

Negligent Wrongs: Responsibility for Avoidable Harm

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I. ACCIDENTAL WRONGS

Modern tort law took shape in the second half of the nineteenth century, when the common law worked itself free of the forms of action and was reconstructed around general principles of responsibility. The body of law that emerged from this reconstruction was centered on accidental harm and dominated by the fault principle.¹ Because this reconstruction of the field was so extensive, we tend to take it for granted that tort law has a core of “accidental torts” governed by negligence liability, and that this core is flanked by the intentional torts on one side and strict liability on the other.² This, we think, is the basic conceptual structure of tort law.

As an account of the basic architecture of modern tort law, this account is subject to serious objections. For one thing, the distinction between strict and fault liability cuts across the distinction between accidental and intentional wrongdoing. The intentional torts of battery, trespass, conversion and nuisance are all either characteristically or occasionally strict.³ For another, presenting fault liability as the opposite of strict liability both overstates the difference between the two, and understates the gap between moral fault and legal fault.⁴ These are well-taken objections. The standard understanding of the architecture of tort does indeed obscure some of the subject’s most important and interesting features. Even so, this conceptualization has the considerable virtue of placing several fundamental features of modern tort law front and center. Fault *is* the dominant principle of modern tort law and accidental wrongs *do* lie at its center. Oliver Wendell Holmes’ famous aphorism that “[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like,” whereas “the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses . . . railroads, factories, and the like”⁵ testifies to the centrality of accidents. Whereas pre-modern tort law was a law of nominate, mostly intentional, wrongs modern tort law is a law of accidents. Indeed, modern tort law emerges in response to the rise of accidents as a pressing social problem. And because accidents are a “social problem” concepts such as “cost” and “harm” figure as prominently in modern tort discourse as “wrong” does.

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¹ See Tom Grey, *Accidental Wrongs*,-- *VAND L.REV.* – (2001) for an illuminating account of this intellectual reconstruction. [other citations – Horwitz, . . .]

² The phrase, though not the conventional conception, is Grey’s.

³ [cites]

⁴ See e.g., John C.P. Goldberg & Benjamin Zipursky, *The Fault in Strict Liability and the Strict Liability in Fault*, [cite to *Fordham L.Rev.*] Richard Epstein’s classic paper, *A Theory of Strict Liability*, [cite] powerfully states the persuasive argument that negligence as tort law conceives it is not

⁵ Oliver Wendell Holmes, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 183 (1920). The paper itself was originally delivered in 1897.

Holmes' epigrammatic observation to two distinct phenomena. The first is that the emergence of an industrial and technological society brought with it an explosion in the incidence of accidental injury. The second is that these accidental injuries were not the consequences of a multiplication of discrete individual wrongs; they were the byproducts of organized activities. This twin transformation—from preoccupation with intentional wrongs to preoccupation with accidental wrongs, and from preoccupation with individual wrongs to preoccupation with a social problem—had large implications for torts as a legal field. The concept of negligence, for instance, underwent a profound transformation. In pre-modern tort law negligence was internal. Negligence was a state of mind with which certain nominate torts could be committed.⁶ Modern tort law reworked the concept of negligence, turning it from a state of mind into a standard of conduct and a general principle of responsibility

The transformation of tort in response to the emergence of accidents as a social problem in fact put pressure on our very understanding of what torts are. From Blackstone down to the present prominent scholars have characterized torts as a law of wrongs.⁷ When, however, the most common form of tortious wrong is accidental—and when accidents are a pressing problem for society as a whole—the very concept of “torts as wrongs” comes under attack from two directions. First, the connection of tortious wrongs to core moral concepts such as culpability and responsibility becomes ripe for contestation. Accidents happen. The blame associated with being responsible for one is often quite attenuated. Inadvertently taking one's eyes off of the road while driving is a canonical example of carelessness; it is also the kind of lapse that all of us suffer at some time.⁸ The moral culpability involved in such lapses is slight. Indeed, an influential body of contemporary legal theory maintains that *moral* responsibility extends only to intentional acts and not to inadvertent ones.⁹ Whatever tortious responsibility for accidental wrongs may be, it is not (on this account) true moral responsibility.¹⁰

The pressure that “tort law as accident law” puts on the concept of “torts as wrongs” paves the way for the emergence of a competing conceptualization of tort law as a law of costs and

⁶ [cite to Grey] The basic state of mind is culpable inadvertence.

⁷ [cite to Blackstone, to CJ theory and to John and Ben, Torts As Wrongs]

⁸ A well-known example of Jeremy Waldron's illustrates this attenuated blameworthiness:

Two drivers, named Fate and Fortune, were on a city street one morning in their automobiles. Both were driving at or near the speed limit, Fortune a little ahead of Fate. As they passed through a shopping district, each took his eyes off the road, turning his head for a moment to look at the bargains advertised in a storefront window. . . . In Fortune's case, this momentary distraction passed without event. The road was straight, the traffic in front of him was proceeding smoothly, and after a few seconds he returned his eyes to his driving and completed his journey without incident. Fate, however, was not so fortunate. Distracted by the bargain advertised in the shoe store, he failed to notice that the traffic ahead of him had slowed down. His car ploughed into the motorcycle ridden by a Mr. Hurt. Hurt was flung from the motorcycle and gravely injured. His back was broken so badly that he would spend the rest of his life in a wheelchair.

Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *Philosophical Foundations of Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, (David G. Owen, ed., 1995). While Waldron's basic point here is comparative, the example of Fortune shows incidentally that we do not blame people much for lapses which, as luck has it, prove harmless.

⁹ [cites needed]

¹⁰ [cite to Raz, Barbara, Seana and Gary needed]

benefits. Accidental injury is a significant social problem and it needs to be addressed as such. Just as the tort law itself shed its old preoccupation with isolated, individual, intentional wrongs, so too the theory of torts needs to shed its old conception of “torts as wrongs” and adopt a new conception of tort law as a technology for addressing the “costs of accidents.”¹¹ Paying for and preventing accidents consumes scarce resources. Scarce resources need to be put to good use and the way to do this is to minimize the combined costs of accidents and their prevention.¹²

Modern negligence law thus poses the following challenge. On the one hand, an adequate theory must acknowledge the fact that our law of torts is a response to a social problem. On the other hand, it must recognize that matters of harm and responsibility remain matters of right and wrong.

A. Tort as “Private Law”

An influential strand of modern non-economic tort theory places great weight on the claim that tort is “private law”.¹³ In making this claim private law theorists are insisting that tort law is sharply demarcated from fields of law two which it is often thought to be adjacent. Administrative schemes which pool losses and compensate the victims of accidental harms, and statutory and administrative regimes which regulate risk are the two main cases in point. Private law theorists insist that the line between tort and private law on the one hand, and administrative and statutory public law on the other, is hard and fast. Private law theory takes the fusion of right and remedy to be constitutive of tort. On the first page of the Preface to *Private Wrongs* Arthur Ripstein writes “The central claim of this book will be that the unity of right and remedy is the key to understanding tort law.”¹⁴ When we take the common law of tort to be defined by duties of repair owed to named victims by named tortfeasors, we are forced to regard workers’ compensation and similar administrative schemes as entirely discontinuous from the law of torts. These schemes abolish private law duties of repair and private law mechanisms for the enforcement of rights, and replace them with public law systems and mechanisms.

This placing of great weight on the autonomy and distinctiveness of private law is a rejection of the conventional wisdom. Most contemporary American legal scholars regard the concept of private law as a fairly uncontroversial taxonomical classification, with little substantive importance. Private law addresses the relations among persons as members of civil society; public law addresses the relations between the state and persons as citizens. This is a real distinction, and it has its uses. One might orient first-year students, for example, by telling them that the law of intentional torts and the law of crime overlap extensively. The essential difference between them is that criminal law is public whereas tort law is private. Criminal law is concerned with the state’s authority to respond to various wrongs on behalf of the community as a whole whereas tort law is concerned with the rights of the victims of those wrongs to call to account those who have wronged them. Punishment

¹¹ See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

¹² Along with the costs of operating the system. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS*, -- (1970).

¹³ [cites to Weinrib & Ripstein]

¹⁴ Ripstein, *Private Wrongs*, ix. [Also cite to Coleman and Weinrib as corrective justice theorists who put responsibilities of repair at the center of tort law?]

is the characteristic response of the criminal law whereas reparation is the characteristic response of tort law. As broad generalizations go, this one is certainly fine.

This distinction between private law and public law is useful orientation but it does not commit us to thinking of private law as autonomous from and discontinuous with surrounding fields of law. This understanding of private law is widely accepted by scholars who regard the line between public and private law as porous. Most Torts casebooks, for example, take their topic to be not only the private law of torts but also administrative alternatives to tort—preeminently, workers’ compensation, but also activity specific schemes addressing nuclear power, vaccination, black-lung disease and so on.¹⁵ Such administrative schemes displace otherwise applicable bodies of tort law and address the kinds of harms that also preoccupy tort. Influence runs in both directions between these legal domains. It is impossible to recount the history of assumption of the risk in American law without addressing worker’s compensation which displaced the law of torts from the domain of workplace accidents. And once it arose, worker’s compensation exerted a powerful influence on the development of tort law itself.¹⁶ Conversely, many statutory causes of action are tort-like; employment discrimination claims are one case in point.¹⁷ In the same vein, health and safety regulations which displace tort protections are frequently understood to be closely related to the central concerns of the law of torts. Indeed it is perfectly intelligible to say that we need environmental law only because the private laws of tort and property are imperfect. If the private law of property could specify and institute entitlements to physical objects completely and perfectly, and if the law of torts could specify and redress impermissible interferences with property and physical health and integrity perfectly, we would not need environmental law.

These points are of a piece with the fact that accidental harm is a basic and systemic feature of an industrial society. That fact, too, puts pressure on the understanding of torts as a highly autonomous body of law. How we respond to accidents is a matter of collective concern. There are, moreover, more general reasons to be wary of the claim that any sphere of law is “private” in any strong sense of that term. John Rawls pointedly remarks that “[i]f the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing.”¹⁸ Justice is concerned with the terms on which persons relate to each other, insofar as they are coercively enforceable.¹⁹ Consequently, even the most intimate relations among persons can raise questions of justice. There are also reasons to think tort law is not a realm governed by its own distinctive principles of justice.

¹⁵ [citation needed]

¹⁶ See Jeremiah Smith, *Sequel to Workmen’s Compensation Acts*, 27 Harv. L. Rev. 235, 344 (1914) (arguing that the workmen’s compensation acts were organized on the principle of strict liability, which could not be reconciled with the fault liability of the common law, and prophesying that the common law of torts would be reconstructed to be more compatible with the normative logic of workers’ compensation). For further discussion, see Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 Vand. L. Rev. 1285 (2001)

¹⁷ [cite to John & Ben]

¹⁸ JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, 166 (2001). Philosophical libertarians may be the principal exception to this generalization. By assigning so much priority to property rights and contractual agreements libertarianism may adopt an essentially private conception of authority. Philosophical libertarianism exists in the legal academy in general, and in tort theory in particular, but it is not the prevailing point of view.

