dog which digs up flowers, leaves droppings on the lawn, licks me, and occasionally bites me, I can let my dog go on your property and dig up your flowers, leave droppings on your lawn, lick you, and occasionally bite you? If I am willing to engage in some risky activity like leaping off cliffs into the ocean for a thrill despite the anxiety and fear, I can push you off the cliff instead if you won't suffer any more anxiety and fear than I would have and I will still experience the same (or greater) thrill?

I assume anyone, even a legal economist, would answer no to all of the preceding questions, although the answer under the various versions of the impartiality principle that are contained in Gilles's and Friedman's jury instructions should be yes. Contrary to what Gilles would like to believe, it clearly is the disagreement of judges and jurors with the Hand-formula definition of reasonableness that explains both judges' refusal to give Hand-

153. Holmes, *The Common Law*, supra, note 15, at 7.

formula instructions to jurors and the well-grounded expectation that jurors would often refuse to follow such instructions if they were given.

Gilles anticipates this objection. He states:

The arguments I have offered in support of Hand Formula instructions will not persuade scholars such as Richard Wright, who think jury resistance to Hand Formula balancing in fact reflects a different and better conception of negligence. To them, the Hand Formula, risk-utility analysis, and “balancing” interests are just so many distortions of the true reasonable person standard. The courts’ reluctance to give Hand Formula instructions, Wright suggests, is evidence that the Hand Formula really is not the prevailing conception of negligence.¹⁵⁴

This argument is unpersuasive. The courts’ failure to routinely give Hand formula instructions certainly indicates some ambivalence about asking juries to engage in cost-benefit analysis. But the basis for that ambivalence is plainly the jury, not the black letter law—which in most states is couched in terms of Hand formula balancing. The reasons courts would give—if they gave reasons, which with rare exceptions they have not—concern the jury’s ability to understand and apply Hand formula instructions, the risk that detailed instructions will somehow invade the jury’s discretion, and the like.¹⁵⁵

It is Gilles’s alternative explanations that are unpersuasive. He suggests that judges do not give jurors Hand formula instructions because they are concerned about “the jury’s ability to understand and apply Hand formula instructions, the risk that detailed instructions will somehow invade the jury’s discretion, and the like.” Look back at the several different versions of the Hand-formula (impartiality) instruction stated above. They seem pretty simple to me. Deceptively simple. Juries may indeed be misled, but misled in the direction the legal economist wants: toward applying the Hand formula without realizing its injustice. There surely are many longer and more complicated instructions that juries are given every day—for example, on actual cause, proximate cause, consent, intent, defense of necessity, *res ipsa loquitur*, burden of proof, and so forth. Similarly, a Hand-formula instruction would not “invade the jury’s discretion” any more than any of these other instructions that are routinely given to juries. The desire not to “invade the jury’s discretion,” which apparently was the reason that was given by Los Angeles trial judges for not using, and eventually eliminating, a rare Hand-formula jury instruction,¹⁵⁶ is a transparent statement by the judges that they

154. Gilles, “Hand Formula Balancing,” *supra*, note 9, at 860 (citing Wright, “The Standards of Care in Negligence Law,” *supra*, note 5).

155. *Ibid.*, 860-861 (footnotes omitted).

156. See *ibid.*, 861 and n.155 (citing Gilles’s previous discussion of the Los Angeles trial judges’ rejection of the Hand-formula instruction in Gilles, “The Invisible Hand Formula,” *supra*, note 1, at 1049).

think the instruction will prevent the jury from reaching the proper (just) result or make it harder for the jury to do so: a disagreement with the substantive guidance contained in the instruction.

Gilles's suggestion that judges who refuse to give a Hand-formula instruction are subverting the rule of law,¹⁵⁷ since "the black letter law . . . in most states is couched in terms of Hand formula balancing,"¹⁵⁸ ignores a lesson driven home long ago by the legal realists: the "black letter" law that is explicitly stated in treatises or the Restatements, or in dicta or even in "holdings" in judicial opinions, is not necessarily the actual law. Rather, the rules and principles that explain the results in the actual cases constitute the actual law.¹⁵⁹ It remains true today that only a small minority of courts even mention the Hand formula or risk-utility balancing. Very few judges attempt to actually apply the Hand formula, and rarely if ever has any judge, including the major judicial proponents of the Hand formula, actually succeeded in using the formula to properly resolve the negligence-conduct issue.¹⁶⁰ Judges who refuse to give instructions that are consistent with widespread black letter in secondary sources or even judicial dicta but not with the actual results of the decided trial and appellate cases are conforming to the rule of law rather than flouting it.

