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THE HAND FORMULA IN THE DRAFT RESTATEMENT THIRD OF TORTS: ENCOMPASSING FAIRNESS AS WELL AS EFFICIENCY VALUES

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Abstract

The draft Restatement Third of Torts' definition of negligence employs a version of the Learned Hand formula. According to the chief Reporter, the Hand formula can accommodate both economic and fairness accounts of negligence law.

Is he correct? I argue that he is, and that the Hand formula, suitably defined and explained, is indeed an appropriate general criterion for negligence. The draft Restatement is also correct in largely rejecting a "reasonable person" criterion of negligence. At the same time, however, the current draft is deficient in some respects. It does not adequately allay the fears of those who worry that the Hand formula will inevitably receive a narrow economic interpretation. It should more clearly underscore that negligence is a species of fault. And it should clarify the unavoidable value judgments inherent in a negligence determination, value judgments that are no less necessary or desirable when the Hand formula is employed to make that determination. At the end of this paper, I suggest some specific Restatement language that might remedy these deficiencies.

With respect to the evaluative dimension of negligence, the paper examines four different approaches: willingness-to-pay, utilitarian preference-satisfaction, social welfare maximization, and nonutilitarian (or not exclusively utilitarian). The last two are the most plausible and most consistent with actual doctrine.

A determination that an actor is negligent reflects a value judgment at two levels. It expresses the judgment that the actor should have done something different, in light of the foreseeable risks of his conduct. It also presupposes value judgments about the relevant marginal advantages and disadvantages of taking such a precaution. The task of conscientiously identifying and clarifying the appropriate value judgments is not easy, but it is unavoidable if negligence is to remain a justifiable ground of tort liability.

**The Hand Formula in the Draft Restatement Third of Torts:
Encompassing Fairness As Well As Efficiency Values**

Kenneth W. Simons¹

[Draft: November 30, 2000]

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The draft Restatement Third of Torts' definition of negligence employs a version of the Learned Hand formula. According to the chief Reporter, Professor Gary Schwartz, who is responsible for this draft, the Hand formula can accommodate both economic and fairness accounts of negligence law.

Is he correct? I will argue that he is, and that the Hand formula, suitably defined and explained, is indeed an appropriate general criterion for negligence. At the same time, however, the current draft of the Restatement Third is deficient in some respects. It does not adequately allay the fears of those who worry that the Hand formula will inevitably receive a narrow economic interpretation. It should

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more clearly underscore that negligence is a species of fault. And it should clarify the unavoidable value judgments inherent in a negligence determination, value judgments that are no less necessary or desirable when the Hand formula is employed to make that determination. At the end of this paper, I suggest some specific Restatement language that might remedy these deficiencies.

I. The Draft Restatement's definition of negligence

Section 4 of the Discussion Draft defines "Negligent" in terms of the Learned Hand factors²:

An actor is negligent in engaging in conduct if the actor does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the actor and others if the actor takes precautions that eliminate or reduce the possibility of harm.³

According to the comments that immediately follow, this definition is intended to have the same meaning as a "reasonably careful person" test.⁴ Moreover, the definition is meant to have some flexibility: while the listed "primary" factors explain the content of reasonable care in "the typical case," sometimes other "considerations or circumstances" will "supplement or somewhat subordinate the primary factors."⁵ Examples include emergencies, actors who are children, actors with disabilities, and inadvertent negligence.⁶

² Under the Learned Hand test, an actor is negligent if " $B < (P \times L)$," where "B" refers to the burden of taking a precaution, "P" to the probability of a loss if the precaution is not taken, and "L" to the magnitude of such a loss. See *United States v. Carroll Towing Co.*, 159 F. 2d 169, 173 (2d Cir. 1947).

³ Restatement of the Law Third, Torts: General Principles (Discussion Draft, April 5, 1999), §4.

⁴ *Id.*, §4, comment a.

⁵ *Id.*, §4, comment c, at 43-44.

⁶ In this last case, the Draft concludes, "the reasonably careful person" test is preferable. *Id.* at 44 & comment k. For further discussion, see text at notes 105-110= *infra*.

The draft offers a catholic and nondogmatic characterization of the Hand test, suggesting that “risk-benefit,” “cost-benefit,” and “balancing” are all acceptable descriptions, and that all express the “simple idea” that “[c]onduct is negligent if its disadvantages exceed its advantages.”⁷ So stated, this “simple idea” verges on the vacuous.⁸ But the draft goes on to explain that “disadvantages” encompass the foreseeable likelihood and severity of harm, while “advantages” means the avoided burdens of risk prevention (i.e., burdens that would be incurred if the actor did take a precaution against the risk of harm). Moreover, those burdens “can take a wide variety of forms,” including: financial burdens, delays experienced by motorists’ reducing their speed, inconvenience, inability to satisfy a friend’s need (if one declines to lend a car to a friend who is a bad driver), and the possible creation of new risks of injury.⁹

Other comments helpfully explain the following points:

(a) All three primary factors are relevant. Thus, it can be negligent to create even a low-level risk (where the probability of injury is low, or where the injury if it occurs will not be severe), and reasonable to create even a high-level risk.¹⁰

(b) Determining whether the actor should have “reasonably foreseen” a risk sometimes requires a balancing of factors (namely, the advantages and disadvantages of gathering information) similar to the balancing that the negligence test itself entails.¹¹

⁷ Id. at 44.

⁸ Similarly, Restatement (Second) of Torts, §291, comment a, pithily asserts: “The problem involved may be expressed in homely terms by asking whether ‘the game is worth the candle.’” See also Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. L. Stud. 931, 934 (2000) (noting that any “pro” and “anti” arguments associated with a proposal can be translated into “benefit” and “cost” language).

⁹ Id. at 45. Other examples of burdens are the risk that criminals will escape (if police do not conduct a high-speed chase); and interference with privacy (if a hospital asks blood donors about their sexual orientation). Id. at 50.

¹⁰ §4, comment e, pp. 45-46.

¹¹ §4, comment f, pp. 48-49.

(c) The decisionmaker should consider all foreseeable harms that a precaution would minimize, and not just the type of harm suffered by the plaintiff.¹²

(d) The focus should be the marginal advantages and disadvantages of taking a particular precaution. Thus, failure to take a precaution can be negligent even if the precaution would only have reduced, rather than eliminated, the risk.¹³

(e) In analyzing whether the actor should have taken a precaution, the test calls for an ex ante, not an ex post, judgment.¹⁴

(f) Sometimes one is negligent simply for choosing to engage in an unduly risky activity, even if there is no realistic way that one can both engage in the activity and reduce its risks.¹⁵

¹² §4, comment g, p. 49.

¹³ §4, comment h, p. 50. However, I question the assertion in §4, Reporter's Note, pp. 67-68, that courts reject the following type of "refined" marginal precaution argument. Suppose: (a) the defendant concedes that its level of precaution was inadequate (e.g., it failed to fence a golf course); (b) marginal analysis supports a moderate precaution (e.g. a fifty foot fence) but not a superprecaution (e.g. a 100-foot fence); and (c) only the superprecaution would actually prevent the injury suffered by the victim. The Reporter's Note concludes that a court would find such a defendant negligent even though marginal analysis would not support this result. The Note suggests that a court would evaluate the marginal benefits and burdens by comparing the actual level of precaution (no fence) to the superprecaution that would assist the victim, even though the superprecaution is more than a negligence standard would demand. Here the Note does not cite any case support, but refers approvingly to Mark F. Grady, A New Positive Economic Theory of Negligence, 92 Yale L. J. 799 (1983).

I agree that this type of detailed information about marginal precautions and their causal effects is normally unavailable. But when it is available, it should be relevant, and I believe that a court would consider it. Thus, suppose the following scenario. A motorist is speeding 45 miles per hour in a 30 mph zone. Coming around a curve, he runs over a drunk person sleeping on the street. The accident could not have been avoided by traveling at the speed limit, but could have been avoided by driving 15 mph. Suppose that (in terms of the Hand factors), driving 15 mph is preferable to driving 45 mph, but driving 30 mph is preferable to driving 15 mph. If the motorist really could show that driving 30 mph would not have prevented the accident, I would be surprised if a court would find him negligent. Although it might be appropriate to shift the burden of proof to the defendant in this type of case, I believe that the defendant should prevail if he satisfies that burden.

¹⁴ See §4, comment g, p. 48.

Finally, and critically, the draft explains that the balancing test can be justified both “in fairness terms as remedying an injustice inflicted on the plaintiff by the defendant,” and “also ... as a measure for providing the defendant with safety incentives.”¹⁶

Thus, the Discussion Draft does purport to offer a sufficiently general criterion of negligence to accommodate quite different justifications of negligence liability. Does it succeed? Or is the criterion a thinly disguised invitation to courts to adopt a reductionist, economic efficiency approach? I will argue that the language of §4, and all of the features described in points (a) through (f), are consistent with understanding negligence in either fairness or efficiency terms.

II. Negligence and fault

Before addressing that issue, it is worth emphasizing a fundamental point. The Draft clearly understands negligence as a species of fault, of deficient conduct. Although negligent conduct is ordinarily the least serious or culpable form of fault, relative to reckless conduct and unjustified intentional torts, it is most assuredly a form of fault. If this were not the case, negligence doctrine would not focus on the precaution that the actor should have taken,¹⁷ and on the actor’s failure to act as a reasonable person would have acted. On this perspective, although compensation is an appropriate remedy for victims injured because of the actor’s fault, such liability is not just a pricing mechanism. It is not the case that a negligent actor is entitled to omit a precaution so long as he is willing to pay for the consequences of

¹⁵ §4, comment i, pp. 51-52. As the tort literature explains, one can be negligent in selecting a particular level of activity even if one is not negligent in selecting a particular level of care, i.e., even if there is no reasonable precaution that the actor could take that would permit him to engage in the same level of activity, but more safely. See §4, comment I, Reporter’s Note, pp. 68-69.

¹⁶ Comment j, at 52.

¹⁷ See §4, comment h, p. 50 (noting that the party alleging negligence must identify “a precaution that should have been adopted.”).

his neglect; rather, it would be better if the negligent actor had taken the precaution in the first place.¹⁸

Moreover, the Draft emphasizes that a negligence judgment should be made from the perspective of foresight, not hindsight. Section 4 clarifies that the negligence judgment is a judgment of ex ante fault, where fault often consists in making improper tradeoffs in choosing among alternative courses of action.

Finally, consistent with this understanding of negligence as fault, tort law sharply distinguishes between negligence liability and strict liability. The very recent Restatement Third draft provisions on strict liability draw this distinction quite clearly. Thus, comment a to proposed §18 on strict liability for animals indicates that “[n]egligence is an obvious form of ‘fault’” while “strict liability signifies liability without fault, or at least without any proof of fault.”¹⁹ Moreover, under the proposed test of strict liability for abnormally dangerous activities, one necessary prerequisite of liability is the existence of a residual, substantial risk of injury even if all actors exercise reasonable care.²⁰ Under this test, strict liability is actually defined in contradistinction to negligence. And the Restatement (Third) of Products Liability also distinguishes between manufacturing defects, for which genuine strict liability is imposed, and design and warning defects, for which negligence liability is in effect imposed.²¹

¹⁸ See, e.g., Kenneth W. Simons, Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation, 15 Harv. J. L. & Pub. Pol. 849, 868-869 (1992); Ernest Weinrib, The Idea of Private Law 143 (1995).