¹⁹ [cite and discussion]

The law of torts protects persons against various forms of impairment and interference by others as they go about their lives as members of civil society. The obligations that it imposes and the rights that it recognizes play a central role in establishing people's freedom to realize their diverse conceptions of the good and lead independent and equal lives. Those rights and obligations, moreover, are enforced by the coercive powers of the state. Tort is part of the basic structure of society, particularly in its modern form.²⁰

B. *Accidents and Economics*

The commitment of important contemporary non-economic theories of tort to a robust conception of tort as “private law” is therefore not a necessary commitment. On the contrary, it is a questionable and problematic one. Pervasive accidental harm raises issues of justice as much as it raises issues of efficiency. Nonetheless, the accident law centered character of modern tort law probably plays an important role in the emergence of an economic conception of the subject. Holmes himself laid much of the groundwork for the economic conception. To this day, Holmes is the most important figure in the intellectual history of American tort law and much of his writing anticipates economic ideas.²¹ Early, and brilliant, work in law and economics took torts as its subject and left an enduring mark on our understanding of the field.²² On the merits, though, the most important reason why the reconceptualization of tort law in terms of costs and benefits gets a grip on academic legal thought is that it resonates with the reconfiguration of the law of torts itself. In an industrial and technological world, accidental injury *is* a social problem and accidents themselves involve tradeoffs. Accidents are the byproducts of economically productive and beneficial, but risky, activities. In Holmes' time, accidents were the byproducts of manufacturing and milling, mining and railroading. The prominent activities have since changed, but the problem has remained the same. Reducing the risks of such activities usually involves reducing the productive value that we extract from the activities. The vocabulary of cost and benefit is an attractive way to think about such tradeoffs. When that vocabulary is embedded in the larger apparatus of economic analysis, it provides a comprehensive theory of how tort liability can promote the general good by minimizing the total resources consumed in avoiding and repairing accidental injury, thereby maximizing wealth.

To be sure, the economic analysis of torts has been subject to powerful and telling criticisms. Its thesis that the role of tort adjudication is to deter cheapest cost-avoiders from inflicting future injuries is much less plausible than the corrective justice thesis that tort plaintiffs sue those who have wronged them *because* those defendants have wronged them and in order to have the harm that those defendants have wrongly inflicted repaired.²³ The larger critique that the economic theory of torts treats the rights and duties of the parties as mere vessels through which the socially desirable end of wealth-maximization is served, and not as a matter of what people owe to one another in the way of reciprocal obligations to respect rights and repair wrongs, also hits home. People have fundamental claims to the liberty and integrity of their persons and their property. The vindication of these claims is what tort suits for battery, trespass, conversion, invasion of privacy, intentional infliction of

²⁰ Samuel Scheffler, *Distributive Justice, The Basic Structure and the Place of Private Law*, *Oxford Journal of Legal Studies* (2015) 1, 19.

²¹ [cite needed to “man of statistics . . .”]

²² [cite needed – Calabresi, Coase? Posner]

²³ [cite to previous chapter]

emotional distress, and accidental physical injury purport to be about. Tort plaintiffs sue on their own behalf and they sue to vindicate their own claims to respect and repair; they seek to vindicate their own rights and interests. The fact that accident law is preoccupied with physical harm to persons is a further reason to doubt the economic account of tort. Harm to persons has intrinsic moral significance.²⁴ It is presumptively bad to suffer harm and it is presumptively bad to inflict such harm. When people put others at significant risk of physical harm questions of what they owe to those others with respect both to precaution and repair cannot be avoided. Those questions are questions about obligations.

Though they may have overshot the mark in some respects²⁵, critics of the economic analysis of torts have thus shown its account of the institution to be unsatisfying. They have been less successful, however, in offering an alternative account of tort law's primary, obligation-imposing norms. Prominent corrective justice theorists, for example, assume an account of "torts as wrongs" but do not propose such an account.²⁶ In the legal academy, there is widespread suspicion that accidental harm (and accidental wrongs) are fundamentally different from intentional harm (and intentional wrongs) because they are matters of both innocent intent and tradeoffs. This, too, seems to make accidental injury both ill-suited to deontological moral theorizing and especially well-suited for economic analysis. Ill-suited to deontological thinking because deontology is thought to be drawn to categorical conceptions of wrongdoing. Especially well-suited to economic analysis, because tradeoffs are the bread and butter of economic thinking.

My aim in this chapter is to offer an interpretation of the fundamental features of negligence liability which shows it to be body of law concerned with what people owe to each other in the way of care when they undertake acts and activities which impose risks of physical harm on others. The argument proceeds as follows. Section II discusses three central features of negligence law—its relationality, the priority that it places on the avoidance of harm, and its emphasis on reasonableness in contradistinction to rationality—and argues that these cohere better with a non-consequentialist conception of tort than with a consequentialist one. Section III . . .

II. REASONABLENESS AND RISK

The economic conception of negligence is forthrightly consequentialist and welfarist in its commitments.²⁷ The role of efficient precaution is to promote states of the world in which an

²⁴ [cite to Honore, Thomson, Shiffrin]

²⁵ E.g., In insisting that tort law is radically "private."

²⁶ [cite needed]

²⁷ Welfarism holds that human well-being is the only end worth pursuing in itself, and that everything else matters only insofar as it contributes to or detracts from well-being. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) assumes both that welfare is the touchstone of economic analysis and that welfare is the only ultimate value. Most proponents of cost-benefit analysis identify it as welfarist. See e.g., Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards and Cost-Benefit Analysis*, 46 ENVIRONMENTAL LAW REPORTER 10674, 10675 (2016). ("Cost-benefit analysis . . . places both costs and benefits along a common metric and supports the standard that maximizes net benefits (the difference between benefits and cost). As practiced in the United States . . . cost-benefit analysis is grounded on a welfare economic conception of social good . . ."); PETER SCHUCK, WHY GOVERNMENT FAILS SO

important kind of desirable consequence— namely, wealth-maximization— is realized. For the economic conception, due care in negligence law is epitomized by the Hand Formula and the Hand formula is an instantiation of cost-benefit analysis. Due care is determined by comparing the costs and benefits of various packages of risk and precaution, and picking the course of action which maximizes net benefit, with net benefit conceived as the course of action which minimizes the combined costs of accidents and their avoidance, thereby maximizing wealth. In turn, wealth-maximization in the law of torts promotes welfare. Welfare is best promoted by an institutional division of labor within which courts pursue wealth-maximization and welfare-enhancing redistribution is left to legislative action, especially the tax system.²⁸

This is a powerful and coherent position but it is difficult to square with a number of prominent features of negligence law. Negligence law is, in fact, immanently non-consequentialist in important ways. For one thing, negligence duties are relational. For another, the law of negligence is preoccupied with harm in general and physical harm in particular, and it understands harm to be asymmetrically more important than benefit. Both of these features are odds with the economic conception. Economic analysis is consequentialist, and consequentialist theories are not relational. Their dominant concern is with the production of consequences, not with how people treat one another. For the economic analysis of torts, this cashes out as a concern with maximizing the amount of wealth in the world by minimizing the combined costs of accidents and their prevention. Harm has no special significance for cost-benefit analysis. Harm is just a kind of cost and costs and benefits are symmetrical— pluses and minuses on the same scale. Third, economic analysis conceives of due care as socially rational care whereas negligence law speaks of reasonable care. Rationality and reasonableness are fundamentally different notions. We act rationally when we pursue our own self-interest in an instrumentally intelligent way. We act reasonably when we act in ways that we can justify to others insofar as they are affected by our actions.

A. Relationality

The duties of care imposed by negligence law are relational because they run from some people and to others. They are owed by those who impose risk and they are owed to those on whom they impose the risks at issue. Duties of care are not duties to promote the general good, economically conceived as the maximization of wealth. Questions about what care is due are questions about the terms on which risks may be imposed by some and on others. Questions about whether a particular plaintiff was wrongly harmed by a particular defendant are questions about who did what to whom. The basic moral questions posed by issues of risk and precaution are thus questions about what people owe to each other when they put others at risk of physical harm in the course of pursuing their own ends and agendas. To be sure, the relationality characteristic of negligence duties and negligent wrongs is special in an important way. We tend to think of relational wrongs as personal and bilateral. Core batteries, for example, are direct assaults on the persons and personalities of named victims.

OFTEN, 45 (2014) (“CBA is a welfarist decision-making tool, focusing on the actual consequences of policies for human well-being.”). Shuck cites Kaplow and Shavell in support of his account of cost-benefit analysis.

²⁸ [Kaplow and Shavell]

Negligent risk impositions may well be “affronts to personality”²⁹ but they are abstract affronts to unknown and unnamed victims, not direct affronts to named persons. Negligent risk impositions normally put indefinite classes of persons at risk. Driving carelessly, for example, puts others who happen to be in the vicinity—be they drivers, passengers, pedestrians or cyclists—in harm’s way. But it puts them in harm’s way as members of foreseeable classes of potential victims, not as named targets of wrongful conduct. And when we think about what duties of due care demand we think about persons in an impersonal way. We think of representative injurers and the representative victims that they may endanger. “If you run red lights,” we might say, “you could kill a child crossing the street.” The obligation we are articulating is relational. It runs from some people (drivers) to others but it runs from all drivers to all children crossing streets at lights, not from named drivers to named children. And it is owed by drivers to children on the basis of what Cardozo calls “personality,” not because of any special relation between some children and some drivers.³⁰

Distinctively, negligence law is both relational and impersonal. It is relational because duties of care run among persons. They owed by some and to others. It is impersonal because duties of care are owed by abstract (or representative) persons to other abstract (or representative) persons—by drivers to pedestrians, for instance. For present purposes, negligence law’s relationality, not its impersonality, is what matters. Because it is fundamentally relational, negligence law fits far more comfortably with deontology than with consequentialism. The supposition “at the heart of deontological (or non-consequentialist)” moral theory is that the “subject matter of morality is not what we should bring about, but how we should relate to one another.” By contrast, in a consequentialist view, questions such as who does (or did) what to whom have no intrinsic significance. What matters is overall value in an end state of affairs—the amount of wealth in the world, in the particular case of economic analysis.

B. The Priority of Avoiding Harm

Physical harm is a necessary element of a standard negligence claim. In general, the tort law of negligence permits claims only when negligence results in physical harm—harm to real property and to persons. Harm to persons is understood as bodily injury and bodily injury is understood as the impairment of normal physical functioning.³¹ Michigan’s codification of the standard common law rule in the automobile accident context is a case in point. It defines “serious impairment of bodily function” to mean “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”³² This definition follows

²⁹ [quote Cardozo from Palsgraf]

³⁰ [cite to Gardner’s discussion of *Donohue v. Stevenson* and *MacPherson v. Buick* explaining why and how modern negligence law is less relational than the negligence law of the late 19th century]

³¹ The exceptions have to do with nominate torts (e.g., negligent misrepresentation) and an exceptional domain where serious emotional distress will suffice to ground a claim. [cites needed] In the emotional distress circumstance, courts are struggling to distinguish the circumstances of transient emotional upset from circumstances of serious emotional impairment. See [cite to my paper]

³² MCL 500.3135(1) (“A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.”). A recent Michigan Supreme Court case,

longstanding principles. The *First Restatement of Torts* defined bodily harm as “any impairment of the physical condition of another’s body or physical pain or illness.”³³ The *Second Restatement* refined this definition. “Bodily harm” was defined as “any physical impairment of the condition of another’s body” and “an impairment of the physical condition of another’s body [exists] if the structure or function of any part of the other’s body is altered.”³⁴ The *Third Restatement* now defines “physical harm” as “the physical impairment of the human body (‘bodily harm’) or of real property or tangible personal property . . . [such impairment] includes physical injury, illness, disease, impairment of bodily function, and death.”³⁵

These characterizations of harm rule out many costs and many losses as predicates for negligence claims. Pure economic losses are a case in point. They leave their victims poorer, but physically intact. Pure economic losses are costs but they are not harms and their negligent infliction generally does not give rise to negligence claims.³⁶ So too there are physical impacts and transformations that are not harms in the sense required to ground a negligence claim. A body of case law grappling with the slowly unfolding consequences of exposure to asbestos illustrates this nicely. Overwhelmingly, these cases conclude that identifiable subclinical damage at the cellular level will not support a tort claim. “The threat of future harm, not yet realized, is not enough.”³⁷ Functional impairment must be shown; basic physical powers—lung function, for instance— must be impaired before a claim arises.³⁸ Without such impairment there is no physical harm even though there are very real financial and psychic costs, and even though there is physical damage to the

McCormick v. Carrier, 795 N.W.2d 517 (Mich. 2010), applies this concept of impairment in an instructive manner. Plaintiff’s foot was broken and bruised when defendant’s truck ran it over. The foot healed, though it continued to ache occasionally. With the healed foot the plaintiff could perform the same work he performed prior to the injury but the post-injury foot hampered his fishing and other recreational activities. The court found impairment because plaintiff’s ability to lead his normal life was adversely affected.