The author of the fourth paper at the Wade Conference, Kenneth Simons, begins by giving the negligence section in the draft Restatement Third a very generous reading. He argues that the Hand formula, "suitably defined and explained, is indeed an appropriate general criterion for negligence" that "can accommodate both economic and fairness accounts of negligence law."¹⁶¹ Despite the draft's affirmation of the impartiality principle, which implies a fairly rigorous balancing and tradeoff of individual interests, and its elimination of the prior Restatements' language stressing the need to assess the affected interests in accordance with their social value as recognized in the law, he interprets the draft Restatement's language concerning "balancing" and the requirement that the advantages of conduct exceed its disadvantages

157. See text at note 149, *supra*.

158. See text at note 155, *supra*.

159. See Wright, "Principled Adjudication in Tort Law and Beyond," *supra*, note 79, at 266-274. Thus, Michael Green's claim—that the Restatement's adoption of the risk-utility test disproves my claims about the law in the courts—is invalid. See Green, "Negligence = Economic Efficiency: Doubts," *supra*, note 8, at 1625 n.90. Green also failed to note that the particular claim of mine that he challenged was limited to a specific context: cases involving defendants putting others at risk for purely private benefit.

160. See sources cited in note 6, *supra*, and text at notes 49, 137, 139, *supra*.

161. Kenneth W. Simons, "The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values," *Vanderbilt Law Review* 54 (2001) 901, 902 [hereinafter "Encompassing Fairness as Well as Efficiency Values"].

so loosely that, as he himself says, the limits on what constitutes “balancing” “[verge] on the vacuous.”¹⁶² His own view of what counts as “balancing” is so broad that he includes an approach that he describes as utilitarian and as maximizing social welfare even though it includes “such values as equality and distributive justice.”¹⁶³ Indeed, he goes even further. Another alleged “balancing” approach, “not exclusively utilitarian,” allows the decision maker to consider “morally relevant features of the situation other than aggregate welfare . . . including intentions, motives, rights, consent, social role or responsibility, justifiable expectations or reliance of others, and reciprocity and distribution of risk,”¹⁶⁴ not subject to any maximization requirement.¹⁶⁵

Nevertheless, in the end, Simons finds the draft Restatement Third’s discussion of the negligent-conduct issue to be too susceptible to a reductionist, economic, cost-benefit interpretation. He suggests a number of changes, including eliminating “cost-benefit” language, restoring the prior Restatements’ language emphasizing “socially recognized” advantages and disadvantages and the “social value” of the affected interests, and adding language that notes that different standards of reasonable care are applied in different types of situations.¹⁶⁶ Furthermore, he seems to have retreated from his prior ill-founded claim that the utilitarian impartiality principle encompasses a “deontological norm” or a “Kantian element.”¹⁶⁷ At least, he does not repeat the claim. In fact, he says almost nothing about interactive justice. His only citation to the relevant comment in the draft Restatement Third refers only to its discussion of the accident-prevention goal.¹⁶⁸ Elsewhere on the same page he states that “such fault standards as the ‘Golden Rule,’ ‘equal’ or ‘impartial’ consideration of the interests of others, or the ‘single-owner heuristic’ could express a utilitarian criterion of fault.”¹⁶⁹ His article, therefore, provides no support for the draft Restatement’s claim that its aggregate-risk-utility test of negligence is supportable as a matter of interactive justice.

Jules Coleman, George Fletcher, Ernest Weinrib, and I were also at the Wade Conference, and we all voiced objections to the negligent-conduct provisions that mirrored Perry’s and Hetcher’s critical comments. In

162. *Ibid.*, 903.

163. *Ibid.*, 919.

164. *Ibid.*

165. *Ibid.*, 923.

166. *Ibid.*, 915-17, 936-939.

167. See text at notes 103-108, *supra*.

168. Simons, “Encompassing Fairness as Well as Efficiency Values,” *supra*, note 161, at 912 n.39 (citing *Restatement Third Tentative Draft*, *supra*, note 55, § 4 comment j).