¹⁹ See Restatement of the Law Third, Torts: General Principles (Prelim. Draft No. 2, May 10, 2000), Ch. 3, Strict Liability, §18, p. 1.

²⁰ Id., §21 (B):

An activity is abnormally dangerous if:

- (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
- (2) the activity is not a matter of common usage.

See also id., comment j, p. 86: “[T]his section sets forth a rule of strict liability, not of negligence liability, and accordingly rests on the assumption that the advantages of engaging in the activity are in fact substantial enough to render reasonable the defendant’s choice to engage in the activity.”

²¹ For a helpful articulation of this point, see David Owen, Defectiveness Restated: Exploding the “Strict” Products Liability Myth, 1996 U. Ill. L. Rev. 743. I say “in effect”

Although the Draft commentary does discuss reasonable care and precautions, more emphasis on the need to prove the actor's fault and his failure to take a reasonable precaution (especially in the black letter provision) would be helpful. The Appendix contains some suggested language to this end.²²

III. The Draft negligence criterion and economic efficiency

The negligence criterion elucidated in §4 of the draft could easily be misunderstood to express only an economic efficiency approach, notwithstanding the explicit statement in the comments that fairness as well as safety incentives can justify the criterion. For the Hand test of negligence, which the criterion closely resembles,²³ has indeed often been invoked—one is tempted to say “adopted,” with parental pride and love—by academics interested in applying economic analysis to negligence law.²⁴

because, for a variety of reasons, the Restatement Third is hesitant to unambiguously categorize design and warning defects as instances of negligence liability. However, the test for design defects does emphasize that the plaintiff must ordinarily identify a reasonable alternative design, and the test for warning defects emphasizes that the plaintiff must show the inadequacy of the existing warning and the efficacy of a proposed alternative. Restatement (Third) of Products Liability, §2, text and comments d, f, i. Further, comment a to §2 explains that the design and warning defect standards “achieve the same general objectives as does liability predicated on negligence.”

²² As we will see shortly, however, an economic efficiency approach might not be consistent with the fundamental understanding of negligence as deficient, faulty conduct.

²³ The Reporter's Note explicitly identifies the Hand test as “[a] famous exposition of the balancing approach.” Reporter's Note, Comment g, p. 66. The Note also points out that “Judge Hand recognized the problems of quantifiability and incommensurability” in applying the test. *Id.*

²⁴ See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal. Stud.* 29, 32 (1972); William A. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 85-107 (1987); David W. Barnes & Lynn A. Stout, *Cases and Materials on Law and Economics* 93-104 (1992). See also Gregory Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311, 331-336 (1996). For examples of critics of the economic efficiency approach who view the Hand formula as inextricably linked with efficiency, see Michael Wells, *Scientific Policymaking And*

But the assumption that the Hand test must be identified with efficiency analysis is unfounded. The basic Hand formula requires balancing, at the margin, the foreseeable advantages and disadvantages of taking a precaution. However, the disadvantages might be understood to include only the socially recognized burdens of taking a precaution (of the sort noted in the draft's comments). The advantages can be understood to include the socially recognized benefits of taking a precaution, especially the range of foreseeable injuries whose incidence the precaution will reduce. As we will see below, the Hand test is consistent with several very different conceptions of which burdens and benefits should be legally recognized, and of how they should be valued. Economic efficiency is only one of these conceptions.

What explains the common assumption that the Hand formula is necessarily, and not merely contingently, associated with economic efficiency analysis? Apart from the historical fact that many prominent law and economics scholars have championed the Hand formula, three explanations seem important.

First, judgments of negligence often depend on the actor having made an improper tradeoff among interests that weigh in opposite directions. Insofar as "economic analysis" at the most general level addresses any choice among competing values in circumstances of scarcity, it might seem that the Hand test necessarily expresses economic efficiency.

Second, any test of negligence, insofar as it expresses an ex ante judgment about the advantages and disadvantages of taking precaution against risk of future injury, is inevitably concerned with consequences in some sense. But then it is assumed that any test of negligence must be "consequentialist" in a deeper sense,

The Torts Revolution: The Revenge Of The Ordinary Observer, 26 Ga. L. Rev. 725, 734-737 (1992); Richard Wright, The Standard of Care in Negligence Law, in *Philosophical Foundations of Tort Law* 249 (David G. Owen, ed., 1995); Ernest Weinrib, *supra* note 18=, at 148-150. By contrast, Michael Green finds the linkage more contingent, acknowledging that the Hand formula "can also be understood noninstrumentally to reflect the Golden Rule." Michael Green, "Negligence = Economic Efficiency: Doubts >," 75 Tex. L. Rev. 1605, 1614 (1997). Still, Green's account frequently equates the Hand formula with economic efficiency. See *id.* at 1625, 1627.

in the sense of a moral or legal theory that judges the rightness or goodness of an act or practice solely by the aggregate consequences of that act or practice.

Third, the Hand formula is often understood to embody a reductionist approach to balancing, one in which the interests to be balanced are valued according to a simple common measure such as wealth or utility, so that the actor ideally would literally “calculate” the relevant costs and benefits.

Each of these assumptions is false, as I will explain. Moreover, to underscore the point, a later section (Section IV) will explicate several normative understandings of negligence other than economic efficiency that are consistent with a Hand balance.

A. Distinguishing tradeoffs from economic efficiency

It is true that “economics,” in its most general sense, is the study of tradeoffs of resources or interests in circumstances of scarcity. But the economic efficiency approach to negligence is much more specific: it means wealth-maximization, or at least a tractable version of utilitarian preference-satisfaction. A balancing approach to negligence that explicitly considers tradeoffs can indeed accommodate an economic efficiency approach. However, as we shall see, it can also accommodate broader social welfare and nonutilitarian approaches, though these other approaches will trade off different competing interests and values, or will trade them off differently.

To be sure, some nonconsequentialists endorse absolute norms, norms that do not permit balancing of competing interests or values.²⁵ But

²⁵ See, e.g., Heidi Hurd, *The Deontology of Negligence*, 76 B.U. L. Rev. 249 (1996); Heidi M. Hurd, *What in the World is Wrong?*, 5 J. Contemp. L. Issues 157 (1994); Alan Donagan, *The Theory of Morality* (1977).

nonconsequentialists need not be committed to absolutism,²⁶ and in the particular context of negligence, such absolutism is highly implausible.²⁷

B. Distinguishing ex ante balancing from consequentialism

The second misunderstanding is that any ex ante balance of the foreseeable advantages and disadvantages of taking a precaution expresses a form of consequentialism, and thus is inconsistent with a deontological, fairness, or corrective justice account of negligence.²⁸ This misunderstanding flows from two confusions.

The first confusion is that because ex ante, marginal analysis necessarily involves predicting possible future consequences (both positive and negative) of taking a precaution, such an analysis is “consequentialist” in a morally important sense, i.e., in the sense captured by the distinction in moral and political theories between consequentialist and deontological theories. That distinction contrasts two fundamentally different ways of understanding what duties people have—a consequentialist duty (often described as agent-neutral) to bring about the best possible consequences for human welfare, or a deontological duty (often described as agent-relative) of an agent not to violate another’s rights or not to commit a wrong.²⁹ Thus, a deontologist might categorically object to blaming or punishing an innocent person, even if blaming or punishing that person would lead to good

²⁶ See, e.g., F.M. Kamm, *Nonconsequentialism*, Ch. 11, *The Blackwell Guide to Ethical Theory* 206, 218-219 (Hugh LaFollette ed., 2000). See also Shelly Kagan, *Normative Ethics* 73 (1998) (“[D]eontologists need not actually be absolutists about their rules; and, at any rate, consequentialists are absolutists: they are absolutists with regard to the requirement to do the act with the best results.”).

²⁷ See Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 *B.U. L. Rev.* 273, 293-294 (1996).

²⁸ In the earlier draft of his paper, Stephen Gilles appeared to take this view. = Compare Gilles, at 5, 23; check = final draft.

I will employ the term “fairness” generically for any noneconomic and nonutilitarian account of tort law. Obviously, this category can encompass numerous different corrective justice, fairness, deontological, and distributive justice views.

²⁹ For some discussions, see Kagan, *supra* note 26=, at 70-78; Thomas Nagel, *The View from Nowhere* 164-166 (1986); Kamm, *supra* note 26=, at 205-207.

consequences, while a consequentialist would view the empirical consequences as decisive.³⁰ In the legal realm, consequentialist theories include utilitarianism and its economic variants, while deontological theories include corrective justice and fairness theories of tort law and retributivist theories of criminal law.

But *ex ante*, marginal analysis of the duty to take a precaution is not necessarily consequentialist in this fundamental sense. Just because a criterion of fault finds some consequences of a person's act to be relevant to whether he is at fault, it does not follow that the criterion is fundamentally consequentialist, in the sense that the rightness of the act depends only on a consideration of whether the act produces the best aggregate consequences.³¹ Consider murder, the intentional and unjustified killing of another human being. Both deontological and consequentialist theories can justify treating murder as a serious wrong (though for different reasons). Now consider attempted murder. If a person fires a gun with the intention of killing his victim, but misses, is he also seriously at fault? Clearly he is, on either a deontological theory (assessing which acts justly deserve the most retributive blame), or on a consequentialist theory (assessing which acts are

³⁰ See Kagan, *id.*; Kamm, *id.* at 215-218. Another classic example of the distinction is an agent's intentionally harming an innocent person in order to prevent someone else from intentionally harming several persons. Many deontologists would object to such an action, while a consequentialist might approve. However, some deontologists would countenance a rule that defines primary wrongs in deontological terms, but then permits a consequentialist policy of minimizing such wrongs. (For example, Moore supports "consequentialist retributivism," and thus would permit a policy of punishing one defendant less than he justly deserves if that defendant assists the prosecutor in assuring that other defendants obtain their just deserts. Michael Moore, *Justifying Retributivism*, 27 *Israel L. Rev.* 15 (1993)). In the text that follows, I discuss the analogous possibility of "truncating" a utilitarian approach between a utilitarian criterion of primary fault and a utilitarian reason for imposing liability.

³¹ Kamm provides a helpful general criterion:

Nonconsequentialism is a normative ethical theory which denies that the rightness or wrongness of our conduct is determined solely by the goodness or badness of the consequences of our acts or the rules to which those acts conform. It does not deny that consequences can be a factor in determining the rightness of an act. It does insist that even when the consequences of two acts or act-types are the same, one might be wrong and the other right.

Kamm, *supra* note 26, at 205.

sufficiently dangerous that they are especially worth deterring). But notice that, on either theory, our judgment that the attempted killer is seriously at fault depends in significant part on the potential consequences of his acts. He is seriously at fault not just because he has performed an unjustified act (firing the gun at the victim), but because he has done so with the intention of bringing about a very harmful future consequence, the death of the victim. Yet it hardly follows that the retributivist assessment of blame for attempted murder is just a disguised form of “consequentialism.”³²

The second confusion is a failure to appreciate that any justification for imposing negligence liability on an actor depends on two independent issues: (1) the reason for concluding that the actor is at fault, and (2) the reason for imposing liability on a faulty actor. A fully consequentialist theory such as utilitarianism provides consequentialist reasons at both levels; what we might call a “truncated” consequentialist theory provides a consequentialist reason at only one.³³ This confusion is potentially troublesome. For even if the actor’s fault at level (1) is determined by a genuinely consequentialist analysis (and not just by a consequentialist analysis in the specious sense just discussed, of an ex ante evaluation of some of the expected advantages and disadvantages of taking the

³² See Simons, *Deontology*, supra note 27, at 285; Kenneth W. Simons, *Negligence*, 16 *Soc. Phil. & Pol.* 52, 76 (1999).