³³ *Restatement (First) of Torts* § 15 (1934).

³⁴ *Restatement (Second) of Torts* § 15 *cmt. a* (1965). Section 7 distinguishes “bodily harm” from “injury” with “injury” covering cases in which a “legally protected interest” is invaded, but no harm is done. A harmless trespass would be an injury in this sense. *Id.* at § 7.

³⁵ *Restatement (Third) of Torts: Liability For Physical & Emotional Harm* § 4 (2010). The *Third Restatement* extends the idea of harm as an impaired condition to include the impairment of property. The philosophical conception of harm is concerned only with harm to persons. The question of how to account for the importance of property damage to tort is peripheral to the concerns of this paper. Offhand, the easiest way to make the extension would appear to be to draw upon the fact that we have rights in property. Those rights give rise to claims against others that they not damage our property, and make impairment of our property a harm to us.

³⁶ [cite]

³⁷ *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987) (quoting PROSSER & KEETON ON THE LAW OF TORTS, § 30, at 165 (5th ed. 1984)). Pleural thickening, a condition in which the lining of the lung thickens, may be the most common form of cellular damage which does not, by itself, count as physical harm. Because the harms of asbestos exposure are progressive, pleural thickening is a harbinger of asbestosis and mesothelioma.

³⁸ In addition to *Burns*, *id.*, illustrative decisions include *Owens-Illinois, Inc. v. Armstrong*, 604 A.2d 47 (Md. Ct. App. 1992); *In re Hawaii Federal Asbestos Cases*, 734 F.Supp. 1563 (D. Haw. 1990). *Verbryke v. Owens-Corning Fiberglas Corp.*, 84 Ohio App.3d 388 (1992) holds that pleural thickening does constitute bodily harm, but it is abrogated by *Ackison v. Anchor Packing Company*, 120 Ohio St.3d 228 (2008).

victim's bodies.³⁹ Under the law of negligence, then, physical harm is bodily impairment, and impairment is interference with normal functioning.

When bodily harm is understood as the impairment of normal powers of physical agency it is intimately connected to autonomy, not welfare. Broken bones, severed limbs, disabilities of sight and hearing, diseased organs and disfigured body parts all compromise the capacities through which we act. Those capacities play central roles in normal human lives. When we are seriously ill—or disabled or in serious pain—we are denied our normal lives. We are deprived of normal and important powers through which we exert our wills. Physical harm thus impairs our autonomy. It is this impairment of autonomy that explains and justifies the asymmetry of harm and benefit, in both law and morality.

The Asymmetry of Harm and Benefit

Both our ordinary moral thinking and our law treat the avoidance of harm as asymmetrically more important than the conferral of benefit. This has long puzzled law and economics scholars. “From an abstract [economic] perspective there would seem to be little reason for harms and benefits to be treated differently. Decades of cost-benefit analyses suggest that the two categories are interchangeable: reducing by one dollar damage that would otherwise occur is equivalent to providing a dollar's worth of new goods or services.”⁴⁰ This claim of symmetry is true to cost-benefit analysis, but at odds with firmly fixed moral judgments and legal doctrines, which take our obligations to avoid harming others to be stronger than our obligations to benefit others. We can be compelled to refrain from battering our neighbors, but we cannot be compelled either to love or to help them. Tort is robust whereas restitution is anemic. Our constitution contains a “takings” clause but it does not contain a “givings” clause. The key to understanding this asymmetry lies in considerations of autonomy. Before we take up those considerations, however, it pays to pause and take stock of the pervasiveness of the asymmetry.

Many examples of the harm-benefit asymmetry manifesting itself in our law might be given,⁴¹ but the following are representative:

³⁹ Medical monitoring costs, for example, are very likely to be incurred if a patient presents with subclinical damage from asbestos. The psychic costs are even larger. Persons afflicted by such changes live under swords of Damocles that are beginning to drop. This is a real and serious psychic burden, as the U.S. Supreme Court notes in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 150 (2003) (“In the course of the 20th century, courts sustained a variety of other “fear-of” claims. Among them have been claims for fear of cancer. Heightened vulnerability to cancer . . . must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows it is there, but not whether or when it will fall.”) (internal quotations and citations omitted).

⁴⁰ Wendy T. Gordon, *Of Harms and Benefits: Torts, Restitution and Intellectual Property*. 21 J. LEG. STUD. 449, 451 (1992).

⁴¹ For example, if I pollute your water when working on my own property, I am likely to be liable in nuisance for the harm that I do. By contrast, if I purify your water in the course of purifying my own, my unjust enrichment claim is likely to fail. Businesses can normally “free ride” off of the positive externalities of other business without doing any legal wrong. A story, popular in property circles, about Disneyland and Disneyworld is illustrative. When Disney built Disneyland, it acquired just enough land for its theme park. The park conferred a major windfall on neighboring landowners and businesses. Lured by Disneyland, customers came from all over the world and the value of neighboring land soared. Several decades later, when

1. *Endangering and Rescuing*. In the law of torts, there is a general duty not to impose unreasonable risks of physical harm on others. There is no parallel general duty to benefit people.⁴² The avoidance of harm is a matter of legal and moral obligation; the conferral of benefit is supererogatory.
2. *Tort and Restitution*. The law of torts, whose province is liability for harm done, is robust. The law of autonomous unjust enrichment—whose province is liability for benefit conferred—is much smaller.⁴³
3. *Fraud and Failure to Volunteer Information*. We all have various obligations to not commit fraud—obligations not to manipulate other people through the provision of false information. We are not under a parallel obligation to step forward and affirmatively provide information to others.
4. *Takings and Givings*. In our public law there is a takings clause but there is no “givings” clause. Yet, as Avi Bell and Gideon Parchmovsky observe, “[t]he efficiency rationale for takings compensation also dictates that the state properly measure the benefits of its actions. Just as the state’s failure to internalize the cost of takings creates fiscal illusion and inefficiency, the state’s failure to internalize the benefits of givings creates fiscal illusion and inefficiency.”⁴⁴

In economic terms, all of these examples involve differential treatment of negative and positive externalities. The law of torts is largely about harms; harms are negative externalities. The law of restitution is about un-bargained-for benefits, benefits are positive externalities. When the government takes property to build a freeway, it creates a negative externality; when it builds a freeway, it creates a positive externality. Misinforming my customers by disclosing false information to them is a negative externality; educating them by disclosing valuable information is a positive externality.

Disney built Disneyworld, it purchased much more land than it needed for its theme park. The strategy worked, but imperfectly. Disney kept more of the total value added by its theme park, but the Park’s positive externalities also expanded into a larger geographic area. See Richard A. Epstein, *A Conceptual Approach to Zoning: What’s Wrong with Euclid*, 5 N.Y.U. ENVTL. L.J. 277, 289 (1986). “Rescue cases” afford another important example. In the course of performing a rescue a rescuer may inflict lesser harm to avoid greater harm, but people may not inflict harm merely in order to confer benefit. For perceptive discussion of this example see Seana Shiffrin, *Harm and Its Moral Significance*, 18 LEGAL THEORY 357, 363-65 (2012). LEO KATZ, *ILL-GOTTEN GAINS*, at 197–203 (1996) discusses interesting and related asymmetries in the rules of praise and blame.

⁴² “If A saw that B was about to be struck on the head by a flowerpot thrown from a tenth-story window, and A knew that B was unaware of the impending catastrophe and also knew that he could save B with a shout, yet he did nothing and as a result B was killed, still, A’s inaction, though gratuitous (there was no risk or other nontrivial cost to A) and even reprehensible, would not be actionable.” *Stockberger v. U.S.*, 332 F.3d 479, 480 (7th Cir. 2003) (Posner, J.).

⁴³ See, e.g., Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 71 (1985) (“[T]he legal remedies available to victims of harms are far superior to those enjoyed by analogous providers of nonbargained benefits.”); Scott Herschovitz, *Two Models of Torts and Takings*, 92 VA. L. REV. 1147 (2006).

⁴⁴ Abraham Bell & Gideon Parchmovsky, *Givings*, 111 Yale LJ. 547, 554 (2001).

From an economic point of view, negative and positive externalities are pluses and minuses on the same scale. Negative externalities are costs imposed on others with whom the cost-imposer does not have a bargaining or market relationship. Positive externalities are benefits conferred on others with whom the benefit-conferrer does not have a bargaining or market relationship. Costs and benefits are opposite but symmetrical. This is Professor Gordon's point: "the two categories are interchangeable: reducing by one dollar damage that would otherwise occur is equivalent to providing a dollar's worth of new goods or services."⁴⁵ From an economic point of view it is at least presumptively irrational to treat costs as more important than benefits—or vice-versa. Presumptively, the law should care as much about promoting positive externalities as it does about correcting negative ones.

Unsurprisingly, the harm-benefit asymmetry has attracted considerable attention from legal economists and these economists have expended considerable ingenuity trying to explain different manifestations of the asymmetry. The plain fact, however, is that the depth and pervasiveness of the law's differential treatment of positive and negative externalities is simply not what one would expect if efficiency were the master value of the law.⁴⁶ It is vividly the case that "other things being equal, harms, harming events, and opportunities to harm are more important morally [and legally] than benefits, benefitting events, and opportunities to benefit."⁴⁷

Caveats and Complexities

Examples of the harm-benefit asymmetry are knotty and they can be misleading. Real world examples present complex configurations of consideration; they don't simply instantiate the asymmetry in its pure form. Restitution cases, for example, raise the question of when people are obligated to pay for unsolicited benefits, not the question of when they are obligated to confer

⁴⁵ Gordon, *supra* note --.

⁴⁶ See, e.g., Oren Bar-Gill & Ariel Porat, *Harm Benefit Interactions*, 16 AMERICAN LAW & ECONOMICS REV. 86 (2014); Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 261 (2009) (arguing that liability for unrequested benefits often enables production of public goods which would not otherwise be created). Levmore, *supra* note 43, is particularly focused on the comparatively feeble state of the law of unjust enrichment in comparison with the law of torts. The economic theory of property law has had significant success in arguing that property law responds to the problem of positive externalities. See, e.g., Harold Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS AND PROC.) 347, 348 (1967) ("[A] primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."). Economic explanations for other instances of the asymmetry have also been offered. See, e.g., William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

⁴⁷ Shiffrin, *supra* note 41, at 361. Shiffrin describes this as the "first" and "principal" harm-benefit asymmetry. There are two subordinate asymmetries. First, lesser harm may be inflicted to avoid greater harm but harm may not be inflicted simply in order to bestow benefit. If you are drowning, I may break your arm to save your life. I may not, however, knock you unconscious in order to operate on you and endow you with encyclopedic knowledge of the works of Shakespeare, or the athletic prowess of Michael Jordan. Second, there is an asymmetry between what others may do and what a person may do to herself. Others may not knock someone out to perform an operation which will endow the victim with great knowledge or skill, but someone may themselves elect to submit to such a procedure. *Id.*, at 363–66. Other complications or qualifications are sometimes necessary. For example, some failures to benefit are harms because the victim has a right to the benefit. If USC fails to pay my salary its failure to benefit me is a harm because I have a right to be paid.

benefits on others. These are markedly different questions. Similarly, the distinction between negative and affirmative duties not only implicates the difference between harm and benefit; it also implicates the deep and difficult distinction between malfeasance and nonfeasance. Legal examples, moreover, have distinctive institutional dimensions. They may, for instance, implicate the division of labor among institutions. Takings may be the proper concern of private rights of action whereas “givings” may be addressed by the “public law” of taxation. Conversely, economic analysis may exaggerate the salience of the harm-benefit distinction by virtue of its restricted vision: economic analysis takes welfare to be the only relevant value and consequences to be the only morally significant phenomenon. The “givings” problem may not loom so large in a framework which places people’s rights and responsibilities at its center.