169. *Ibid.*, 912.

particular, we all agreed, indeed insisted, that the Hand formula's aggregate-risk-utility test is not supportable as a matter of interactive justice. I do not recall anyone at the conference (which included Kenneth Abraham, David Owen, and Robert Rabin) stating a contrary view. There was also widespread agreement that significant changes were needed in the overall treatment of the negligent-conduct section, to rid it of its reductionist cost-benefit language, restore the prior Restatements' emphasis on the need to apply a social valuation of the affected interests, and recognize the varied standards of reasonable care that exist for different categories of cases. Several of the interactive-justice theorists, noting the consensus among those present that the Hand formula and its aggregate-risk-utility test are inconsistent with interactive justice, asked Schwartz to remove the statements in the comments and reporters' notes that claim that interactive-justice scholars support the Hand formula.

Nevertheless, when the Tentative Draft was subsequently published in March 2001, none of the suggested changes were made in the black letter or the comments of the negligent-conduct section, and the reporters' notes continue to claim that many scholars support the draft Restatement's reductionist, cost-benefit, "balancing approach to negligence" for "reasons of fairness or corrective justice."¹⁷⁰ The five scholars now listed as examples of the "many" scholars that supposedly support the Restatement's aggregate-risk-utility test for reasons of fairness or corrective justice are Dworkin (based on his argument in *Taking Rights Seriously*, which he has since repudiated),¹⁷¹ Perry (despite his explicit, published, critical statements to the contrary at the Wade Conference),¹⁷² Rabin (who is a social-welfare theorist rather than an interactive-justice theorist, and whose cited article, which was previously cited in the Discussion Draft, only mentions being "sensitive" to costs and does not provide any justice argument for the Hand formula's aggregate-risk-utility test),¹⁷³ Simons (whose cited Wade Conference article treats the impartiality and "equal consideration" standards that underlie the aggregate-risk-utility test

170. See *Restatement Third Tentative Draft*, supra, note 55, § 3 comment d, Reporters' Note ("Other scholars support the negligence-liability rule for reasons of fairness or corrective justice. Among these scholars, many support the balancing approach to negligence.").

171. Ibid. (citing Dworkin, *Taking Rights Seriously*, supra, note 95, at 278-80; see text at notes 105-108 and 121-131, supra).

172. Ibid. (citing Stephen R. Perry, "Responsibility for Outcomes, Risk, and the Law of Torts," in *Philosophy and Tort Law*, Gerald J. Postema, ed. (Cambridge, England: Cambridge University Press, 2002), as "supporting a 'constrained version' of the Learned Hand test of negligence"; see text at notes 139-141, supra).

173. Ibid. (citing Rabin, "Law for Law's Sake," supra, note 15, at 2275; see text at notes 97-102, supra).

as utilitarian in nature rather than as principles of justice, and who interprets “balancing” as encompassing rights-based, non-aggregative tests of negligence),¹⁷⁴ and Owen.¹⁷⁵

The cited article by Owen is different than the one that was cited in the Discussion Draft. The newly cited article, which further develops the themes in Owen’s earlier article, previously discussed,¹⁷⁶ clearly exposes Owen’s misunderstanding of and lack of commitment to the equal-freedom norm that grounds the principles of justice, at least at the time when this article was published (in 1995, when many other scholars evidenced similar confusion), as well as the inconsistent and incoherent nature of Owen’s arguments. As before, Owen’s pluralistic moral theory attempts to encompass utilitarian as well as equal-freedom principles, even though he concedes that utilitarianism is “arguably irrational or incoherent as a *universal* moral theory,” being “particularly flawed . . . in disregarding the separateness of persons.”¹⁷⁷ Ignoring the justice theory’s conception of the “common good” as the promotion of the equal freedom of each member of the community, he instead adopts the utilitarian-efficiency (aggregate social welfare) conception of the “common good,” which “subordinates the separate welfare of members individually to the broader collective welfare of the group,” even though he acknowledges the unattractiveness of this collectivist interpretation as evidenced by the recent disintegration of collectivist governmental regimes.¹⁷⁸

Owen relies primarily on utilitarian efficiency to explain and justify the Hand formula’s aggregate-risk-utility interpretation of negligent conduct, although he claims that “the principal relevance of the Hand standard to a moral inquiry of this type lies in its demonstration of respect for the equality of other persons and for communal interests, not for any utility or efficiency that the tort law rules as so defined may themselves produce.”¹⁷⁹ He continues to invoke Dworkin’s impartiality-of-interest interpretation of the “equal concern and respect” principle in *Taking Rights Seriously* in the context of accidental injury,¹⁸⁰ even though he is aware that Dworkin subsequently

174. Ibid. (citing Simons, “Encompassing Fairness as Well as Efficiency Values,” *supra*, note 161; see text at notes 161-169, *supra*).