Another way to see this point is to note that for almost any moral theory, some types of possible consequences of an act matter. On one kind of “objective” account, whether a particular consequence actually occurs affects the rightness of the act. On a “subjective” account, whether the act is right depends on what the actor actually believes, or on what she should believe. Both consequentialists and deontologists must decide which account to employ; the fundamental question is whether morality is concerned with guiding decision-making (the “subjective” account) or with providing a standard for evaluating the rightness or wrongness of acts. See Kagan, supra note 26, at 66; see also *id.* at 82-84.

Insofar as the fault criterion of negligence is meant to guide decision-making by identifying when an agent should have taken a precaution against possible future harm, the “subjective” account is more suitable.

³³ Similarly, a fully nonconsequentialist theory provides a nonconsequentialist reason at both levels.

action), such a consequentialist criterion of fault might not support a full-fledged consequentialist justification of tort liability.

Consider a truncated utilitarian approach that is utilitarian at level (1) but not at level (2). At level (1), the approach understands fault as inefficient conduct, i.e. conduct that fails to maximize utility. However, at level (2), suppose the reason for imposing liability on such an actor is not utilitarian or instrumental; there is no assumption that faulty actors should compensate their victims in order to minimize the incidence of such faulty behavior in the future. Rather, liability is imposed for some other reason—perhaps because it is, in some sense, unfair for an actor to act suboptimally or inefficiently at the expense of another, or because an innocent victim has a corrective justice right not to suffer harm at the hands of an actor who “should” (as a matter of his personal utilitarian duty) have acted otherwise.³⁴ We might call this the “fault as inefficiency” approach.

Insofar as courts sometimes employ the Hand test as a utilitarian criterion, I believe that they often are employing only a truncated utilitarian approach of the sort I have just described. My reason for so believing is simple: quite often, courts that formulate and apply negligence doctrine are unaware of, do not advert to, or are uninterested in the deterrent effects of negligence liability.³⁵ Thus, such fault standards as the “Golden Rule,” “equal” or “impartial” consideration of the interests of others,³⁶ or the “single-owner heuristic”³⁷ could express a utilitarian criterion of

³⁴ See Simons, *Deontology*, supra note 27, at 276, 281-282; Simons, *Negligence*, supra note 32, at 84-85.

³⁵ See Simons, *Deontology*, id. at 273-282. One example is contributory negligence: often (and especially with respect to personal injury) it is doubtful that the liability rules about whether a person’s own fault will reduce his recovery will affect his primary behavior, yet courts continue to apply a reasonable person or balancing test in determining contributory negligence. The Draft Restatement agrees that the same balancing test should apply both to contributory negligence and to negligence towards others. §4, Comment b.

³⁶ See Restatement (Second) of Torts §283, comment e (Negligence balancing test requires that the actor “give an impartial consideration to the harm likely to be done the interests of the others as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor ... to prefer his own interests ...”).

³⁷ See Stephen Gilles, *The Invisible Hand Formula*, 80 Va. L. Rev. 1015, 1035 (1994) (under the “single-owner heuristic,” “the inquiry reduces to whether the average person would take the precaution if he or she bore both the costs and benefits in full.”).

fault. But if the standards are deployed in order to express a retrospective judgment about the actor's fault, not in order to deter actors from engaging in similar faulty action in the future, then the justification is not fully consequentialist.

But one might also truncate the utilitarian approach in the converse way—if, at level (2), one imposes liability in order to deter and minimize faulty conduct, while, at level (1), one defines personal fault in noneconomic, nonutilitarian terms.³⁸ This approach is instrumentalist, for it seeks to provide actors with financial incentives to act differently; but the ultimate value that it seeks to promote is not the maximization of aggregate utility. Thus, if fault were defined as any nonconsensual imposition of risk on another, or as any violation of certain specified rights of a victim, then liability might be designed primarily to minimize the incidence of such fault.³⁹ As comment j of the Draft Restatement explains, the goal of providing appropriate safety incentives includes “broadly humanitarian goals” as well as overall social welfare.⁴⁰ (In the next section, I will explore some plausible

³⁸ See Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 *Tex. L. Rev.* 1801, 1828-1833 (1997); Simons, *Negligence*, *supra* note 32=, at 85.

³⁹ To be sure, even on this view, the economic and noneconomic costs of the liability system itself could be relevant to whether the law should recognize a duty to compensate. (Consider the fraud and proof problems that would arise if we recognized a cause of action for the negligent creation of emotional harms.) But viewing such additional costs as relevant does not perforce transform an instrumentalist approach that is concerned with minimizing injustice or minimizing rights-violations into a thoroughly utilitarian approach.

⁴⁰ See §4, Comment j, at 52. See also Schwartz, *Mixed Theories*, *supra* note 38=, at 1831 (“[I]f accident prevention is an economic goal, it is also a generous, warm-hearted, compassionate, and humane goal. As such, it is a goal that can be and is in fact supported by a broad range of scholars.”).

However, a nonutilitarian criterion of fault combined with an instrumental, consequentialist rationale for imposing liability for fault is problematic to some nonconsequentialists. This admixture permits what Nozick called a “utilitarianism of rights.” Robert Nozick, *Anarchy, State and Utopia* 28 (1974). Just as a nonconsequentialist might object to an agent torturing one innocent person even if this is necessary in order to prevent ten individuals from being tortured, she might object to a similar consequentialist decision by an agent to minimize the aggregate amount of negligence by committing a negligent act herself. For example, suppose A and B are intoxicated, and B informs A that

interpretations of the Draft's balancing test of negligence that do not define fault in utilitarian terms.)

Finally, although it might seem that a fully consequentialist approach to the law of torts must employ both a utilitarian conception of fault at level (1) and an instrumental conception of the role of liability rules at level (2), this need not be the case. For it sometimes might be more efficient or utility-maximizing not to employ a fault criterion at all, i.e. to reject a negligence rule, in favor of either strict or no liability. Consider the many situations in which victims have almost no power to minimize the harm; in these circumstances, a utilitarian analysis would often support strict liability. However, courts impose strict liability much more rarely than this analysis would endorse.⁴¹ This judicial preference for fault over strict liability is yet another indication that a thoroughly consequentialist approach cannot fully explain the pervasive role of fault in American tort law.

The upshot of this discussion is that a negligence balancing test is in principle consistent with a variety of different normative approaches in tort law, from partial utilitarian views (at level (1) but not (2), or level (2) but not (1)) to fully nonutilitarian views. A thoroughly utilitarian view, such as the economic perspective, is only one such normative approach, and indeed it is sometimes inconsistent with the fault-based view of negligence reflected in actual tort doctrine.⁴²

Moreover, the consistency of different normative approaches with a balancing test of negligence is evident in the case law. For example, some tort doctrines can best be explained by a noninstrumental perspective. Contributory

he plans to drive them to B's home. And suppose that A reasonably believes that he can prevent B's lengthy and dangerous drive home only by immediately driving them to A's home, which is much closer. Although A's driving thereby reduces the expected risk, someone injured by A's drunken driving might nonetheless have a valid complaint that A has acted wrongly.

⁴¹ See Simons, Deontology, *supra* note 27, at 278.

⁴² Stephen Gilles' contribution to this volume clearly makes the point that the earlier Restatements endorsed balancing tests of negligence without committing themselves to a narrow economic interpretation. See Gilles, *supra* note 28, at =; see also Heidi Li Feldman, Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law, 74 Chi-Kent L. Rev. 1431, 1441-1443 (2000).

negligence is one such example.⁴³ Another is the emergency doctrine: if we were only concerned about optimal incentives for future behavior, it might make sense to impose no liability in cases of genuine emergency, for it's doubtful that when people are faced with a sudden emergency, they are responsive to incentives from tort liability rules. Nevertheless, as a matter of fairness, it is proper to apply a standard of care in an emergency that is less rigorous than the usual standard, but that is not completely toothless.⁴⁴

However, some who reject utilitarian approaches to moral and legal issues would still object to a negligence standard that is formulated as a Hand balance, even if the standard is only understood as partially utilitarian, at level (1)—i.e., even if a legal rule of liability for negligence is viewed as expressing only a utilitarian criterion of fault. So it is worth considering in more detail whether the Hand formula must be so viewed.

C. Distinguishing balancing from reductionist cost-benefit calculation

The algebraic formulation of the Hand test can easily be misunderstood. When we see a formula, a natural inclination is to fill in the variables with specific quantities and solve the formula. Moreover, the Hand formula is sometimes described as requiring a “calculus of risk.”⁴⁵ Such language, if taken literally, implies that the responsible actor, or the factfinder evaluating his conduct, should have a calculator at hand, should insert the appropriate values, and then should wait to see whether the calculation (“Is $B < (P \times L)$?”) shows that the actor was negligent.⁴⁶

⁴³ See note 35= supra.

⁴⁴ The Draft Restatement appropriately adopts a more forgiving standard for actors in emergencies. See §7, pp. 94-102.

⁴⁵ See, e.g., Richard Epstein, *Cases and Materials on Torts* 179 (7th ed. 2000) (Section C of Chapter 3, The Negligence Issue, is entitled “Calculus of Risk”); G. Christie, J. Meeks, E. Pryor, & J. Sanders, *Cases and Materials on the Law of Torts* (3rd ed. 1997) (Section C.3 of Chapter 3, Negligence, is also entitled “Calculus of Risk”).

⁴⁶ Cf. Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, *Regulation* 33, 40 (Jan./Feb. 1981):

In cost-benefit analysis, equivalencies are established in advance as one of the raw materials for the calculation. One determines costs and benefits, one

But, of course, Hand himself believed that quantification of the formula would rarely be possible,⁴⁷ and the Draft commentary concurs.⁴⁸ Still, there are aspects of the Draft's discussion that are insufficiently reassuring in this respect. The Draft suggests that the main problem with applying a Hand balance in an "operational" and predictable way is evidentiary: as a matter of proof, we often don't have the relevant information.⁴⁹

What this focus on problems of proof ignores, as Gilles points out in his illuminating paper, is the evaluative dimension in negligence.⁵⁰ More evidence is useless unless we know what kind of evidence is relevant, and how. And value judgments are necessary in order to determine how the legal decisionmaker should select among the many possible meanings of the "burdens" of a precaution, or the

determines equivalencies (to be able to put various costs and benefits into a common measure), and then one sets to toting things up—waiting, as it were, with bated breath for the results of the calculation to come out. The outcome is determined by arithmetic; if the outcome is a close call or if one is not good at long division, one does not know how it will turn out until the calculation is finished. [By contrast,] [i]n the kind of deliberative judgment that is performed without a common measure, no establishment of equivalencies occurs in advance.

See also note 111= infra (noting Gilles' point that cost-benefit analysis is often a matter of reflection on the relevant values).

⁴⁷ As the Reporter's Note indicates, Hand himself explained that the value of his approach was "to center attention upon which one of the factors may be determinative in any given situation." *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949), discussed in Reporter's Note, Comment g, p. 66.

⁴⁸ §4, Comment g.