These caveats and complexities are real and important, but they should not lead us to lose sight of the common thread tying together these diverse cases. Our negative rights not to be harmed *are* more extensive than our positive rights to recover when we benefit others. The asymmetry of harm and benefit may not be the only phenomenon at work in the cases we have canvassed, but it is an important one and it runs through a range of important legal doctrines and moral judgments.

Autonomy and Asymmetry

For cost-benefit analysis, the harm-benefit asymmetry is a puzzle at best and an irrationality at worst. If avoiding a dollar’s worth of damage “is equivalent to providing a dollar’s worth of new goods or services,” then we ought to treat harms and benefits symmetrically.⁴⁸ It is presumptively irrational to do anything else. To solve this puzzle—and to make sense of the special significance of harm for the law of negligence—we need to set aside the framework of cost-benefit analysis and take our separateness and independence as persons as fundamental. We need to understand ourselves as independent agents who have a fundamental interest in authoring our own lives, and to understand our obligations to avoid harming others as obligations owed to those others, not as proxies for the pursuit of the general good. Non-consequentialism justifies assigning special priority to avoiding harm because harm is presumptively and especially bad for persons. Or so I shall argue.

Harm is a morally freighted word. It is presumptively wrong to harm someone and presumptively bad to suffer harm. In most circumstances, it is not presumptively wrong to fail to benefit someone. Benefits are presumptively good things, but they are also often trivially good things for which we have little use. Harms impair essential conditions of human agency. Physical harm is, for tort law, the core chase of harm and physical harm compromises our autonomy by impairing our normal powers of human agency. Physical harms—death, disability, disease, and the like—rob us of normal and foundational powers of action. Physical harm comes close to being unconditionally bad.⁴⁹ Few benefits, by contrast, are unconditionally good. Anything which enhances someone’s life is a benefit, but whether or not something enhances someone’s life depends greatly on their particular ends and commitments. Extraordinary visual-spatial processing skills are

⁴⁸ Wendy T. Gordon, *Of Harms and Benefits: Torts, Restitution and Intellectual Property*. 21 J. LEG. STUD. 449, 451 (1992).

⁴⁹ In some cases, the physical harm suffered may avoid a greater physical harm. In others, the harm may enable the realization of some value or good to whose realization the harmed person is deeply committed. These are exceptional cases, however, and even in these cases the harm suffered is still, in itself, bad. A broken arm may be worth suffering if it avoids death by drowning, but it is still a harm.

invaluable for football quarterbacks, but of little or no value to lawyers. Unusually low levels of anxiety may be indispensable to elite mountaineers and an impediment to more ordinary lines of work. Whether some benefit—great wealth, or great musical talent, or great athletic skill, or great mathematical brilliance, for example—plays a valuable role in someone’s life depends heavily on her aspirations and projects. Even great wealth is not an unalloyed good. Great wealth is necessary to major philanthropy, but it may impair the pursuit of authentic relationships. And the capacity of wealth and its pursuit to derail and thwart the pursuit of valuable ends should not be underestimated. It is well-known that winning the lottery is anything but an unalloyed good.⁵⁰

Harms and benefits stand in very different relation to autonomy because they stand in very different relation to our wills. Harms compromise our autonomy by impairing our normal powers of human agency. Benefits enhance our lives only if they are congruent with our wills. To thrust an unsought benefit upon someone—and then demand compensation from them for the value conferred—is to impose upon them.⁵¹ Demands for compensation for the conferral of unsought benefits stand in the same relation to our wills as harms do. They subject us to conditions which we have not chosen; they sever the link between our wishes, our wills and our lives and enlist us in other people’s projects. If I play beautiful music outside your open bedroom window and then stick you with a bill for my services, I determine the use to which you must put some of your time and some of your money. You are presumptively entitled to determine those things and your ability to do so is an important aspect of your autonomy.

The fact that both harms and obligations to benefit can undermine autonomy helps to explain the asymmetry between our stringent obligation not to commit fraud and our permission not to volunteer useful information. Fraud is deception and deception is wrong because it unjustifiably undermines autonomy. By manipulating the reasons available to its victims, fraud severs the link that normally exists between a person’s reason and their will. Fraud makes its victims the unwitting instruments of its perpetrators’ wills. It usurps their self-governance. A duty not to commit fraud is a duty not to undermine the autonomy of others in a particular and important way. An obligation to volunteer information for the benefit of others merely because it is beneficial to them, by contrast, would be an imposition on our autonomy. We would be required to work for the benefit of others whether or not we chose to do so and whether or not we were compensated for so doing. A *general* obligation to volunteer information for the benefit of others would be a significant burden to our autonomy.

Benefit and Harm

The argument so far has proceeded as though the concepts of harm and benefit were uncontroversial. In the case of benefit, the assumption is correct. The concept of a benefit is broad, straightforward and relatively uncontroversial. A benefit is an advantage; anything that promotes or enhances well-being.⁵² Harm, however, is a contested concept. The philosophical literature is divided between dueling conceptions, and the argument of this chapter takes sides in that debate. The

⁵⁰ See, e.g., Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?* 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978).

⁵¹ See, e.g., Lee Anne Fennell, *Forcings*, 114 COLUM. L. REV. 1297 (2014) (discussing forced ownership of property by the government).

⁵² See, Shiffrin, *supra* note 41.

dominant conception conceives of harm as a setback to an “interest,” with an interest being something in which someone has a “genuine stake.”⁵³ The interest theory’s principal competitor conceives of harms as conditions in which powers of human agency are impaired. Both the interest and the impaired condition conceptions of harm can be mapped onto American law. Tort law distinguishes between a broad conception of tortious wrongdoing as conduct which invades “legally protected interests” (or rights), and a narrower conception of physical harm as the suffering of an impaired condition.⁵⁴ And its computing damages tort law adopts an approach which approximates an historical version of the setback to an interest conception of harm. The “impaired condition” conception of harm, however, maps more smoothly onto negligence law’s conception of harm as physical impairment, does a better job of capturing harm’s essential badness, draws an illuminating and persuasive connection between harm and autonomy, and thereby sheds light on the harm-benefit asymmetry.

The dominant conception of harm as setback to an interest understands harm to be a comparative phenomenon, a worsening of one’s position. To be harmed is to have one’s well-being significantly diminished, either historically or counterfactually. Either one is made worse off than one was (the historical account), or one is made worse off than one otherwise would have been (the counterfactual account). For example, a college football player with aspirations to a professional career is harmed historically if he is injured, loses his starting position to another player and is subsequently cut from the team. He is harmed counterfactually if his professional aspirations are thwarted because he is never drafted. The principal competitor to the interest conception of harm starts by taking harms to be conditions one would not wish to suffer.⁵⁵ The focus of this conception is on the condition or state itself, not on its relation to an antecedent or alternative condition. Suffering excruciating pain, for example, is harm—even if the alternative is death and even if you prefer agonizing pain to death.

On this competing conception, core harms are conditions of impairment, conditions which compromise normal functioning. Blindness, for example, is a harm because sight is a normal human power, a part of normal human functioning. This is true even if the person in question is born blind and so never suffered the loss of sight—never underwent any worsening of position. Introducing the idea of impairment helps to elaborate the idea of harms as conditions that no one would wish to

⁵³ JOEL FEINBERG, *SOCIAL PHILOSOPHY* 26 (Pearson 1973) (“A humanly inflicted harm is conceived as the violation of one of a person’s interests, an injury to something in which he has a genuine stake.”). The idea of a setback can be developed either counterfactually or historically. Feinberg develops it counterfactually. See Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, *FREEDOM AND FULFILLMENT*, 3, 4 (1992). Hershovitz draws upon and modifies Feinberg’s account of harm. See Hershovitz, *supra* note 43.

⁵⁴ See, e.g., *Restatement (Second) of Torts* §§ 7, 15 (1965).

⁵⁵ Preeminently, this conception is advanced by JUDITH THOMSON, *THE REALM OF RIGHTS* 262–68 (1990), and by Shiffrin, *supra* note 41. See also Judith Thomson, *More on the Metaphysics of Harm*, 82 *PHIL. & PHENOMENOLOGICAL RESEARCH* 436 (2011). In *The Metaphysics of Harm*, Professor Hanser develops a third conception of harm. That conception takes harms to be events that injure basic human goods, not the ensuing conditions of impairment. Basic goods are “those goods [the] possession of which makes possible the achievement of a wide variety of the potential components of a reasonably happy life. . . . [The] basic goods . . . include certain fairly general physical and mental powers and abilities. The power of sight, for example, is a basic good for human beings.” Matthew Hanser, *The Metaphysics of Harm*, 77 *PHIL. & PHENOMENOLOGICAL RESEARCH* 421, 440–41 (2008).

suffer, but the concept of an “impaired condition” is itself a broad one. Anything that can function normally can have its proper functioning impaired. Damage to a butterfly’s wings disturbs the functioning of the wings and harms the butterfly. Harm in this broad sense need not impair autonomy; many things that are not autonomous have functions that can be impaired. Cars and computers are cases in point.

The core cases of harm to persons—cases such as broken, deformed and lost limbs; chronic pain; serious illness; and significant developmental disabilities—constitute a narrower set of impaired conditions. In these cases, *basic powers of normal human agency are seriously compromised*. The harms that matter most in law and morality rob people of normal and essential powers through which they shape their lives and their worlds in accordance with their wills.⁵⁶ Our wills are at the center of our understanding and experience of ourselves as agents. We draw upon our wills when we act, and the exercise of our wills makes us aware of our own persons as sources of events in the world. Through our wills we exercise mastery over ourselves and portions of the world. We are aware that there are events which we may bring into existence if we chose to do so. I can, for example, bring words into existence on a page by typing on a keyboard. So doing is an exercise of my will, and my consciousness that I can do this is consciousness of my own mastery over myself and certain portions of the world. Physical harms, chronic pain, developmental disabilities, illness and the like deprive us of normal forms of mastery over ourselves, our experience, and some portions of the external world by driving a wedge between our wills and our lives. They thrust upon us “conditions that generate a significant chasm” between our wills and our experiences.⁵⁷ When my wrist is broken my attempts to type come to naught.

Because physical capacities play central roles in normal human lives, physical harm is the central case of harm under the impaired condition conception.⁵⁸ Blindness is, for example, serious harm because sight is a normal human capacity and its loss usually diminishes a person’s life. Being blind denies someone access to an important range of normal human activities. Other things being equal, a person whose sight is normal has access to a richer life than a blind person does. A broken leg is a serious harm because a person whose leg is broken is unable to engage in a range of normal activities, beginning with walking. Loss of a leg is a more serious harm than a broken leg, because loss of a leg is permanent whereas a broken leg, properly treated, will heal.⁵⁹ On an impaired-

⁵⁶ See Shiffrin, *supra* note 41, at 383. In sharpening the concept of harm in this way Shiffrin is, in part, criticizing Raz’s conception as too broad. See Shiffrin at 389, n. 48. By contrast, she is further articulating Thomson’s conception, though Thomson might not accept the sharpening. See JUDITH THOMSON, *THE REALM OF RIGHTS*, 227–48, 250–51, 253–71 (1990); Judith Thomson, *More on the Metaphysics of Harm*, 82 *PHIL. & PHENOMENOLOGICAL RES.* 436 (2011).