175. Ibid. (citing David G. Owen, “Philosophical Foundations of Fault in Tort Law,” in *Philosophical Foundations of Tort Law*, David G. Owen, ed. (Oxford: Oxford University Press, 1995), 201).

176. See text at notes 115-117, *supra*.

177. Owen, “Philosophical Foundations of Fault in Tort Law,” *supra*, note 175, at 213-214 and n.57 (emphasis in original) (citations omitted).

178. See *ibid.*, 212-13 and nn.48, 49, 52.

179. See *ibid.*, 215 and n.64.

180. See *ibid.*, 210 and n.30.

rejected the impartiality principle, in *Law's Empire*, as a (utilitarian) principle that would lead to the destruction of personhood.¹⁸¹ He states that "an actor should not infringe another person's autonomy merely to enhance his own"¹⁸² and that "actors are at fault for choosing without good reason to harm other persons, or choosing to expose them to a risk of harm,"¹⁸³ and he cites Holmes, who, without mentioning any risk-utility balancing, treated persons as negligent for exposing others to a foreseeable, avoidable risk of harm.¹⁸⁴ Yet, as before, he employs the impartiality principle to justify risk-utility balancing for foreseeable accidental injuries while refusing to apply it to justify risk-utility balancing for intentional injuries, without providing any principled basis for distinguishing the two types of situations.¹⁸⁵ He continues to describe the utilitarian-efficiency principle as occupying a "default" role, ordinarily secondary to the equal-freedom norm but "promoted to a controlling status in many instances—those in which the guidance it can provide is strong and that of freedom weak," and, in the end, he concludes that "in the case of accidental harm, the equal abstract freedom interests of every person (in both action and security) are usually best accommodated—and fault is usually best determined—by principles of utility."¹⁸⁶ Thus, contrary to the statement in the Tentative Draft of the Restatement Third, Owen ultimately supports the Hand

181. See *ibid.*, 214 n.59, 225 n.97; text at notes 105-108 and 131, *supra*. Owen clings to the idea that "the [impartiality] principle unremitted is arguably what the classic 'Golden Rule' concept contemplates in abstract terms." *Ibid.*, 225 n.97 (citing Kant, *Foundations of the Metaphysics of Morals*, *supra*, note 69). He misinterprets the golden rule and Kant. See note 130, *supra*, and text at notes 85-92 and 127-131, *supra*.

182. Owen, "Philosophical Foundations of Fault in Tort Law," *supra*, note 175, at 207.

183. *Ibid.*, 209 (emphasis removed).

184. See *ibid.*, 208 n.27 (citing Holmes, *The Common Law*, *supra*, note 15, at 95); note 15, *supra*, and accompanying text.

185. See Owen, "Philosophical Foundations of Fault in Tort Law," *supra*, note 175, at 207-208, 218-219, 224-225. As Owen seems to realize, the priority of bodily integrity over property interests that he discusses does not distinguish intentional from accidental injuries, since injuries to both persons and property occur intentionally and accidentally. See *ibid.*, 218. Nor are all injuries treated as intentional torts willed, as Owen seems to assume. See *ibid.*, 220-221, 226. Most are not willed but rather are known to be nearly certain to occur, and thus merely involve a (much) higher level of foreseeable risk than ordinary negligence. See *Prosser and Keeton on the Law of Torts*, *supra*, note 3, § 8. Owen's difficulty may be due to his apparent assumption that the only possible liability rules for accidental injury are strict liability or negligence defined by the Hand formula. See Owen, *supra*, at 224, 227, 228. He ignores alternative, non-utilitarian conceptions of negligence, including one set forth in the same collection of essays, which he edited, that fit the cases much better than the utilitarian Hand formula. See Wright, "The Standards of Care in Negligence Law," *supra*, note 5.

186. Owen, "Philosophical Foundations of Fault in Tort Law," *supra*, note 175, at 216-217, 220; see *ibid.*, 223, 226 n.98.

formula for reasons of utilitarian efficiency, rather than interactive justice or equal freedom.

Given the prior confusion among interactive-justice scholars themselves, many of whom, assuming that the Hand formula was the test of negligence actually applied by the courts, attempted to develop interactive-justice theories to explain and justify the Hand formula despite its transparent utilitarian content, one might understand Schwartz's claims in the 1999 Discussion Draft of the Restatement Third that the impartiality principle is a principle of fairness or justice and that many or most interactive-justice scholars support the aggregate-risk-utility test. However, by the time that the 2001 Tentative Draft was published, these claims were not credible. It was made very clear at the Wade Conference in 2000 that almost all interactive-justice scholars, including all the leading interactive-justice theorists of tort law, now reject the Hand formula as being inconsistent with interactive justice and its underlying equal-freedom norm.