⁴⁹ The Draft concludes that the balancing approach "is not one that can be rendered operational in a way that generates certain results. Rather, the approach identifies important variables for the jury to take into account...; the jury's responsibility is to render an informed judgment." Comment g, at 50.

Similarly, in the judge/jury section, at 74, the Draft suggests that if the facts bearing on the Hand formula were fully available, "there might frequently be an answer to the negligence question that all reasonable minds must accept. But because the information presented at trial is commonly incomplete, reaching a decision on the negligence issue requires an exercise of judgment by the jury." §5, comment b, at 74.

See Gilles, *supra* note 28=, at =, noting =. =Gilles is correct that "proof" discussion at 49 improperly suggests that the balance is only over facts, not over values.

⁵⁰ Gilles, *supra* note 28=, at =.

“benefits” of taking a precaution (including the “reasonably foreseeable” probability of harmful outcomes, and the “severity” of the possible outcomes).

To be sure, by indicating that some of the interests being balanced are “difficult if not impossible to quantify,”⁵¹ and by referring to the need for “informed judgment” by the jury,⁵² the Draft does hint at this evaluative dimension.⁵³ But it fails to acknowledge the need for value judgments explicitly, except in a statement in the Reporter’s Notes⁵⁴ and a passing comment about adolescent risk-taking.⁵⁵ And even those statements suggest only that certain types of burdens (the lost excitement of a motorist racing a train, or of adolescents taking risks) should not be

⁵¹ Comment g, at 49. Examples noted in the Draft include the severity of a personal injury, or certain burdens of precaution (such as the failure to apprehend a suspect if police decline to conduct a high-speed chase, or the invasion of a blood donor’s privacy if a blood bank inquires into the sexual orientation of a potential donor). *Id.* at 49-50.

⁵² Comment g, at 50. See also §5, comment c, explaining that the jury (rather than the judge) plays a large role in exercising its judgment about negligence “partly because several minds are better than one, and also because of the desirability of taking advantage of the insight of the community, as embodied in the jury, rather than relying on the professional knowledge of the jury.” And comment d states that “[t]ort law has ... accepted an ethics of particularism, ... which requires that actual moral judgments be based on the circumstances of each individual situation.” *Id.* at 75. However, neither statement is clarified, so the nature of the (value) judgment remains somewhat obscure.

⁵³ The Draft also suggests that the burdens of taking a precaution “can take a wide variety of forms,” as noted above. *Supra* note 9=.

⁵⁴ The Reporter’s Notes state that in a “limited” number of cases, negligence law declines to credit burdens, e.g. the lost excitement of a motorist who chooses to race a train towards a highway crossing. Draft, p. 62, Notes to comment c, §4. The Reporter’s Notes, unlike the Restatement provisions and accompanying commentary, are not officially enacted by the ALI and thus have lesser weight. See <http://www.ali-aba.org/ali/rest.htm>. (indicating that the Reporter’s Notes are not themselves part of the Restatement, because they represent the views of the individual Reporter rather than those of the American Law Institute).

⁵⁵ “[I]t appears that many adolescents display a preference for risk-taking, deriving special pleasure from behaving in certain risky ways; these are pleasures that negligence law disregards.” Draft, p. 109, §8, comment g.

legally recognized.⁵⁶ However, the appropriate question is not simply whether certain burdens and benefits will be credited at all. (Only rarely will the law give no social recognition to interests that individuals subjectively view as burdens or benefits.) Rather, we must also consider how much the burdens and benefits that do count should be valued.⁵⁷

Thus, although some statements in the Draft might imply that conducting a straightforward financial cost-benefit analysis is the only way, or at least the ideal way, to determine negligence, in the end this is not a defensible position.

IV. Negligence: the evaluative dimension

But what is the most appropriate evaluative approach, and the most appropriate way to express the need for evaluation, in a formal negligence standard that requires a balance of the Hand factors? One option, and the method employed in prior Restatements, is explicitly to require a balance of “legally recognized” or “social” interests.⁵⁸ By itself, this doesn’t say very much more than

⁵⁶ In this respect, the statements are consistent with the Restatement Third of Products Liability, which instructs that the trier of fact should ignore certain costs of improving a product. “[I]t is not a factor under subsection (b) [design defect] that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry.” §2, comment f.

⁵⁷ See Gilles, *supra* note 28, at =. Consider the following general characterization in the Reporter’s Note:

In general, negligence law takes into account whatever burdens of precaution are actually experienced by the actor and others. However, in a limited number of cases, there are burdens that negligence law declines to credit.

Draft, p. 62, Notes to comment c, §4. This characterization is at least misleading, for it implies that determining what burdens are “actually experienced” by the actors is a value-free inquiry.

⁵⁸ See Restatement (Second) of Torts, §291 (in general terms, an “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.”); §292 (referring to “the social value which the law attaches to the interest” which the actor seeks to promote); §293 (referring to “the social value which the law attaches to the interests which are imperiled” by the actor). For

the Hand formula, or the Draft's version of the Formula. And the "legally recognized" formulation, without more, is circular: What interests should the law recognize, and how much should it value those interests? Still, as I will suggest, the generality of the term "social" might be a virtue, rather than a vice, in this context.

Let us first examine four different evaluative standards that are more specific and determinate, and that have some support in case law and commentary.⁵⁹ I will then consider an illustration discussed in the Draft Restatement and identify the different ways that it would be analyzed under the four standards. Finally, I will explain why "social value" is probably the best general language to use in a Restatement, insofar as it accommodates all four of the different evaluative standards. (For reasons of space, the focus will be on different ways of evaluating the burden of taking a precaution.⁶⁰)

further discussion, see Gilles, *supra* note 28=, at =; Green, *supra* note 24=, at 1624.

"Social utility" of the product has also been considered relevant in design defect litigation. See Green, at 1634.

When Restatements or judicial opinions refer to "social utility" rather than "social value," one might assume that the writer is explicitly adopting a utilitarian approach. That is, it might seem that "social utility" must mean aggregate utility of all persons (rather than just the personal utility of the defendant and the victim). But I believe that the term is not necessarily employed in this sense. Rather, it often expresses a social, rather than personal, valuation of the importance of the interests at stake, whether those interests are of the individual defendant and victim alone or of other persons as well, and whether or not the underlying evaluative approach is actually utilitarian. For example, comment d to Restatement (Second) of Torts §291 refers to the "social value of the respective interests concerned." (Within utilitarian theory, this reflects the distinction between objective and subjective utilitarianism. See Simons, *Negligence*, *supra* note 32=, at 73; note 66=, *infra*.)

⁵⁹ There are many different ways to carve up the normative world. I choose these four standards because they are well-represented in both legal doctrine and academic commentary, and because it is easy to see the relationship between them.

⁶⁰ Of course, an evaluative judgment is also necessary with respect to the two other Hand factors—the probability of a harm, and the severity of the harm if it occurs.

With respect to probability, the issue is usually framed as whether the risk was "reasonably foreseeable." This inquiry itself is sometimes usefully evaluated according to a balancing test of the burdens and benefits of efforts to acquire more information. See text

The first possible standard is the most closely associated with economic analysis: the willingness to pay measure. Many economic versions of the Hand formula interpret it as requiring the actor to take cost-effective precautions, with the relevant costs and benefits measured by willingness to pay (taking as given the existing distribution of wealth). Judge Richard Posner has endorsed this interpretation,⁶¹ in significant part because this measure is much more tractable than the alternatives.⁶² But this is a context in which it may be better to be vaguely right than precisely wrong.⁶³ Even Posner's wealth-maximization interpretation is not easy to quantify, as he now admits.⁶⁴ More importantly, that approach is hardly value-free; it instantiates a controversial normative criterion about how to value the respective interests. As Posner, to his credit, concedes, wealth maximization "implies that a person should feel free to drive faster in a poor than in a wealthy

at note 11= supra. Moreover, a negligence standard could also consider more qualitative dimensions of attitudes towards risk, such as whether the risk is especially dreaded, or whether the victim obtained some benefit from the risky activity. See Simons, Negligence, supra note 32=, at 82, 86.

With respect to severity, the issue is how property damage, personal injuries of various sorts, and death are to be evaluated. These are obviously extremely difficult and controversial judgments, involving consideration of physical, emotional, and financial "costs." (For a brief discussion of the problem of valuing human life in the negligence context, see text at notes 85-86= infra.) It is also important to remember that our evaluation of the severity of these harms is relevant to an ex ante judgment of fault. Whether the same criteria should also be applied in rendering an ex post judgment of appropriate compensation for negligently-caused harm is an open question, which I cannot examine here.

⁶¹ Richard A. Posner, *Economic Analysis of Law* §1.2 (5th ed. 1998); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *Philosophical Foundations of Tort Law* 99-111 (D. Owen ed. 1995).

⁶² Posner, *Economic Analysis*, id. at 13; Posner, *Wealth-Maximization*, id. at 106-108.

⁶³ See John Maynard Keynes =: "I would rather be vaguely right, than precisely wrong."

⁶⁴ The Reporter's Note to §4, comment g, page 67, mentions an opinion authored by Judge Posner and quotes the following language: "[F]or many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand formula." *McCarty v. Pheasant Run, Inc.*, 826 F. 2d 1554, 1557 (7th Cir. 1987).

neighborhood because expected accident costs are on average lower in the former.”⁶⁵

A second possible standard is utilitarian preference-satisfaction. On this view, fault is determined by the actor’s failure to maximize utility, with utility measured by the satisfaction of the preferences of all affected persons. (On this view, Posner’s example might no longer be troublesome, insofar as the poor are likely to have the same preferences about avoiding injury as the wealthy; under the first standard, by contrast, the poor lack the resources to place much “value” on that preference.)

A third possible standard, also utilitarian, judges fault according to whether an action maximizes social welfare, rather than maximizing aggregate preference-satisfaction. This standard employs a much broader criterion of value than the second standard. On this view, all components of social welfare (including such values as equality and distributive justice) can be included.⁶⁶ This last standard permits a more pluralistic understanding of the values that make up human welfare, but it might still deserve the name “utilitarian” (or at least consequentialist)

⁶⁵ Posner, *Wealth-Maximization*, supra note 61, at 110. As Posner explains, “the magnitude of the loss if an accident occurs [is] a function in part of the income of the victim, making the optimal expenditure of time and other resources on avoiding accidents in the poor neighborhood also lower” (parentheses omitted).

⁶⁶ See, e.g., David Brink, *Moral Realism and the Foundations of Ethics*, ch. 8 (1989) (defending an “objective utilitarian” approach that views rights, distributive justice, and pursuit of personal projects, as well as other components of human welfare, as intrinsically good things to be maximized); Kagan, supra note 26, at §§2.4, 2.6; Sen, supra note 8, at 936, 943 (a broadly consequentialist approach can consider as costs the violations of rights and limitations on the intrinsic value of freedom).

The forthcoming book by Kaplow and Shavell seems to straddle the second and third categories. See Louis Kaplow & Steven Shavell, *Principles of Fairness versus Human Welfare: On the Evaluation of Legal Policy*, Discussion Paper No. 277 (3/2000), http://www.law.harvard.edu/programs/olin_center/. Consistent with the third category, they defend an account of social welfare that considers not just aggregate welfare but also how welfare is distributed. *Id.* §II.A.3. However, they also emphasize the role of individual preference in determining which elements of welfare should count. *Id.* at §§II.A.1, VIII.B. The latter emphasis is more consistent with the second category.

insofar as the ultimate end is to maximize the aggregate total of human welfare (so understood).