⁵⁷ Seana Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117, 123 (1999).

⁵⁸ Psychological harm follows not far behind. Impaired psychological capacities wreak similar havoc with normal lives. Child sexual abuse, for instance, usually leads to serious harm because it usually damages the capacity to trust other people and so impairs the formation of normal and valuable human relationships. Disfigurement is, intuitively, a core case of harm, but not an easy case to explain. The role of normal human appearance in social relations probably explains the importance of disfigurement as a harm. ERVING GOFFMAN, *STIGMA* 41–104 (1963).

⁵⁹ In *Davis v. Consolidated Rail*, 788 F.2d 1260 (1986), Judge Posner remarks that “the loss of a leg is a terrible disfigurement, especially for a young man” even if the victim “is able to walk with the aid of prosthetic

condition conception, then, the gravity of harm is usually a function of the importance to the victim's life of the capacity that the harm impairs and the extent and duration of the impairment.

The impairment conception of harm thus holds that all harms are presumptively bad for those who suffer them, but not all harms equally bad. A gangrenous limb, for example, is both a serious impairment in itself and a threat to the life of the person whose limb it is. Losing a gangrenous limb is also bad, even though the person whose limb is lopped off is better off than he would be if it were left attached. To live without a limb is to live with seriously diminished capacities of agency. Lesser harm cases vividly illustrate both the differences between the impairment and interest accounts of harm and the difference between the impairment account and the way in which the concept of benefit is used in cost-benefit analysis. On the impairment conception, lesser harms are still harms. From the point of view of the interest conception of harm, by contrast, lesser harms are not harms, they are benefits. The person whose gangrenous limb is lopped off is better off than she would have been had the limb been left in place. Severing her limb improves her position. Economically speaking, lopping off the limb is a Pareto-superior move. It is a benefit, not a cost. Amputation is preferable to retaining the limb and letting the gangrene spread. Both of these assertions are correct on their own terms. But the terms fail to register the moral significance of harm adequately. It is not a benefit to live without a limb. Loss of a limb is both disabling and disfiguring. We are in the domain of impairment and diminution, not the domain of improvement and enhancement.

Costs and Losses

When harm is conceived of as an impaired condition—and physical impairment is considered the core case—harm delineates a domain of special concern much narrower than the domain of concern identified by the concept of cost. Cost is any value given up in order to obtain some good. It encompasses any disadvantage, anything which diminishes well-being. Ordinary losses—athletic, financial and romantic—are costs, but not harms.⁶⁰ Ordinary losses make their victims worse off than they would otherwise be but they do not leave their victims with permanent physical or psychological damage. The prospect of loss to others does not usually give rise to strong reasons to avoid inflicting such loss. The prospect of harm does. A person is, after all, at liberty to

devices, to drive, to work, and in short to lead almost a normal life.” The plaintiff had had one leg severed just below the knee and most of the foot on the other leg sliced off in a railroading accident. Precisely because the idea of harm as impairment is not a part of the economic theory to which Judge Posner subscribes, this appeal to ideas of disability and disfigurement is revealing. *Id.* at 1263.

⁶⁰ Influential psychological research by Daniel Kahneman and others has shown that people's ordinary judgments about gains and losses violate the prescriptions of expected utility theory because people treat financial losses and gains differently. See Daniel Kahneman et al., *Anomalies: the Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991). There is an obvious resemblance between the asymmetry of harm and benefit in law and morality and the asymmetry of gain and loss in observed human behavior. It is therefore tempting to regard the harm-benefit asymmetry as an instance of a more general psychological aversion to loss. That temptation should be avoided. The two asymmetries are importantly different. Harms generally result in impaired conditions whereas losses generally do not. Moreover, insofar as the take home lesson of the psychological research is that people make irrational judgments, that lesson is at odds with the argument developed here. The argument developed here is that people have good reasons—rooted in considerations of autonomy—to treat harms and benefits differently.

beat a competitor out for a job by being better qualified, but she is not at liberty to break that competitor's arm.

Tellingly, in competitive circumstances risk of loss is usually inseparable from the good that the competition seeks to realize. Races that cannot be lost are not worth winning, and markets in which firms cannot fail do not realize the benefits of economic competition. And, in sports, business and love, the risk of loss is accepted when the enterprise is taken up. Losses suffered in these arenas cannot usually be counted as harms. This is so even though it is not always worse to suffer harm than loss. Most of us would rather, for instance, break our pinkies than see our business bankrupted by a competitor. Even so, it is not presumptively wrong for one businessman to drive another out of business, fair and square, whereas it is presumptively wrong for one businessman to break another's finger. It is almost always presumptively wrong to do harm, whereas it is not always presumptively wrong to inflict loss. One reason why this is so is that, absent some further condition—such as a right to, or a legitimate expectation of, some benefit—losses are not harms.⁶¹

C. *Prudence and Obligation*

The economic analysis of risk imposition conceives of due care as rational care—as the care that a single rational actor would take if that actor bore both the costs and the benefits of its own risk impositions. In its embrace of the single actor metaphor, economic analysis echoes an important thread of negligence rhetoric. A leading American case from the 1870's, for example, remarks that “the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.”⁶² The economic analysis of risk and precaution, however, goes beyond the ethical ideal of impartiality between one's own interests and those of others and seeks to purge judgments of due care of their apparently intrinsic moral character. Thomas Schelling inaugurated the modern approach cost-benefit analysis of risks to life and limb by challenging the received wisdom that valuing a human life required “a moral judgment.” “Why a moral judgment?” Schelling asked. “Why not a practical judgment—a consumer choice—by the members of society about what it is worth to reduce the risk of death” as a “consumer choice.”⁶³ “We nearly all want our lives extended and are probably willing to pay for it.”⁶⁴

Implicit both in Schelling's observation that we can view the question of “what it is worth to reduce the risk of death” as a “consumer choice,” and in his general thesis that “the life you save may be your own,” is an invitation to think about matters of risk and precaution as purely prudential personal choices.⁶⁵ Consider the purchase of a new car. It eminently sensible and wholly legitimate for a prospective purchaser to evaluate the desirability of purchasing an optional accident avoidance

⁶¹ See

⁶² *The Nitro-glycerine Case* (Parrott v. Wells, Fargo, & Co.), 82 U.S. (15 Wall.) 524,538 (1872)

⁶³ THOMAS SCHELLING, *The Life You Save May Be Your Own*, in CHOICE AND CONSEQUENCE, 113, 114, 115 (1984). Schelling's innovation was to revise the cost-benefit analysis of risks of death so that it included the value that those at risk of death placed on their own lives. Prior to his paper, loss of life was computed solely as loss of human capital—as the productive output lost when a worker died prematurely. See Gary Schwartz, *The Myth of the Ford Pinto Case*, 43 Rutgers L. Rev. 1013 (1991).

⁶⁴ *Id.*;

⁶⁵ See Schelling, *supra* note 64.

system by comparing the value of the accidents avoided to the value of the other goods she might purchase with the money it costs to add the option. To be sure, it may be extremely difficult to do this, but that difficulty is not an objection to the legitimacy of doing so. In other cases, however, treating safety decisions as purely personal prudential choices would strike us as wildly inappropriate. Imagine for example, a peculiar person who is attracted to the idea of exposing herself to the level of risk involved in climbing K2, but who is utterly averse to the deprivation and intense exertion of mountaineering. To tailor her life to her special taste for both risk and indolence, she hits on the idea of rigging up her car with an external gas tank so that even a minor fender bender might prove fatal. Because this way of pursuing her preferences for her own life seriously endangers others, it's clearly wrong to treat her decision as purely personal.

The cost-benefit analysis of risk of death is far from indifferent to the distinction between these cases. Economists are keenly aware that the second case involves a major negative externality, whereas the first does not. But cost-benefit analysis responds to the difference between the two cases in a distinctive way. It addresses circumstances where the actions of some negatively affect the welfare of others by incorporating the benefits to some and the costs to others into a single calculus of risk and benefit. In so doing cost-benefit analysis models social decision on an intuitively appealing conception of individual rationality. In many circumstances, the prudent thing for each of us to do is to balance the costs and benefits of alternative courses of action and choose the action that is most net beneficial. The extension of this conception to the circumstances of social choice, where costs and benefits fall on different people, however, is much less attractive. When benefits accrue to some and costs fall on others—and when people evaluate costs and benefits differently—social choice and individual choice are very different. People value risks and benefits differently. Few of us are enthusiastic about being exposed to dangers akin to those involved in summiting K2 as part of our morning commutes. By combining all costs and all benefits into a single calculus of risk cost-benefit analysis eclipses “the distinction between persons.”⁶⁶ Because our lives are distinct—and our ends are diverse and incommensurable—treating social choice as individual rational choice writ large is a fundamental mistake.

The law of negligence is preoccupied with imposed risk—with risks that some people impose and to which other people are exposed. In eclipsing this fact, the economic conception of due care as rational converts a moral question into a prudential one and obscures the heart of the problem. The basic question presented by the problem of due care is what people owe to others in the way of precaution when they undertake acts and activities which put those others at significant risk of physical harm. This is a moral question; it is a matter of obligation, not a matter of prudence. Tellingly, negligence law itself speaks of reasonable care, not of rational care. The distinction between reasonableness and rationality is a fundamental one.⁶⁷ We act rationally when we pursue our

⁶⁶ Here, cost-benefit analysis inherits the weakness of utilitarianism, its parent philosophy. For the pertinent criticism of utilitarianism, see JOHN RAWLS, *A THEORY OF JUSTICE* 24 (rev. ed. 1999).

⁶⁷ JOHN RAWLS, *POLITICAL LIBERALISM* 48 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. Rawls traces the philosophical recognition of the distinction to Kant. For slightly different views of the matter, see W.M. Sibley, *The Rational and the Reasonable*, 62 *PHIL. REV.* 554, 554 (1953) (discussing the distinction and the affinity between reasonableness and Kant's categorical imperative) and George P. Fletcher, *The Right and the Reasonable*, 98 *HARV. L. REV.* 949, 951, 964-68 (1985) (arguing that the common law concept of reasonableness parallels the German civil law concept of right, which descends from Kant).

self-interest in an instrumentally intelligent way. We act reasonably when we restrain our pursuit of self-interest by acting in accordance with principles that fix fair terms of cooperation.

Three distinctions between reasonableness and rationality are worth emphasizing. First, Reasonableness is intrinsically moral whereas rationality is not. Reasonableness is concerned with what we owe to others whereas rationality is not. Second, taking the distinction between persons seriously directs our attention not to rationality, but to reasonableness. Rational principles of action are suited to single persons, or to groups with shared final ends.⁶⁸ Reasonable principles of cooperation are suited to governing relations among equal and independent persons whose lives are distinct and whose ends are diverse. Third, taking the distinction between persons seriously directs our attention not to efficiency but to fairness. Efficiency is concerned with overall welfare whereas fairness is concerned with the distribution of burdens and benefits—“with how well each person’s claim is satisfied compared with how well other people’s [claims] are satisfied.”⁶⁹ Reasonableness is as linked to fairness as rationality is to prudence. Reasonable principles reconcile the conflicting aims and interests of different people on terms that each could acknowledge as legitimate if they were to change places with those burdened by the pursuit of their ends.⁷⁰ Reasonable principles are fair principles.