VI. CONCLUSION

The Restatement's risk-utility definition of negligent conduct, which was adopted in the first Restatement almost seventy years ago as a result of academic innovation rather than any demonstrable presence in the case law, has become enshrined in the academically driven secondary literature even though it still plays a minimal role in actual tort litigation. The risk-utility test's pervasive presence in the secondary literature for such a long period has resulted in increasingly frequent references to the test by a minority of the courts, but, somewhat surprisingly, essentially no use of the test in pattern jury instructions and very few attempts to use the test to actually resolve the negligent-conduct issue. However, the continued pervasive references to the test in the secondary literature inevitably create continuing pressure for the actual use of the test by the courts.

The expanded adoption and use of the Restatement's risk-utility definition of negligent conduct would be a good thing if it furthered the basic objective of law: the attainment of justice. There is some reason to believe that the drafters of the Restatement's risk-utility language did not mean for it to be interpreted in a strict utilitarian-efficiency manner, but rather in a manner to allow socially valuable activities to proceed despite their inherent risks as long as those risks were not too great, while still paying considerable attention to the relationships and rights of the affected parties. Over time, however, two developments occurred that led to an increasingly formal, rigorous, aggregate-risk-utility interpretation of the Restatement's definition.

One development was the passing from the scene of the group of scholars who initially drafted the Restatement definition and who had a better feel for its arguably intended flexible, rights-respecting use. The other development was the birth and rapid growth of the law-and-economics movement during the last third of the twentieth century. The leaders of that movement all cut their teeth on the law of torts. They found the utilitarian-sounding definitions of negligence and nuisance in the secondary literature to be natural spawning grounds for their theories and springboards for their forays into other areas of the law.

As a result, the academic definition of negligence became increasingly formal and rigid and became much more firmly identified as a utilitarian and even economic principle. Ambiguous language in the first Restatement about consideration of the interests of others when engaging in conduct that put others at risk came to be interpreted as the basic impartiality principle of utilitarianism and economic efficiency, to be applied as the definition of negligence in all cases. As students drilled on the Hand formula interpretation of negligence moved into practice and some academic leaders of the law-and-economics movement moved into the courts, the pressure increased there as well as in the academy.

Resisting the pressure, if only at the subconscious level, were the basic norms of equal-freedom and justice that are embedded in human morality and in the law. The power of these norms is demonstrated by the minimal actual use of the aggregate-risk-utility test of negligence in the courts, despite the longstanding and pervasive use of the test in the academy and the academy-driven secondary literature. However, as powerful as these norms are, their force is bound to gradually weaken without conscious attention and reinforcement. Unfortunately, such attention and reinforcement from the academy has been impeded by the Restatement's utilitarian definition of negligence. Those who sought to develop long-neglected justice-based theories of liability, when confronted with the general acceptance of the Restatement definition in the secondary literature, attempted to shape their theories to fit the presumed reality, not realizing that the actual criteria of reasonableness employed by the courts are much more varied and rights-conscious than the Restatement's transparently utilitarian definition. Their justice theories thus became co-opted utilitarian clones, divorced from and unable to reinforce the legal reality of justice.

The drafting of the Restatement Third provided an opportunity for the American Law Institute and others to step back, take a hard look at the actual cases, reassess policies and goals, and correct seventy years of academic misdirection. Unfortunately, so far that opportunity has been ignored by the American Law Institute. Dominant trends in the academy, infused into the

Restatement drafting process by the reporters and their advisers, have continued to transform the academic definition of negligence, and hence the definition in the draft Restatement, into an increasingly rigorous, reductionist, cost-benefit mold.

Fortunately, the opportunity has not been ignored by others. The academic justice theorists have thrown off the utilitarian chains they welded onto their own theories, and they and others have begun to take a hard look at the actual case law for the first time in many years. Hopefully it is not too late for their work to have a beneficial effect on the new Restatement. If not, one need not despair about the continued existence of a just law of negligence liability. Seventy years of experience have shown that law and justice can hold out for a long time against misguided Restatement doctrine. But it is important that the academic exploration and elaboration of the principles and criteria of justice that are actually employed (explicitly or implicitly) in the cases, which has only recently been initiated, be continued and expanded, so that the law will not continue to be left on its own to fend off the encroachments of the academic advocates of utilitarian efficiency.