A fourth standard (or, more accurately, group of standards) is not exclusively utilitarian. On this fourth view, the individual or legal decisionmaker⁶⁷ properly considers morally relevant features of the situation other than aggregate welfare. Those features could include intentions, motives, rights, consent, social role or responsibility, justifiable expectations or reliance of others, and reciprocity and distribution of risk.⁶⁸ But this view also allows for the possibility that the

⁶⁷ Whether the negligence standard is better understood as an ideal decision-making procedure for the primary actor, or instead an evaluative standard for the judge or jury, is discussed infra at note 110=.

⁶⁸ For further discussion, see Simons, Deontology, supra note 27=, at 277, 284; Simons, Negligence, supra note 32=, at 82-84.

If the standard is to remain a standard of fault, however, these features are relevant must help explain what was deficient about the actor's conduct. But such features have a very different meaning and justification if they are used to identify a category of cases appropriate for strict liability (in which the actor should pay for resulting harm, even if it cannot be said that he should have acted otherwise).

Thus, consider two different contexts in which the "expectations" factor has been employed in tort doctrine. If the reasonable expectations of tenants are relevant to what precautions it is fair to ask a landlord to take against injury, e.g. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F. 2d 477 (D.C. Cir. 1970), then that factor is indeed relevant to fault. But if the question is whether a product has a manufacturing flaw that causes the product to malfunction in a way that disappoints consumer expectations, the factor is relevant to strict liability. See Restatement (Third) of Products Liability, §2, comment c. (Similarly, many who advocate a "consumer expectations" test of product design defect in lieu of the "risk utility" test that the Restatement (Third) of Product Liability adopted support that alternative test precisely because it imposes strict liability.)

For a use of the consumer expectations test that appears to equivocate between the two categories, see Restatement (Third) of Products §7, providing that a harm-causing ingredient in a food product is properly considered a "manufacturing defect" (a category normally understood as imposing strict liability) "if a reasonable consumer would not expect the product to contain that ingredient." At the same time, however, comment b states: "A consumer expectation test in this context relies upon culturally defined, widely shared standards that food products *ought to meet*" (emphasis added), language that suggests a fault-based rationale.

individual deciding whether to take a precaution should ignore factors that might be relevant on a utilitarian account, including whether the actor, by omission, failed to benefit a stranger, and whether the preferences that would be satisfied are immoral (for example, racist or malicious preferences) or simply unworthy of social recognition.⁶⁹ For example, on some versions of this fourth criterion, we should be less willing to judge an actor negligent if his motive in taking a risk was altruistic (e.g., in attempting to save another from danger), if the potential victims fully consented to the risk,⁷⁰ or if the actor complied with a custom on which others justifiably rely. And we might be more willing to judge an actor negligent, *ceteris paribus*, if she intends a particular risk of harm, and does not merely foresee that quantity of risk as a probable side-effect of an activity.⁷¹ (At the extreme, an actor's intentional creation of risk to others for her own private pleasure might be considered categorically unreasonable.⁷²)

⁶⁹ Consider the benevolent but paternalistic desire of a doctor to countermand the patient's wishes in order to improve the patient's health. The modern American law of informed consent gives such preferences no weight.

⁷⁰ For a discussion of the complexity of assumption of risk, see Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. Rev. 213 (1987). The Restatement (Third) of Apportionment abolishes assumption of risk as a distinct doctrine, but does acknowledge that the scope of a duty sometimes depends on whether the participants in an activity are aware of and agree to accept its inherent risks. See §2, Comments i, j; §3, Comment c.

⁷¹ "Contrast Alice driving near a pedestrian for the thrill of endangering him, with Betty driving just as close to a pedestrian as an unavoidable incident of bringing her sick child to the hospital." Simons, *Negligence*, *supra* note 32=, at 62. See also *id.* at 82-83.

⁷² Often, such an actor would be reckless, and not merely negligent, under the definition in §2, because "the precautions that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the actor's failure to adopt the precaution a demonstration of the actor's indifference to the risk." §2(b). Notably, however, this conclusion depends on a value judgment—that the loss of the private pleasure one could obtain from intentionally creating a risk is not a legally significant "burden."

These four standards clearly will differ in how they resolve certain issues in tort doctrine.⁷³ Indeed, much of tort doctrine—including its very limited duties of affirmative action, and the scope of different special relationships—reflects an implicit choice of one of these standards (often, the fourth), or a variant of one of them. What is somewhat less clear is whether they will resolve differently those issues that are subject simply to a generalized “Hand balance.”

But even within the more limited context of a generalized Hand test, the choice of standards can make a difference. Consider a straightforward example from the Draft, Illustration 1 from §5:

Susan is the mother of Michael, a 23-month-old child. Susan and Michael are visiting at a vacation home owned by their friend Jon. Susan and Michael are in the kitchen; the room is lit by a kerosene lamp. If Susan leaves the kitchen for an hour in order to read a book, and before she returns Michael knocks over the lantern, starting a fire that damages Jon’s cabin, a court should find Susan negligent as a matter of law. If Michael knocks the lantern over during a 10-second period in which Susan has turned her back in order to take a boiling pot off the stove, the court should find as a matter of law that Susan’s turning away is not negligent. If the lantern is knocked over after Susan, wanting to make a quick phone call, leaves the room for one minute, whether Susan’s departure is negligent is a question for the jury to decide.⁷⁴

The example helpfully illustrates a number of points—the relevance of the Hand factors; the importance of considering the marginal benefits and burdens of different possible precautions⁷⁵; and how the determination of negligence is sometimes a question of degree.⁷⁶

⁷³ For example, the nonutilitarian standard best explains tort law’s recognition of only a limited affirmative duty to act, for most deontological theories accept some version of the act/omission distinction. See Simons, *Deontology*, supra note 27, at 277. That standard might also best justify the informed consent doctrine, which gives enormous weight to a patient’s choice about medical treatment, even when the medical community would consider that choice unwise. *Id.* at 284.

⁷⁴ Draft, p. 74.

⁷⁵ These might include:

(1) Not leaving Michael alone more than a certain period of time, for any reason;

Consider some features of how the four different standards would evaluate this example.⁷⁷ Under the first two standards, wealth-maximization and aggregate preference satisfaction, the “burden” of not making a telephone call depends on Susan’s private valuation of that burden, which can in turn depend on the purpose of the call. She might be obsessed with her financial future, and therefore feel a compelling need to telephone her broker to take advantage of a rising stock market. Or she might be calling the doctor to ask about a troubling symptom of Michael. If she happens to value the first call more highly, then the burden of not making that call is (*ceteris paribus*) greater, and counts more strongly against a negligence finding. (Needless to say, it is doubtful that any jury or judge would evaluate her interests in such a subjective way.)

Under the third standard, under which “social welfare” in a more objective and broader sense is to be maximized, we might well conclude that immediate health needs have an urgency and importance that deserve greater legal recognition in this context than prospective financial profits. However, this judgment is one of degree: a phone call to accept a new job might be more socially important than a call just to confirm that Michael’s strep test is negative. Moreover,

(2) Ensuring that Michael is as safe as possible, consistent with his enjoying some freedom of movement (for example, strapping him into a child seat, if one is available, or borrowing or renting one, especially if the house is in other respects not safe for children);

(3) Moving the lamp to a safer location.

⁷⁶ I am not entirely confident, however, that a 10-second period of ignoring a 23-month old is, as a matter of law, not negligent. A lot can happen in 10 seconds, especially if this child is known to be rambunctious. The illustration would be more convincing if the time period it identified as conclusively non-negligent were five seconds.

⁷⁷ For reasons of space, I emphasize only certain important features. One could certainly develop more complex accounts that attempt to reconcile each standard with common sense intuitions about fault. For example, a wealth-maximization approach might well emphasize the institutional costs of resting negligence judgments on unreliable evidence about the actor’s private preferences. But it is still worth noting how significantly the standards can differ when we put those costs to one side.

Moreover, the ability of a standard to give a more straightforward explanation that accords with common sense judgments does, in my view, count in favor of that standard. And I believe that common sense judgments often support the more pluralistic fourth standard.

the third standard can accommodate a wider range of values to be maximized, including equality or distributive justice.⁷⁸

Now consider the fourth standard. Analysis of Susan's responsibility to avoid an unreasonable danger of fire damage should consider her role as a parent. She has a duty to look out for the welfare of her child, encompassing both a concern for her child's physical safety and a concern to permit the child a certain amount of freedom and independence. To be sure, the third standard might conceptualize these concerns as competing welfare interests, and might thus require Susan to maximize their aggregate value (as well as the value of her own welfare and the welfare of her friend Jon). But this is only one possible perspective. We might instead view a parent's moral position as departing from a maximizing model in at least two ways: (1) as requiring the parent to sacrifice his or her own interests, to a considerable extent, to promote the interests of a child, even if the former "cost" might be viewed as greater than the latter "benefit"; and (2) as entailing a permission or prerogative, within a significant range, to act in what she believes to be her child's best interest, even if some acts within that range are significantly more dangerous to the child or to third parties than are others.⁷⁹ In light of (1), the fact that Susan is tired of caring for Michael might be

⁷⁸ Here is a very small-scale example of "distributive justice": it might be reasonable for Susan to leave Michael alone for a while so that she can spend some time alone with her other, older child.

⁷⁹ For example, within a significant range, a parent might properly choose to emphasize the child's independence and self-knowledge, or instead to be highly protective of the child's physical safety. Some parents would not leave Michael alone in a room for more than a couple of seconds; others would encourage his independent explorations even at some risk to his or others' physical safety.

One reason for recognizing an age-sensitive standard of care in negligence law is the social value of encouraging learning and experimentation by the young. Interestingly, that value is not mentioned in the Draft's account of this issue. See §8 & accompanying comments. Notice that this is an instance in which social value can differ from subjective value, insofar as some children do not subjectively appreciate the value of taking risks that provide long-term benefits. (I count as evidence my own reluctance as a child to learn to ride a bike, an attitude that my children inherited.)

On the role of permissions or prerogatives in deontological morality, see Samuel Scheffler, *The Rejection of Consequentialism* (1982); Kamm, *supra* note 26, at 207-208.

entitled to little weight, for she has indeed assumed a parental responsibility that ordinarily precludes that type of tradeoff of welfare. In light of (2), Susan might decide to warn Michael to behave but then trust him to be alone, in order to develop his independence. Such a choice might be reasonable, especially if he has acted reliably in the past, even though the choice does increase the risks that Michael will pose to himself and to others.

Other examples in the Draft would also be analyzed differently, depending on the evaluative standard. For example, “in a case in which a blood bank is allegedly negligent for failing to inquire into the sexual orientation of potential donors, the burden involves the interference with those donors’ privacy.”⁸⁰ The Draft says that this is a situation in which “the burden of precaution ... is a value that resists quantification.”⁸¹ True enough, but one could say more: privacy is an interest which will be understood very differently, depending on the evaluative standard. Under the first standard, a relevant question is how much the donor would pay to be free of such an inquiry. Depending on the donor’s resources and need for money, the amount might be negligible. Under the third standard, privacy might be viewed as an objective value, apart from how readily some donors would waive it. And under the fourth standard, instead of developing a policy that attempts to maximize the differential between the health benefits of invasive questioning and the privacy costs of such questioning, perhaps the hospital should simply forbid any questioning about sexual orientation or sexual practices, regardless of the health benefits of such questioning, based on the qualitative nature of the privacy interest.⁸²

⁸⁰ Draft, §4, comment g, at p. 50. The Reporter’s Notes (p. 66) identify *Doe v. American National Red Cross*, 866 F. Supp. 242 (D. Md. 1994), as such a case.