It is hardly surprising, therefore, that when the law of negligence specifies the duties that persons engaged in risky acts and activities owe to those they put at risk, it speaks in terms of *reasonable* conduct and *reasonable* persons, not in terms of *rational* conduct and *rational* persons. What is surprising is that the economic analysis of due care as the care that a single rational actor would take if she were to bear both the costs and the benefits of a particular risk imposition is thought to fit the law of negligence hand and glove.⁷¹ Negligence law’s implicit test of principles of risk imposition is not whether they maximize net benefit, but whether they are justifiable to those whose lives they govern. Reasonable principles of risk imposition protect the essential interests of those affected by the risks in question. Doing so may well conflict with promoting overall welfare. The claims of those whose lives are at risk of accidental destruction and devastation at the hands of valuable activities may, for example, require that the rest of us accept standards of safety which require more than efficient precaution.

The possibility that reasonable (or fair) principles of risk imposition will diverge from rational (or efficient) ones comes into sharper focus once we connect the priority of avoiding harm

⁶⁸ A group of mountaineers committed to summiting K2 share an end which justifies them in accepting upon themselves and imposing on each other exceptional risks of death. Many kinds of associations and activities may share ends in this way. In a modern pluralistic society, members of civil society as a whole do not.

⁶⁹ John Broome, *Fairness*, 91 PROC. OF THE ARISTOTELIAN SOC’Y 87, 94–95 (1990-91). See also, Johann Frick, *Contractualism and Social Risk*, *supra* note **Error! Bookmark not defined.** See also, Dov A. Waisman, *Reasonable Precaution for the Individual*, 88 ST. JOHN’S L. REV. 653 (2014); Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, And Tradeoffs: A Closer Look at the Controversy*, 41 LOYOLA OF LOS ANGELES L. REV. 1171 (2008).

⁷⁰ . . . My explanation of reasonableness is imprecise because the idea of changing places is a rough test of reasonableness, not reasonableness itself. *Id.* (“[T]he thought experiment of changing places is only a rough guide; the fundamental question is what would it be unreasonable to reject as a basis for informed, unforced, general agreement.”).

⁷¹ [cites to Posner & Cooter & Ulen]

with the separateness of persons, and ask when benefits to some might justify imposing risks of harm on others. When we consider significant risks of serious harm, fairness requires that we compare the gains to those who stand to gain from the risks at issue to the burdens to those who stand to lose.⁷² Some gains—some benefits—are not comparable to serious harms. When serious harm is risked something of comparable importance must sit on the benefit side of the scale. Not all benefits will do. An example of Tim Scanlon's brings this out.⁷³ Scanlon supposes that a piece of transmitting equipment has toppled and pinned a television technician helping to broadcast a live sporting event to which tens of millions of viewers are glued. The technician is in agonizing pain and serious risk of further harm, including death. The only way to save the technician's life is to interrupt the broadcast for thirty minutes, by which time game may have ended. Unrestricted cost-benefit analysis holds that, if enough people stand to be disappointed by the termination of a television show, terminating the life of a television technician may be preferable to terminating the broadcast of the show. The net benefit to all of the viewers (measured by what they would be willing to pay to have the broadcast continue) might easily exceed the net loss to the technician (measured by what he would be willing to pay to have the transmission interrupted).

Our moral sensibility balks at the conclusion that net social benefit is dispositive in this case. Net social benefit is construct, experienced by no one. The harm to the technician is severe, whereas the benefits to each of those benefitted are modest at best. It is unfair to sacrifice the technician on the altar of the general good as unrestricted cost-benefit analysis conceives it. Taking the distinction between persons seriously brings interpersonal fairness to the fore. Although the number of viewers may be vast, the harm to them is not morally comparable to the harm that the technician stands to suffer. No amount of inconvenience and disappointment distributed across a population of distinct persons sums to the moral equivalent of subjecting someone to unendurable pain. Consequently, we should not decide how to proceed by measuring the victim's preference for having her agony alleviated in dollars and then comparing that sum to the price that the viewers would pay to have the broadcast continue. The cost to the technician and the benefit to the viewers are not substitutable at some ratio of exchange. The benefit to the viewers is, comparatively speaking, trivial and the harm to the technician is devastating. Aggregating harms and benefits does not make moral sense when harms and benefits are not comparable, morally speaking.

Taking the distinction between persons, and the priority of avoiding harm, seriously puts us in a position to see that an alternative framework is latent in our moral intuitions and legal institutions. The physical integrity of the person is a kind of primary good; it is an essential condition of effective human agency. Values are plural and incommensurable and human lives are distinct. The point of protecting the essential conditions of agency for each person is to enable people to shape their own lives in accordance with their aspirations. Within a framework that prioritizes the protection of each person's essential interests, the question of how to trade safety off against other

⁷² This involves evaluating risk impositions from "representative standpoints" and considering the "generic reasons" relevant to those standpoints. See Rahul Kumar, *Contractualism and the Roots of Responsibility*, and *Risking and Wronging*, both *supra* note **Error! Bookmark not defined.**. The presumptively relevant standpoints are the standpoints of potential injurers and victims. Often these standpoints must be revised and refined to analyze a particular circumstance well.

⁷³ See Scanlon, *supra* note **Error! Bookmark not defined.**, at 235.

goods requires making judgments of urgency (or need) not preference (or want). Safety should only be sacrificed in order to promote some comparably urgent interest.

The assertions made in the preceding paragraph come into focus most clearly in the context of the safety and feasibility norms of federal risk regulation, examined in the next chapter. These norms, and the regulatory schemes in which they are embedded, are ways of articulating the priority of avoiding harm and they embody judgments of comparable value—judgments about just what goods are important enough to justify imposing significant risk of irreparable and serious harm. But the distinction between persons and the priority of avoiding harm are also indispensable to understanding negligence law’s articulation of the care we owe to each other when we pursue beneficial but risky activities.

III. REASONABLENESS AND RECIPROCITY

The economic analysis of torts conceives of liability rules as prices. Their role is to allocate the costs of accidents efficiently. Plaintiffs and defendants are merely placeholders for social costs and social benefits. Tort liability as a whole is forward-looking; its role is to minimize the combined costs of accidents and their prevention, going forward.⁷⁴ Corrective justice theory calls the adequacy of this conception into account by calling our attention to the backwards-looking character of tort adjudication. Tort lawsuits repair past wrongs. They ask who did what to whom and their central concern is whether the defendant did or did not comply with its primary tort obligations. These well-taken points, however, say little about tort’s primary norms themselves. Importantly, those norms look forward. They bind persons to standards of correct conduct, and they are matters of correlative rights and duties. Tort obligations are owed reciprocally by persons to one another, and they are owed with respect to individual interests deemed important enough to warrant protection as a matter of law.

Conceived in a forward looking way, tort law is about rights against interference and impairment, and correlative obligations not to interfere or impair in various ways. Tort obligations are owed by persons to each other *as persons* and with respect to important interests. In the context of negligence liability, it is commonplace and correct for American courts to remark that “everyone has a duty of care to the whole world.”⁷⁵ The epigram “duty to the whole world” embodies two distinct assertions. The first is that everyone (every person) owes everyone else (every other person) an obligation to exercise reasonable care for their protection. The second is that people owe and are owed this obligation just in virtue of being persons. Tort obligation is not created by contractual agreement or through the acquisition of property. It is imposed as a matter of law and it is imposed *because* people have rights not to be harmed or interfered with in certain ways just because they are persons and the interests at stake are important enough to demand the forbearance of others.

The law of torts seeks to secure persons essential interests against impairment at each other’s hands. It obligates us mutually to respect each other’s physical and psychological integrity, each other’s personal and real property, each other’s privacy and reputations, each other’s peace of mind,

⁷⁴ See e.g., ROBERT COOTER AND THOMAS ULEN, *LAW AND ECONOMICS*, 3 (6th ed. 2012) and RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*, 7 (7th ed. 2007).

⁷⁵ *Miller v. Wal-Mart Stores* (Wis. 1998)

and so on. In the language favored by the SECOND RESTATEMENT, the intentional torts protect important personal interests against deliberate interference and impairment by others. By so doing they help to establish our security with respect to one another as members of civil society. The tort law of accidents similarly establishes our security vis `a vis one another, but it does so with respect to risks of physical harm. Rights which establish our security with respect to one another as members of civil society are fundamental and important. They safeguard “the very groundwork of our existence.”⁷⁶ And because they do, it is perfectly plausible to regard tort law’s domain as a dimension of the basic structure of society, and tort law’s concerns as basic and fundamental to social life.

Accidental harm presents special problems. The conduct made tortious by the intentional torts—assaults, batteries, slanders, invasions of privacy, and so on—is conduct whose ideal incidence is zero. Every “all things considered” battery, defamation, intentional infliction of emotional distress, and so on is an act which should not have happened. In practice, batteries and invasions of privacy may never be eradicated but in theory nothing would be lost if they vanished from the world. Accidents are more complex. Accidental injury is always a bad thing and avoidable harm is, as tautology has it, harm that should have been avoided. But accidents are inseparable from valuable activities and they are unintended byproducts of those activities to boot. Because human beings are lapse-prone, a certain amount of negligence is unavoidable. Moreover, it is a truism both that some accidents cannot be avoided and that other accidents should not be avoided. A great deal of value would be lost if the actions and activities which spawn accidental injuries were to vanish from the world.

Accidental injury must therefore be conceptualized differently from intentional wrongdoing. Accidents pit physical security (freedom from harm) against liberty (freedom to act). Both freedom to act and security against harm are indispensable. The utter absence of security would jeopardize all of our aims, aspirations and projects, as Mill says. But perfect security would require extinguishing our freedom to act, because risk is an inevitable byproduct of activity. And without the freedom to act we would be unable to pursue our ends and projects and realize any of our aims and aspirations. Thus, liberty and security are *both* conditions of effective agency. The fundamental question that negligence law raises is how to reconcile the two. One answer with a distinguished tort pedigree appeals to the idea of reciprocity. The idea of that reciprocity is at the conceptual center of negligence law is tantalizing for diverse reasons. One source of its allure is its connections to tort law itself. Rights and duties in tort law are reciprocal—everyone *owes* everyone else a duty of reasonable care and everyone *is owed* a duty of care by everyone else. Moreover, courts themselves sometimes invoke the idea of reciprocity, particularly when debating the choice between negligence and strict liability.

A second source of reciprocity’s allure lies in its connections to liberal political theory. In the early 1970’s, George Fletcher and Charles Fried sketched a conception of tort law that centered on

⁷⁶ JOHN STUART MILL, UTILITARIANISM 53 (George Sher ed., 1979). Mill elaborates: “Security no human being can possibly do without; on it we depend for all our immunity from evil and for the whole value of all and every good ... since nothing but the gratification of the instant could be of any worth to us if we could be deprived of everything the next instant.” The passage appears in Mill’s discussion of the justification of rights and the connection between justice and utility.

the idea of reciprocity.⁷⁷ Their writings sought to demonstrate both the normative and the explanatory power of reciprocity theory.⁷⁸ By showing how the idea of reciprocity lay at the center of a Kantian or Rawlsian conception of accident law as a realm of liberty,⁷⁹ Fried and Fletcher presented reciprocity as a powerful and normatively appealing idea. Moreover, their conceptualization seemed strikingly similar other influential accounts of liberty. H.L.A. Hart's thesis that people have a natural right to liberty—which right includes the freedom to perform any action which does not injure others—is one famous case in point.⁸⁰ Building on this deep and attractive foundation, Fletcher and Fried argued that the legal institution of tort law was, at bottom, a positive law of equal liberty. By arguing that the division between negligence and strict liability tracked reciprocity of risk imposition, Fletcher's work claimed that reciprocity was a master principle of institutional design, not just a concept which could situate the private law of torts in a larger intellectual landscape thereby enabling us to understand tort law's place in a liberal conception of justice.⁸¹

Fletcher's and Fried's work did not spring full-blown from their meditations on Kant and Rawls. It drew upon, and extended, a long and powerful tradition of tort theory, one which stretches back through the writings of Francis Bohlen,⁸² and at least as far back as the great 19th Century cases of *Rylands v. Fletcher* and *Loosee v. Buchanan*.⁸³ *Rylands* and *Loosee* conduct a debate of over reciprocity of risk and its role in dividing responsibility for accidental harm between realms of negligence and strict liability. Fletcher's work has entered the select company of classic tort articles, but unlike Coleman and Weinrib's writing on corrective justice Fletcher and Fried's work has not founded a school. It is

⁷⁷ See CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 183-206 (1970) (arguing that the Kantian principle of equal right underwrites reciprocity theory because that principle permits each actor to impose risks upon others to pursue her individual ends, so long as other actors may impose equal risks upon her); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539-40 (1972) (arguing, inter alia, that reciprocity of risk was the principal factor driving the division between strict liability and negligence until the mid-twentieth century).