⁸¹ *Id.* at p. 50.

⁸² This approach still requires evaluative distinctions among interests that people wish to keep private. In order to determine the degree of precaution that treating hospital employees should employ, a hospital might be permitted to question an emergency room patient about drug use but not about sexual orientation, if privacy with respect to sexual orientation is properly valued much more highly.

This brief analysis is only suggestive.⁸³ Proponents of any of the standards might well attempt to reduce or translate prescriptions suggested by the other standards into the terms employed in the standard that they prefer. In this short space, I cannot prove, though I do believe, that something is often lost in such a translation. I tried to demonstrate only that each of the four standards offers a plausible and distinct evaluative account of the interests that a negligence test balances.⁸⁴

One final problem should be noted. The evaluative dimension of negligence extends to the valuation of personal injury and death. If too low a value is placed upon human life, the negligence standard will be too forgiving. (The popular outrage at the cost-benefit balance in the infamous Ford Pinto case can be partly explained on this basis.⁸⁵) If too high a value is placed upon human life, the negligence standard will be too stringent. But juries and judges are ill-equipped to

⁸³ Other ways in which the fourth standard might have unique application to the illustration can quickly be noted. First, the duties of a parent toward Michael might be viewed differently than the duties of a babysitter hired to care for him. For example, the parent should have greater discretion to leave him alone in order to encourage his long-term self-sufficiency. Second, if the owner of the house has children, and otherwise appears to be careful of their safety, perhaps Susan can justifiably assume that the kerosene lamp is in a reasonably safe location. Moreover, in an otherwise close case, we might credit Susan's concern that quizzing her friend about safety precautions would demonstrate a lack of trust. For a comparable example, see Draft, §4, comment d, p. 45 (if an actor takes the precaution of not lending a car to a friend known to have a deficient driving record, the "burden" of this precaution is the inability to satisfy a friend's need).

⁸⁴ This example involves the special role of a parent. Arguably, there might be less difference between the four evaluative standards when the injurer and victim are strangers without such a special relationship. Still, even within the category of "stranger," there are important distinctions. The relationship of a driver to a pedestrian might differ from the relationship of a bicyclist to a pedestrian, in terms of social expectations, reliance, and other factors relevant to the evaluative inquiry.

⁸⁵ In the cost-benefit study that was widely reported in connection with the Ford Pinto litigation, the value assigned to a human life was only \$200,000. But there are reasons for caution before assuming that Ford deserves blame for its design decision or for its decision not to recall Ford Pintos for a retrofit. See generally Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 *Rutgers L. Rev.* 1013 (1991).

make these controversial evaluations. And the process of making these judgments on a case-by-case basis threatens to cause similar fact patterns to be treated quite inconsistently.

In the long run, it might be preferable if legislatures were to specify a presumptive value of human life for purposes of the negligence balance, allowing or encouraging variations in this valuation in particular contexts.⁸⁶ However, it is less clear that a court would feel competent to adopt such a presumptive figure. For now, it seems, courts will need to muddle through this issue as best they can.

V. An inclusive statement of the Hand standard

The upshot? Given the diversity of plausible evaluative stances (especially the diversity of plausible versions of the third and fourth stances), the language of a Restatement balancing test should be accommodating and general. At the same time, it is important that the Restatement both recognize and approve the significance of the evaluative function itself.

Accordingly, the Hand formula should employ the language of “socially recognized advantages and disadvantages,” as a signal that social judgments about policy and principle are critical. And the commentary should articulate the need for the decisionmaker to make value judgments in appropriate cases. At the same time, it is impossible for one simple formula to express the variety of

⁸⁶ For discussion of varying assessments of the value of human life in different regulatory contexts, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1 (1995). See also Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 *J. Legal Stud.* 1037, 1044-45 (2000) (discussing the broader category of irreplaceable commodities). Kornhauser also points out that even on a subjective preference approach, the value of life can vary depending on the context. Thus, a smoker might pay more for a social policy that reduces by half the risk that a smoker will contract lung cancer, than for a policy that reduces by half the death rate from lung cancer. Although each policy has the same effect on the expected number of deaths from smoking, “a smoker might find it particularly troubling that her disease is attributable to her smoking,” and thus might be willing to pay more for the first policy. *Id.* at 1051. For a different explanation of this example, see Richard Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 *J. Legal Stud.* 1153, 1160 (2000).

justifications and values that courts do, and should, endorse, and the Draft should say so. Rather, the formula should invite the decisionmaker to articulate more specific values in particular cases, keeping in mind the fundamental features of a negligence test—an ex ante judgment of fault, considering the foreseeable, marginal advantages and disadvantages of a precaution.

A. Pluralism

Under any of the four criteria, it is important to recall the generality of the negligence formula: it addresses any conduct risking physical harm to others.⁸⁷ Accordingly, the formula must be articulated in such a way as to include the wide diversity of interests that could be relevant.

There is some danger that because the Hand formula identifies only the three factors of B, P, and L as relevant to the negligence judgment, the Draft's version of the formula will be interpreted as narrowing the range of relevant interests. But the Draft helpfully addresses this problem, both by identifying B, P, and L as only “primary factors,” and by acknowledging in the comments that the burden of precautions “can take a very wide variety of forms.”⁸⁸

Of course, each of the four approaches adumbrated above will understand the Hand factors differently. In a sense, the first two approaches are the widest, for the factors that they consider potentially relevant to the negligence decision include any interests that precautions could affect and that have any subjective value (as measured by willingness to pay, or simply by preference). On the other hand, insofar as only actual aggregate preferences are relevant, these approaches will sometimes give less weight to values than the third or four approach will. (On these subjective value approaches, if most people in a community only minimally value, or even disvalue, the welfare of certain minority citizens, an act that risks

⁸⁷ Actually, legal negligence doctrines extend even more broadly, encompassing some cases in which the actor causes economic and emotional harms. See Dan B. Dobbs, *The Law of Torts*, ch. 20 & Part IV (2000). However, the current Draft addresses only negligent creation of physical harm. See §2, comment a.

⁸⁸ P. 45. Moreover, the draft gives examples that demonstrate this range. See text at note 9= supra.

harm only to such citizens is less likely to be judged negligent.⁸⁹) Also, the third and fourth approaches draw qualitative distinctions, recognizing some components of human welfare as relevant, but (especially under the fourth approach) not others.

Thus, the first approach might result in a relatively homogenized cost-benefit analysis, in which the values are reduced to financial costs whenever feasible. But under at least the third and fourth approaches, the interests to be balanced could well be irreducibly pluralistic, lacking any common coin or metric. (Recall that the relevant factors under the third standard can include distribution as well as aggregate welfare, and under the fourth can encompass such features as social role, reliance, expectations, motives, and rights.) This is not to say, however, that the balancing is irrational or indeterminate. Incommensurability in the strong sense is rare.⁹⁰ Rather, the judgment of how to balance parental responsibility for a child's long-term development against safety risks, or privacy against health, will require a sensitive understanding of social responsibilities, as well as knowledge of the facts.

To some extent, such negligence judgments can be crystallized in the form of rules. Without fully entering the debate about whether the legal element of "duty" should play a larger role in the Third Restatement than the current draft assigns to it,⁹¹ I suggest that many, and perhaps all, of the issues conventionally analyzed under the rubric of "no duty" and "limited duty" rules can be fruitfully analyzed under a more subtle, complex, pluralistic understanding of the factors and

⁸⁹ For example, under these approaches, if most citizens have "negative attitudes" towards the mentally retarded because of their unusual appearance or mannerisms, such subjective preferences should count in favor of finding a retarded person contributorily negligent simply for venturing into a public place (where, let us assume, teenagers endanger her for fun). Cf. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (forbidding a city from relying on such prejudice and holding that municipal zoning ordinance violated equal protection).

⁹⁰ See Simons, *Negligence*, supra note 32, at 80.

⁹¹ See John C. P. Goldberg & Benjamin C. Zipurksy, *The Third Restatement and the Place of Duty in Negligence*, 54 *Vand. L. Rev.* = (2000), for a critique of the Draft's position on this issue. See also John C.P. Goldberg & Benjamin C. Zipurksy, *The Moral of MacPherson*, 146 *U. Pa. L. Rev.* 1733 (1998).

valuations relevant to a determination of negligence. Accordingly, while there is much to be said for the Draft's rhetoric viewing "duty" as largely a non-issue,⁹² the rhetoric would be more convincing if the Draft's analysis of negligence more explicitly addressed the variety of factors that are often viewed as relevant or decisive on the duty issue.⁹³

For example, when the Restatement (Third) of Product Liability articulates the risk/utility test for design and warning defects, it essentially adopts a negligence analysis but crystallizes what negligence means in this particular context by carefully articulating a set of rules, relevant factors, and accompanying policies.⁹⁴ These specific rules—such as rules about whether a product manufacturer, a seller of used products, or a private seller has a duty to warn users, and about the scope of any such duty—are justified by considering and balancing a range of factors. The specification of these duties can be understood as simply a sensitive, contextual application of the Hand test to a recurrent set of problems.

B. Complexity and the generality of the negligence inquiry

At this point, it is natural to wonder: why must the analysis of negligence be so complex? Especially as compared to the simpler or more determinate rules of contract or property law, or even intentional tort standards?

⁹² See §6 & comment a.

⁹³ What should be the respective roles of judge and jury in determining negligence? This is obviously one of the key issues in deciding whether "duty" should remain a distinct element of the negligence cause of action, and if so, its proper scope. However, a viable alternative is to eliminate duty as a distinct element and at the same time develop a clear set of standards for the allocation of judicial and jury responsibility in defining negligence.

⁹⁴ See, e.g., Restatement (Third) of Product Liability, §2, comment f (listing as factors relevant to design defect "the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing," as well as "the likely effects of the alternative design on product costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products ...").

The basic reason, I think, is the extraordinary generality of negligence law. Negligence law (even if limited to risks of physical harm to others) covers the waterfront of legal and moral concern. Legally, it comprises an enormous residual category, of private rights not recognized in contract or property. And morally, it comprises an enormous residual category of unjustified acts—namely, acts other than those which the agent believes are likely to cause harm, or by which she intends to do harm or to invade another’s legally protected interests.

To put the point differently, negligence is not really a distinct moral domain. It is just one part of action-guiding morality, the part in which the risk of future harm is uncertain.⁹⁵ But in action-guiding morality itself—that is, the set of principles that tell us what we should do—a wide range of values are relevant. That is, even if we knew to a certainty the advantages and disadvantages of a particular action, we would need to make complex judgments about diverse values in order to decide what a person should do. So it should not be surprising that, in making negligence judgments, we must consider a wide range of values, and we might not even be sure about the best way to structure the analysis. For negligence analysis is continuous with normative analysis more generally.⁹⁶ And no simple deductive procedure exists for resolving normative issues.⁹⁷

⁹⁵ Simons, Negligence, *supra* note 32=, at 61-66. To be sure, there are institutional features of a tort negligence judgment that support a different understanding of a legal “negligence” judgment than of a moral judgment that an actor has been negligent or faulty in creating a risk of harm. Creating trivial risks of harm, or risks of purely emotional or economic harm, might deserve moral blame but not legal sanction. See *id.* at 89. And, partly for pragmatic reasons, the legal standard sometimes departs from a standard of moral fault—for example, ignoring mental incapacity or conclusively presuming that certain types of conduct (such as not paying full attention at all times while driving) are negligent. See Draft, §9, comment e; §4, comment k, pp. 53-54.