⁷⁸ [cite e.g., Dworkin on interpretive theory, which claims distinctively to combine both normative and explanatory power.]

⁷⁹ FRIED, *supra* note 6, at 185 (arguing that an equal right to impose risks on others is "a special case of the Kantian principle of right, that a person is entitled to the fullest amount of freedom compatible with a like freedom for all other persons").

⁸⁰ H.L.A. Hart, *Are There Any Natural Rights*, -- 175, at 175 (19--).

⁸¹ Fletcher, *supra* note , at 541-51. For our purposes, Fletcher's most important interpretive argument is that accident law only imposes liability when risks are nonreciprocal. *See id.* Fletcher contends that the law of abnormally dangerous activity liability, the law of liability for wild animals, and the law of liability for airplane crashes illustrate the principle of accident law that strict liability is imposed on risks that are nonreciprocal, even if the injurer exercises due care. *Id.* at 542. Further, Fletcher argues that negligence liability also illustrates the centrality of reciprocity because negligence liability applies to risks which are roughly reciprocal so long as due care is taken; negligent conduct disrupts reciprocity of risk and so triggers liability. *Id.* at 548-49. These claims are plausible enough to give reciprocity theory real interpretive power. Fletcher also relates reciprocity of risk to John Rawls' theory of justice. *See id.* at 550 (arguing that a reciprocity centered conception of tort law expresses Rawls' first principle of justice).

⁸² See, e.g., Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 209 (1905).

⁸³ Several opinions in *Rylands* have entered the canon of great tort opinions. *See Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (H.L. 1868) (opinions of The Lord Chancellor (Lord Cairns), and Lord Cranworth); *Fletcher v. Rylands*, 1 L.R.-Ex. 265 (Ex. Ch. 1866) (Blackburn, J.).

hard to say just why this tradition has fallen fallow, but the view is interesting and provocative enough to merit serious attention. Reciprocity theory is imperfect, but its imperfections may help us to develop a better account of negligence liability.

A. Reciprocity and Risk

Like corrective justice theory, reciprocity of risk theory conceives of tort law as a body of law whose fundamental concerns are relational, but it places quite a different aspect of relationality at its center. Corrective justice theory looks backward; it takes an *ex post* point of view as fundamental. In particular, it assumes the point of view of an institution which deals with parties who are joined together by the tortious wrong that one of them has done to the other. The plaintiff-defendant dyad is its fundamental tort relation. Because corrective justice theory takes an implicitly *ex post* point of view, the relation that it takes to be fundamental is bilateral and the parties that it has in view are named persons and parties— Mrs. Palsgraf and the Long Island Railroad, for example. Reciprocity of risk theory, by contrast, imagines persons as representative members of classes of actors engaged in risky activities. Its point of view is implicitly *ex ante*; it conceives of persons as abstract representatives of classes; and the relationality it imagines is omnilateral, not bilateral. These are promising starting points.

Rylands' famous, if incompletely theorized, distinction between the sphere of the highway and the sphere of activities fixed in place on the land illustrates these features. In articulating this distinction, *Rylands* is taking the basic task of tort law to be governing the relations among classes of persons engaged in activities which routinely impose risks on others. The question that reciprocity of risk theory takes to be decisive is whether or not those who engage in various activities do or do not reciprocate the risks imposed upon them. Implicit in this framing of the question is an abstract and representative conception of the persons whose relations are at issue, and an *ex ante* point of view. Reciprocity theory speaks to the terms on which risks are imposed. When we name the persons who impose risks and exposed to them we name them abstractly—as drivers, passengers and pedestrians, as farmers and railroaders, as confectioners and doctors, and so on.

Latent in reciprocity of risk theory's *ex ante* focus on the risks that representative persons impose on one another as they go about their business in the world is a focus on ongoing productive activities. Behind the named plaintiff and the named defendant in *Rylands v. Fletcher* stand the two great activities of the industrial revolution in its first full bloom, namely, milling and mining. Whereas the plaintiff-defendant dyad of corrective justice theory implicitly imagines torts as one-off wrongs that one member of civil society commits against another, the background assumption of reciprocity of risk theory is that risks emerge as the expected byproducts of ongoing productive activities. Modern tort law emerges in response to the rise of accidental harm as an important social problem and reciprocity of risk theory takes this for granted. It assumes a world in which organized activities give rise to regular risks and it attempts to articulate general principles of responsibility to govern the terms on which those risks are imposed. Reciprocity presents itself as a principle of equal right. Risks are justifiably imposed when the terms on which they are imposed are terms of equal right, and those equal rights are equally valuable to the classes of persons who hold them. In proceeding this way, reciprocity of risk theory carries out a piece of a larger philosophical and

political project. It takes tort law to be concerned with articulating fair terms of interaction among equal and independent persons, whose interactions routinely and predictably put each other at risk of physical harm. Tort law is concerned with a particular aspect of devising terms of interaction which are terms of equal freedom.

B. The Incompleteness of Reciprocity Theory

If reciprocity theory is tantalizing because it promises to reconcile liberty and security in a regime of equal right whose principles and concepts are sufficiently concrete to guide reasoning at the level of cases and doctrines, it is also incomplete. In part, the incompleteness of reciprocity theory is a matter of scope. For example, neither Fletcher nor Fried have extended reciprocity theory to product or vicarious liability law.⁸⁴ But, what is more troubling is that the incompleteness of reciprocity theory is also, in part, a matter of internal articulation. Thus far, reciprocity theory has failed to justify and explain the law of due care. This is a serious omission: The concept of due care is *the* central concept of negligence law, and a theory that does not explain this concept is not a very convincing one.

The failure of reciprocity theory to shed much light on the concept of due care results from two specific gaps in the theory. First, reciprocity theory does not prescribe a benchmark against which the benefits and burdens of accidental risk imposition ought to be measured. Second, reciprocity theory has so far failed to define the appropriate level of reciprocal risk imposition. These two issues are central to judgments of due care. The first is central because judgments of negligence turn on the balance of the benefits and burdens associated with particular risk impositions, where those risk impositions are implicitly conceived of as instantiations of larger classes. Such judgments cannot be made without some benchmark of comparison. The second is central because judgments of negligence specify a particular level of risk imposition (and precaution) as appropriate. While reciprocity theory requires reciprocal risk imposition for fairness, it does not prescribe a permissible level of risk imposition.

The disagreement between *Rylands v. Fletcher*⁸⁵ and a great nineteenth century American tort case – *Losee v. Buchanan*⁸⁶—forcefully brings home the significance of these two gaps in reciprocity theory. Both cases involved nonreciprocal risks in Fletcher's sense of the term because both defendants exposed both plaintiffs to risks "greater in degree and different in order from those created by the [plaintiffs] and imposed on the defendant[s]."⁸⁷ In *Rylands*, the defendant had

⁸⁴ Fletcher distinguishes product liability claims from stranger accidents because standard product liability claims involve a market relationship between the victim and the product manufacturer. This changes the question of fairness posed by imposing liability because "loss-shifting in products-liability cases becomes a mechanism of insurance," rather than a device for restoring reciprocity. *Id.* at 544 n24. Fried never addresses product liability, and he provides only a general justification for negligence liability. *See generally* FRIED, *supra* note 6.

⁸⁵ 3 L.R.-E. & I. App. 330 (H.L. 1868).

⁸⁶ 51 N.Y. 476 (1873).

⁸⁷ Fletcher, *supra* note 6, at 542. This description of reciprocity is slightly different from, although consistent with, the description I will adopt in this paper: Risks are reciprocal when they are equal in probability and

constructed a reservoir on his land in mining country, thereby exposing his neighbors to the nonreciprocal risk of severe flooding. The materialization of that nonreciprocal risk triggered the suit.⁸⁸ While the *Rylands* court found that the defendants were not negligent, the plaintiffs nevertheless collected damages under a strict liability theory.⁸⁹ George Fletcher's influential reading of the case very plausibly argues that the critical factor justifying the imposition of strict liability was the abnormal, nonreciprocal nature of the risk.⁹⁰ In *Losee*, the defendant mill operator had introduced a steam boiler onto his property, a new technology which exposed his neighbors to the hazards of explosion; the materialization of that great and novel risk triggered the plaintiff's claim.⁹¹ As in *Rylands*, the *Losee* court found that the defendant had not been negligent, but unlike the *Rylands* court, it refused to hold the defendant strictly liable.⁹²

To focus our understanding on the problems at hand, let us take *Rylands* to stand for the proposition that nonreciprocal risk imposition calls for the application of strict liability, whereas reciprocal risk imposition calls for the application of negligence liability. Reciprocity theory, under *Rylands*, holds that a regime of equal freedom and mutual benefit exists when the risks that persons have the right to impose on each other are reciprocal—let us take that to mean equal in probability and magnitude, and imposed for equally good reason—and the governing standard for harm is negligence law. And let us add that the reciprocity here is reciprocity of right, with the rights being equally valuable to those who hold them. Drivers on the highway, *Rylands* supposes, impose roughly reciprocal risks of injury on each other, and representative drivers regard the right as equally valuable. When these conditions are met, reciprocity defines a regime of *equal freedom* because, when risks are reciprocal in these ways, persons relinquish equal amounts of security and gain equal amounts of freedom of action. Reciprocity defines a regime of *mutual benefit* because, *for each person*, the loss of security occasioned by granting to others the right to expose her *to risks* is more than offset by the freedom of action that a regime of reciprocal risk imposition grants *to her*, namely, the right to impose similar risks on others. For without the right to impose some risks on others, the pursuit of the projects and aspirations that give shape and meaning to a human life is all but impossible.

Losee rejects both the rule and the reasoning of *Rylands* as I have fleshed it out. According to *Losee*, when I become a

member of civilized society I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the

magnitude *and* when they are imposed for equally good reason. My description emphasizes the importance of the *reasons* for the risk imposition: *See* text accompanying note 51 *infra*.

⁸⁸ *See Rylands*, 3 L.R.-E. & I. at 332.

⁸⁹ *See id.*

⁹⁰ *See* Fletcher, *supra* note 6, at 545 (arguing that the defendant was held strictly liable for "[c]reating a risk different from the prevailing risks in the community").

⁹¹ *Losee*, 51 N.Y. at 476. The steam boiler exploded and damaged the plaintiff's buildings and personal property. The *Losee* court implicitly concedes that a steam boiler is abnormally dangerous in the way that a reservoir is. *See id.* at 487 (noting that steam is like water because it is likely to produce mischief if it escapes and goes out of control).