However, the balancing judgment implicit in a legal judgment of negligence still remains extremely broad. (In terms of Lewis Kornhauser’s helpful distinction between “local” and “global” cost-benefit judgments, it clearly falls on the “global” end of the continuum. See Kornhauser, *supra* note 86=, at 1051-1056.)

⁹⁶ Although the analysis of intentional invasions and knowing harm-creation is less complex, this is so because such acts are *prima facie* unjustified; accordingly, the structure of analysis is simpler. We first recognize *prima facie* intentional torts, which are relatively

In short, because negligence is the minimal degree of moral “fault” necessary to support tort liability, a legal negligence standard must ask this question: When can we say that the actor “should have acted otherwise” with respect to creating a risk of physical harm? If that remarkably broad inquiry is the question, then we can’t really expect any simple, mechanical formula to provide the answer.

C. Flexibility and legal change

By giving more emphasis to the need for the legal decisionmaker to make a value judgment in applying the Hand formula, the Draft would helpfully underscore an important feature of a generalized balancing formula—its flexibility. And one especially valuable type of flexibility here is the capacity of the formula to adapt to changes over time, changes in both fact and value.

Consider an example. Courts are increasingly willing to impose liability on commercial servers of alcohol, and (in a few cases) even on social hosts, who provide alcohol to intoxicated individuals when the provider knows or should know that the individual is intoxicated.⁹⁸ In part, this change reflects increased knowledge of the facts—namely, the degree of danger posed by intoxicated drivers. But in significant part, the change reflects a change in values.⁹⁹ We now are more willing to impose a burden on those who serve alcohol to protect against the dangers posed by the intoxicated, a burden that is seen as less onerous than before. (Moreover, the personal pleasure deriving from intoxication might now be viewed as having less social value than formerly.¹⁰⁰)

well-defined; and then allow only limited defenses. See Simons, *Negligence*, supra note 32, at 56-57.

⁹⁷ See, e.g., Ken Kress, *Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory*, 17 *Behav. Sci. Law* 555 (1999).

⁹⁸ See Dobbs, supra note 87, at 899-903.

⁹⁹ For an explicit statement to this effect, see *Kelly v. Gwinnell*, 476 A. 2d 1219, 1229 (N.J. 1984).

¹⁰⁰ Another example is *Tarasoff v. Regents of University of California*, 551 P. 2d 334 (Cal. 1976). It is doubtful that the ability of therapists to predict violence or to notify others effectively about the risks that their patients pose has changed much over time. The

VI. The limited role of the “reasonable person”

Might we avoid the difficulties of definition and analysis examined above by employing a “reasonable person” or “reasonably prudent person” test? After all, this is the negligence standard that continues to be widely employed in jury instructions.

The Draft chooses to employ the reasonable person test in only a limited way.¹⁰¹ I think this choice is sensible, for several reasons.

First, the “reasonable person” test is obscure. Although it does tell us that the subjective views of the actor are not decisive of fault, it does not explain which factors are relevant.¹⁰²

judicial recognition of some minimal duty of care seems to reflect instead a changing conception of the appropriate social role of a therapist.

The same is true of (1) the duties of landowners under the approach of *Rowland v. Christian*, 443 P. 2d 561 (Cal. 1968), which expands duties to licensees and even to trespassers, see *Dobbs*, *id.*, §237; and of (2) the duties of landlords, who have an increasing responsibility to protect against third party criminal attacks. *Id.* at §325.

¹⁰¹ See note 6= *supra*.

¹⁰² Sometimes it is suggested that the inquiry should be sharpened to “the reasonable person in the community.” See Gilles, *supra* note 28=, at =; Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 *Clev. St. L. Rev.* 315 (1990). But the meaning and relevance of “community values” remain obscure. See Kenneth Abraham, *The Trouble with Negligence*, 54 *Vand. L. Rev.* = (2000) (“[A]t the level of fine detail that is at stake in ordinary unbounded negligence cases, there is usually no single conscience of the community. The values of contemporary society are too diverse for that.”).

Thus, the “community” standard cannot refer to actual customary behavior, for custom is not ordinarily the dispositive standard of care in a negligence case, except in limited contexts such as professional malpractice. If “community” refers, not to actual practice, but to idealized moral beliefs and practices, then why not directly examine those ideals?

Moreover, “community” might suggest a geographical criterion, but what is the appropriate locus? One answer is that “community” coincides with the jurisdiction of the legal decisionmaker; so if the lawsuit is in Tennessee, the “community” is that state. But

Second, I do not believe that a “reasonable person” criterion is morally fundamental.¹⁰³ In an extralegal context, it would be odd, if not incomprehensible, to analyze the morality of a decision by considering what a “reasonable person” would do. Rather, we directly advert to the features of the situation (actions, reasons, beliefs, consequences, and the like) that seem morally relevant.

Why, then, do legal standards employ “reasonableness” or “reasonable person” criteria? Such criteria can serve a number of distinctive institutional functions. Specifically, in a negligence instruction, the “reasonable person” language might be helpful rhetorically (though not substantively). For it does humanize and make concrete a test that might otherwise be forbiddingly abstract, especially to a lay juror,¹⁰⁴ and especially in the assessment of the conduct of an individual.¹⁰⁵ And the test does emphasize fault, by underscoring that the actor must have failed to act as a reasonable person would. So it might be appropriate to include such language in a jury instruction, either alone or together with the Hand factors. Still, the Hand test gives much more guidance, and accordingly should be employed by trial and appellate judges in rulings on the admissibility and sufficiency of evidence.¹⁰⁶

upon reflection, it is not obvious that “community values” should be relevant in this way. Rather, which “community” is relevant depends on the underlying normative approach (preference-maximization, utilitarian, or fairness). See Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 *Hofstra L. Rev.* 636 (2000) (analyzing this issue in the criminal law context).

¹⁰³ See Simons, *Negligence*, *supra* note 32, at 87-88

¹⁰⁴ Also, as noted above, it might be helpful in expressing the idea that the interests to be balanced are (only) those that are socially reasonable, not those that the individual plaintiff or defendant happens to value.

¹⁰⁵ In the context of a business or corporate entity, even this rhetorical value is dubious. What would a “reasonable corporation” do?

¹⁰⁶ More generally, “reasonableness” standards are often used in legal standards (especially tort and criminal law) to emphasize (a) that proving the actor’s subjective, inculpatory beliefs is not necessary to establish a prima facie case against him, or (b) that proving the actor’s subjective, exculpatory beliefs is not sufficient to support a defense. Sometimes (as in defining what types of threats are necessary to justify serious or deadly defensive force) the law explicitly defines what “reasonable” means (e.g., a threat of deadly force or kidnapping), instead of simply leaving the judgment to the jury or individual judge.

Third, the Draft's approval of the reasonable person test in limited contexts is itself revealing about the nature of a negligence standard. Most significant is the Draft's endorsement of the reasonable person test for cases of inadvertent negligence.¹⁰⁷ In some cases, the Draft suggests, there may be evidence bearing on the burden of paying more attention. "In many cases, however, the level of the burden, and hence the reasonableness of the person's inattentiveness, are largely matters of common sense."¹⁰⁸ In such cases, "the decisionmaker can simply consider whether the reasonably careful person would have been aware of the risk."¹⁰⁹

This approach is both plausible and illuminating. The problem of applying a Hand balancing test to inadvertence underscores that we need a negligence test sufficiently general to encompass all cases of unjustifiable, risky action, not just cases in which the actor has consciously weighed the relevant interests. It also underscores a more fundamental point: to judge conduct as faulty is not necessarily to judge the actor's reasoning or decision-process as faulty.¹¹⁰ The

On other occasions, a vaguer "reasonableness" standard is employed, but normally this judgment is quite circumscribed. In self-defense, it usually governs whether the actor reasonably believed that he was facing a defined type of threat, and, more broadly, whether he had a "reasonable alternative" way to avoid causing injury. See generally Simons, Negligence, *supra* note 32=, at 87-88.

¹⁰⁷ Draft, §4, comment k, p. 53.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ The distinction between an actual decision-procedure and a standard for evaluating the rightness of an action is a fundamental one in moral theory, and is especially important in utilitarian and cost-benefit analysis. See, e.g., David Brink, *Moral Realism and the Foundations of Ethics* 216-217, 265-267 (utilitarian analysis); Posner, *Cost-Benefit Analysis*, *supra* note 86=, at 1154 (cost/benefit analysis). For example, on a utilitarian theory that seeks to impartially maximize the aggregate welfare of all, aggregate utility might well be maximized if parents (as a matter of personal decision-procedure) give enormous weight to the interests of their own family, relative to the interests of others, rather than always impartially weighing the interests of all persons the same.

Thus, utilitarians should not too quickly assume that a utilitarian criterion of personal fault will require the actor to adopt a uniform decision procedure of impartially weighing all interests. Legal doctrines imposing distinctive (and sometimes limited) duties

“reasonable person” language could then be useful in clarifying that conduct can be unreasonable even in instances where the actor’s fault does not consist in consciously balancing interests in an unreasonable way.¹¹¹

of care based on role responsibility or based on failure to rescue clearly do not require such impartiality, yet utilitarians and economists have offered plausible arguments that such doctrines can serve utilitarian ends. Less obviously, an interpretation of the negligence standard that requires an actor to employ a conscious decision procedure of “benevolent impartiality” might actually result in suboptimal actions, relative to a different interpretation of the negligence standard. (This is one reason why the “single-owner heuristic” will not always be the best interpretation of negligence from a utilitarian standard. See note 37=, supra.) As a simple example, it is undoubtedly best if automobile drivers focus their attention mainly on the immediate risks around them, rather than constantly surveying their entire field of vision (and even turning their head) to look out for more remote risks.

¹¹¹ Consider another illustration of this point, besides inadvertence. An actor can be negligent due to lack of reasonable skill in conducting an activity, even if the actor is doing his best and is aware of the risks he is running. The fault lies not in making an unjustifiable tradeoff between the burdens and benefits of a specific precaution, but in failing to conduct the activity with sufficient skill. (If your skill at riding a bike is sufficient that it is not unreasonable for you to ride on a busy street, you still might be negligent if you carelessly lose control of the bike on a particular occasion.)

That negligence encompasses lack of reasonable skill also helps explain why the anthropomorphic “reasonable person” approach is employed to vary the standard of care for children and for those with disabilities. A “reasonable blind person” test connotes not only that a conscientious blind person would consciously balance the Hand factors differently than a sighted person, but also that his ability to safely and skillfully perform certain tasks (such as crossing a street) is different.

Finally, even when individuals consciously choose between options, they often make implicit rather than explicit judgments about the relative values at stake. As Gilles points out:

[M]ost people, even those who consider themselves utilitarians, make only a fraction of their choices by attempting to compare choice A to choice B in terms of an external metric such as utility or money. That is how one chooses at a supermarket, not how one chooses, for example, whether to drive a bit faster so as to have more time with one’s family. In many contexts, including matters of safety, individuals consider what they know about choices A and B, reflect on the values they associate with those choices, and decide which they prefer.

Gilles, *Invisible Hand Formula*, supra note 37=, at 1032-1033. Once again, this reveals that the Hand formula is often not employed as an explicit decision-making procedure.

But how can the Draft can be confident that “common sense” is an apt guide to the amount of attention that an actor should pay to his surroundings? After all, this is clearly not an adequate standard in most cases of advertent negligence. The answer, I believe, is the very limited scope of the first inquiry. It is doubtful that different normative standards (such as standards one through four above) will differ on whether a pedestrian should check carefully for traffic before crossing a street. For similar reasons, it is not surprising that self-defense standards (for both tort and criminal law) contain only undefined “reasonable belief” standards for judging the severity of an attack or the necessity of a defensive response; what a person should believe and should infer about these factual matters ordinarily invites a fairly limited inquiry.¹¹²

Finally, it is worth considering one important attempt to take the “reasonable person” standard seriously as a substantive and freestanding criterion of negligence. This is the virtue ethics approach. On this view, “right action” is the action that a “virtuous” agent would characteristically perform.¹¹³ Moreover, some support for this interpretation can be found in the fact that negligence case law sometimes does mention such virtues as prudence and benevolence.¹¹⁴

It is not yet clear whether this approach can offer a genuine and realistic alternative to the utilitarian and fairness approaches mentioned above. To date, defenders of this approach have not persuasively explained how a negligence analysis can abjure consideration of the Hand factors—at least if they wish to provide primary actors, juries, and judges with a modicum of guidance about the

¹¹² See note = supra.

¹¹³ According to one recent formulation: “An action is right [if and only if] it is what a virtuous agent would characteristically (i.e. acting in character) do in the circumstances.” Rosalind Hursthouse, *On Virtue Ethics* 28 (1999). See also Feldman, supra note 42=, at 1450 (arguing that when the jury engages in the thought experiment of imagining what a reasonable (virtuous) person would do, it operationalizes virtue ethics and gives it prescriptivity). For a sustained argument that virtue ethics can be action-guiding, notwithstanding critics’ doubts on this score, see Hursthouse, at Chs. 1-3.

¹¹⁴ See Feldman, supra note 42=, at 1447 (quoting jury instructions from several jurisdictions).

content of the negligence norm.¹¹⁵ If the point of virtue theorists is that the evaluation of those factors should take into account the (virtuous or vicious) motives of the actor, or should spell out what such virtues as prudence and benevolence mean in the context of balancing disadvantages of taking a precaution against the risk of future that the precaution would avoid,¹¹⁶ then I have less of a quarrel; but that point is consistent with my argument for an inclusive understanding of the Hand test.

VII. Conclusion

The Third Restatement of Torts should not take sides on the highly disputed question whether negligence is better understood as expressing efficiency or fairness. It should, however, reflect the diversity of approaches that courts do pursue, so long as each of the approaches expresses a justifiable understanding of negligence. I have tried to show that a range of approaches is consistent with the same fundamental understanding of negligence as a species of fault, as failure to take a reasonable precaution in light of the foreseeable advantages and disadvantages of such a precaution.

Negligence doctrine will and should continue to develop more specific standards in particular fields. The conventional wisdom that negligence rules normally cannot be articulated beyond the facts of a given case is wrong; negligence doctrine is full of special rules and standards. Although rigid, bright-line rules are often inadvisable,¹¹⁷ more flexible rules and standards are often both

¹¹⁵ Feldman argues for a greater emphasis on the virtues of prudence and benevolence, but she has not yet clarified the meaning of the virtue of “reasonableness.” Feldman, *supra* note 42, at 1431. She does, however, suggest that virtue ethics properly abjures reductionist formulas, and that juries should have broad discretion to decide what is “the proper balance between safety and freedom,” *id.* at 1433.

¹¹⁶ For an analysis suggesting that the virtue of prudence can indeed include weighing of factors such as those of the Hand formula, see James Gordley, *Tort Law in the Aristotelian Tradition*, in *Philosophical Foundations of Tort Law* 131, 147 (David G. Owen, ed., 1995).

¹¹⁷ The famous cases of *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), and *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934), should be viewed as establishing only this narrow point. Unfortunately, the cases are often taken to establish the much broader point

feasible and desirable. Precedent, related statutory rules, and customary norms also should play a role in limiting the open-ended quality of negligence judgments.

Moreover, it would be especially helpful if courts were to give more attention to how negligence standards apply to business and corporate entities. Such actors are more likely than individuals to consciously weigh the advantages of precautions against the disadvantages. And in popular culture, there is a distressing tendency to assume that such deliberate tradeoffs inevitably reflect a callousness to human suffering.¹¹⁸ If an actor, whether individual or corporate, makes a reasonable tradeoff, that should certainly satisfy negligence standards. (The Draft helpfully underscores this point.¹¹⁹)

In the end, a determination that an actor is negligent reflects a value judgment at two levels. It expresses the judgment that the actor should have done something different, in light of the foreseeable risks of his conduct. It also presupposes value judgments about the relevant advantages and disadvantages of taking such a precaution. The task of conscientiously identifying and clarifying the appropriate value judgments is not easy, but it is unavoidable if negligence is to remain a justifiable ground of tort liability.

that a Hand balancing test (or even a vaguer “reasonable person under the circumstances” test) is as precise as we can get in articulating the meaning of negligence.

¹¹⁸ See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 *Stan. L. Rev.* 547 (2000). This assumption is aggravated by (or perhaps a manifestation of) the difficulty of assigning a value to personal injury and death. See note 60= supra.

¹¹⁹ Comment d to §2 (defining “reckless”) explains:

[T]he fact that the actor, because of the burden entailed by a particular provision, has made a deliberate choice to omit a precaution and hence to tolerate a risk by no means signifies that the person has behaved recklessly. Indeed, the fact that such a choice has been made does not even show that the actor has behaved negligently. Rather, the actor is negligent only for making an unwise choice. In a sense, the very objective of negligence law is to encourage actors to acknowledge and confront such choices, and to render these choices wisely rather than unwisely.

VIII. Appendix: Proposed Language for the Draft Restatement

The following language, modifying the Draft Restatement, is suggested in order to implement the analysis in this article.

1. The definition of “Negligent” in §4: Two alternatives

a. Modification of black letter language (new language is underlined):

An actor is negligent in engaging in conduct if the actor does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the actor and others if the actor takes precautions that eliminate or reduce the possibility of harm. The social value of the interests imperiled is the standard for evaluating the severity of the harm. The social value of the benefits foregone or the burdens incurred is the standard for evaluating the burden of taking precautions.

Note: the language of “social value” is drawn from Restatement (Second) of Torts, §§292, 293.

b. Alternative formulation of §4:

An actor is negligent when the actor should have taken a reasonable precaution against the foreseeable risks of harm posed by his or her conduct. In determining whether an actor should have take a precaution, the burden of taking that precaution should ordinarily be balanced against the risks that the precaution would avoid. The magnitude of those risks depends on both the foreseeable likelihood of harm and the severity of that harm if it occurs.

The social value of the interests imperiled is the standard for evaluating the severity of the harm. The social value of the benefits foregone or the burdens incurred is the standard for evaluating the burden of taking precautions.

Note: the first sentence of this alternative partly draws on the design and warning language of the Restatement (Third) of Products Liability, §2.

2. Additional language emphasizing the need for evaluative judgment

In comment d to §4:

- a. Add the underlined language to the last paragraph on p. 44:

The balancing approach rests on and expresses a simple idea. Conduct is negligent if its socially recognized disadvantages exceed its socially recognized advantages, while conduct is not negligent if its social advantages exceed its social disadvantages. ...

- b. Add the following paragraphs at the end of comment d, p. 45:

In balancing the primary factors, the decisionmaker appropriately considers their social value. Accordingly, in some cases, private burdens exist that negligence law declines to credit at all. For example, some motorists might derive excitement from racing a railroad train towards a highway crossing. In deciding what is a reasonable speed for the motorist to drive, the decisionmaker should ignore the burden on a motorist of forgoing that excitement. It is not reasonable to permit a motorist to impose greater risks upon others in order to preserve that kind of antisocial private benefit.

In all cases, the social value of the burden of taking a precaution is a question for the decisionmaker, not for the individual actor. Often the decisionmaker's value judgment will be implicit, but an explicit articulation of the relevant values can be appropriate. For example, in §5, Illustration 1, the social value of encouraging a young child to learn independence is a factor relevant to whether a parent may leave the child alone for a short period of time.

Note: The first paragraph includes the example from Reporter's Note, p. 62.

3. Additional language emphasizing that negligence is a species of faulty, deficient conduct

In addition to the black letter of §4, include this language in the commentary, at the end of comment a:

All such standards express the idea that negligence is a type of fault—i.e, that the actor should have taken a reasonable precaution against the risk of injury.

4. Eliminate “cost-benefit” language

Eliminate the sentence in §4, comment d, stating that the negligence test “can also be called a ‘cost-benefit’ test.” Such language is too closely associated with a narrow economic test of negligence; yet many jurisdictions support a balancing test of negligence that is broader.

Alternatively, if such language is retained because a small number of courts occasionally employ it, clarify that an economic interpretation is not the only way to understand the Hand formula.

5. Avoid “social utility” language

In emphasizing the need for value judgments, the language “social value” or “socially recognized” is appropriate. However, the phrase “social utility” is inapt, for it suggests that a negligence judgment should consider only interests that would be relevant on a utilitarian account. That view is too narrow: it misdescribes how many courts actually evaluate the relevant interests, for utilitarianism is only one of many normative accounts that courts legitimately employ.

Accordingly, the term “utility” in §4, comment i, p. 52, should be replaced with the term “value.”

6. Encourage courts to articulate the specific values that are relevant in particular categories of cases.

Emphasize that it is impossible for one simple formula to express the variety of justifications and values that courts do, and should, endorse in every negligence context.

Rather, the formula should invite the decisionmaker to articulate more specific values in particular cases, keeping in mind the fundamental features of a negligence test—an ex ante judgment of fault, considering the foreseeable, marginal advantages and disadvantages of a precaution. Examples of such category-specific standards are the doctrines governing medical malpractice, legal malpractice, landowner liability, product liability, emergencies, learners and beginners,¹²⁰ and the responsibilities of family members to one another. Future development of standards in additional categories, or more detailed development of standards in existing categories, is both possible and desirable.

Moreover, although it is true that a jury decision in a negligence case is not precedent for later negligence cases on similar facts, it is appropriate for judges to develop more detailed standards in particular categories of cases. To be sure, such standards should rarely take the form of bright-line rules. However, insofar as the Draft's §5, comment c, could be viewed as hostile to the development of standards rather than rules, that language should be modified.

The Scope Note at pp. 191-192 could be modified to reflect the above observations.

¹²⁰ See Draft §10, comment b, p. 138, characterizing this as a “somewhat special case” and distinguishing between a plaintiff who is teaching the defendant beginner how to drive and a plaintiff pedestrian injured by such a defendant.

7. Encourage courts to identify the proper role of explicit risk/ benefit analysis by corporations

The passage in §2, comment d (Defining “reckless”)¹²¹ is a good start. A cross-reference to this passage in the negligence commentary (especially comments to §§4-5) would be helpful.

Perhaps courts should further be encouraged to provide more guidance about the proper role of explicit risk/benefit analysis.

¹²¹ See note 119= supra.