⁹² *Id.* at 486-87.

general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay [sic] at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. *He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit.*⁹³

Losee's rejoinder to *Rylands* poses two challenges for reciprocity theory as Fletcher and Fried have developed it. The first challenge concerns *the benchmark against which mutual benefit is to be measured*. To compare relative benefits and burdens—even mutual ones—we must measure them against some benchmark of comparison.⁹⁴ *Losee* implicitly calls for a fixed historical baseline as the proper benchmark of comparison. As industry and technology advance over time, injurers and victims both benefit: Each person's share in the increasing wealth of an industrializing society helps to compensate her for the increased risks of accidental injury and death incident to the introduction of industrial machinery.⁹⁵ Because *Rylands* calls for no such fixed historical baseline, the question is: What takes its place? The works of Fletcher and Fried, fine and pathbreaking as they are, supply no answer.

The second, related challenge concerns *the level of risk that may be imposed without compensating the victims of ensuing accidents*. Negligence law imposes liability on parties who accidentally injure others when they have imposed risks on those others which should not have been imposed in the first instance. Negligence liability is imposed on risks which should have been avoided because they were not avoided and issued in injury. The flip side of this coin is that negligence liability legitimates risks which it judges should *not* be avoided. Implicitly, negligence liability articulates an acceptable level of risk imposition. *By itself*, the concept of reciprocity offers no guidance for specifying the level of risk that injurers may legitimately impose on victims. When an injurer exposes a victim to a nonreciprocal risk—that is, a risk markedly greater in magnitude and probability than the risk to which the victim exposes the injurer—society can compensate the victim and restore reciprocity in one of two ways. First, society can restore reciprocity by entitling the victim to impose an equivalent risk on the injurer (*per, Losee*). Alternatively, society can restore reciprocity by holding the injurer liable for imposing the risk, thereby requiring the injurer to compensate the victim for any harms suffered at the hands of an accident issuing from that risk (*per Rylands*). Either way of restoring reciprocity can be defended by invoking the language of fairness and mutual benefit, a language characteristic of reciprocity theory.

⁹³ *Id.* at 484-85 (emphasis added).

⁹⁴ See RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 300 ("Fair terms of cooperation articulate an idea of reciprocity and mutuality: all who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison.")

⁹⁵ *Losee*, 51 N.Y. at 484-85.

Rylands and *Losee* urge opposite ways of restoring reciprocity. By subjecting nonreciprocal risk impositions only to negligence liability, *Losee* restores reciprocity by *increasing* the level of non-negligent risk imposition. In other words, *Losee* allows the plaintiff to impose an equivalent risk on the defendant without incurring liability for non-negligent harms issuing from that imposition. *Losee* defends this position by arguing that the right to impose increased risks on the original risk imposer is fair compensation for the increased risk exposure created by the original risk imposer's activities.⁹⁶ *Rylands*, by contrast, requires the party imposing nonreciprocal risks to compensate any victims injured by accidents materializing out of that risk imposition and invokes the language of fairness and mutual benefit *in declining to increase* the level of mutually permitted uncompensated risk imposition. It is simply unclear why the concept of *reciprocity* counsels one solution rather than another.⁹⁷

For example, the non-negligent risks of the road are equally reciprocal no matter where we set the speed limit. What varies is the level of legitimate risk imposition and the compensation given for the bearing of increased risk. If we set the speed limit at fifty-five miles per hour, we declare the risks created by those who drive one hundred illegitimate and compensate with damages awards those who drive fifty-five yet suffer injury at the hands of those who drive one hundred. If we set the speed limit at one hundred miles per hour, we compensate those who might prefer to drive fifty-five for bearing the risks of one hundred mile-per-hour driving by entitling them to impose those risks. Reciprocity theory is thus silent on the central question of negligence law: when should a risk be avoided? Because reciprocity theory offers no guidance in fashioning the tools that will enable us to fix appropriate levels of risk imposition, we need to delve deeper into the moral and political theory that justifies the focus on reciprocity of risk in the first place. I take that theory to be what is now called contractualism.⁹⁸

B. Identifying Benchmarks of Comparison

In the most abstract terms, our challenge is to connect reciprocity—the central concept of reciprocity theory with reasonableness—the central concept of due care doctrine. Within John Rawls' version of contractualism the concepts of reciprocity and reasonableness are closely linked, and are central to the notion of social cooperation. Reasonable principles of social cooperation are principles that are mutually beneficial for free and equal persons.

⁹⁶ *Id.* at 485.

⁹⁷ Richard Epstein, for one, appears to think that this problem makes reciprocity theory useless as a tool for determining the appropriate standard of liability. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 124 (5th ed. 1990) ("[A]rguments from reciprocity ... work with equal force in both directions, making it difficult if not impossible to infer that the norm of equality should generate a decided preference for negligence or strict liability."); *see also* Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963,985 (1981) (arguing that reciprocity can just as easily call for negligence as for strict liability in a given situation).

⁹⁸ In this article, I shall draw almost exclusively on the strand of Kantian social contract theory articulated by John Rawls, Thomas M. Scanlon, and Thomas Nagel. *See, e.g.*, THOMAS NAGEL, EQUALITY AND PARTIALITY 33-40, 154-68 (1991); RAWLS, POLITICAL LIBERALISM, *supra* note 1; JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, JUSTICE]; Scanlon, What We Owe to Others [esp. chapter on Reasonableness] John Rawls, Justice as Fairness: A Restatement (2001) For purposes of simplicity, I shall refer to the views of Rawls and Scanlon as contractualist.

The “fundamental intuitive idea” at the heart of Rawls' theory of justice is the idea of society as a system of fair cooperation among free and equal persons who are both rational and reasonable. They are rational insofar as they have “the capacity for a conception of the good”—that is, “the capacity to form, to revise, and rationally to pursue . . . a conception of . . . a worthwhile human life.”⁹⁹ They are reasonable insofar as “they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so.”¹⁰⁰ In other words, the terms that reasonable persons will propose and abide by are terms that everyone in a society of free and equal persons could reasonably accept. Their willingness to abide by these terms depends on the reciprocal willingness of other free and equal persons to do so as well.

Reasonableness thus relates to reciprocity in a fundamental, but abstract, way. Reasonable persons honor principles of justice that other reasonable persons, all of whom are free and equal, also honor. Among free, equal, and reasonable persons, the proper principles of justice are those that distribute the burdens and benefits of cooperation in a mutually beneficial way. Reasonable persons are neither altruists “moved by the general good [or the good of others] as such,¹⁰¹ nor purely self-interested agents moved to cooperate with others by the prospect of mutual advantage.¹⁰² “Reasonable persons . . . desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept.”¹⁰³ Thus, “[t]he reasonable leads to the idea of reciprocity [which] is a relation between equals who are acting on a fair principle of social cooperation that all of them would propose to the others as fair, and are willing to follow faithfully, provided the others did so as well.”¹⁰⁴ Reasonable people “insist that reciprocity should hold within [their] world so that each benefits along with others.”¹⁰⁵

Under this account of reasonableness and reciprocity, the benchmark against which mutual benefit is measured should be social, not historical, and comparative, not fixed. Principles of justice distribute the burdens and benefits of social cooperation. The reasonableness of these principles depends on how they distribute the relevant burdens and benefits in *comparison with other possible principles for distributing those burdens and benefits*. Members of society may complain about the

⁹⁹ RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 302.

¹⁰⁰ *Id.* at 49.

¹⁰¹ *Id.* at 50.

¹⁰² *See id.* Brian Barry aptly summarizes justice as mutual advantage stating that: Justice is simply rational prudence pursued in contexts where the cooperation (or at least forbearance) of other people is a condition of our being able to get what we want. Justice is the name we give to the constraints on themselves that rational self-interested people would agree to as the minimum price that has to be paid in order to obtain the cooperation of others.

¹ BRIAN BARRY, THEORIES OF JUSTICE 6-7 (1989). The preeminent contemporary development of justice as mutual advantage is Gauthier's *Morals By Agreement*. *See* GAUTHIER, *supra* note 28.

¹⁰³ RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 50. Persons moved by the general good are motivated by altruism, rather than by the sense of justice to which reciprocity appeals. Persons moved by a sense of justice concern themselves with the good of others who reciprocate that concern. *Id.* at 50-52.

¹⁰⁴ John Rawls, The Law of Peoples 24 (November 3, 1993) (unpublished paper presented to the Program for the Study of Law, Philosophy & Social Theory, New York University) (on file with the *Stanford Law Review*).

¹⁰⁵ RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 50.

distribution of burdens and benefits prescribed by a particular arrangement only if an alternative arrangement would give those it disadvantages less reason to object.¹⁰⁶

Due care doctrine fixes and distributes the burdens and benefits of accidental risk imposition among injurers and victims. The particular burdens and benefits involved reflect the conflict inherent in the structure of accidental risk imposition. Precautions (and prohibitions of particular risk impositions) benefit victims but burden injurers, whereas the right to impose particular risks (or to forego particular precautions) benefits injurers but burdens victims. The reasonableness of particular judgments of due care thus depends on how the balance that they strike between the conflicting claims of injurers and victims compares with the balance that alternative judgments would strike. Precautions are reasonable when they burden injurers less than foregoing them burdens victims. Conversely, they are unreasonable when they burden injurers more than foregoing them burdens victims. To compare relative burdens, however, we must understand the interests at stake. Just what do injurers and victims stand to lose and to gain when judgments of due care are made?

Accidental risk imposition pits freedom of action against security. Precautions burden injurers by limiting their freedom of action and benefit victims by enhancing their security. The right to impose particular risks (or to forego particular precautions), by contrast, benefits injurers by expanding their freedom of action and burdens victims by compromising their security. In three important ways, these interests in freedom resemble the equal basic liberties of Rawls' first principle of justice.¹⁰⁷ First, they establish background conditions necessary for persons who affirm diverse and incommensurable conceptions of the good to pursue those conceptions over the course of their lives. Second, they conflict with one another and thus must be reconciled to secure the most favorable conditions for persons to lead lives that answer to their aspirations. Third, they protect interests sufficiently central to persons' exercise of their agency to give them priority over considerations of efficiency or wealth-maximization.

Despite this resemblance, the liberties implicated by accident law are not equal basic liberties in a Rawlsian sense. Rawls' first principle of justice concerns the constitutional rights of citizens against the state, not their common law or statutory rights against one another. Liberty and security as they are implicated by the structure of accidental risk imposition are not basic liberties in a constitutional sense. The constitutional protection that they receive, as a component of the liberty

¹⁰⁶ Scanlon, *supra* note 2, at 113. While there are important differences between Scanlon's Contractualism and Rawls' justice as fairness, both use this sort of comparative, social baseline.

¹⁰⁷ Specifically, these interests can be regarded as aspects of "the liberty and integrity of ... the person." Rawls, Fairness, *supra* note 28, at 92. Rawls categorizes the liberty and integrity of the person as one of the "supporting basic liberties." *Id.* "Supporting basic liberties" play a subordinate role in persons' realization of their conceptions of the good. [? -- "Basic liberties," by contrast, guarantee the social conditions necessary for the development and exercise of persons' "moral powers" in the "two fundamental cases." Loosely defined, those basic liberties include: (1) political liberties and freedom of thought essential to ensuring an opportunity for the free and informed exercise of a citizen's sense of justice; and (2) those liberties such as freedom of conscience that are essential to the development of citizens' conceptions of the good and to their ability to pursue such conceptions over a lifetime. *Id.* In other words, the instrumental role played by "supporting basic liberties" contrasts with the constitutive role played by such "basic liberties" as freedom of conscience, speech, thought, and association. The exercise of the latter liberties contributes to the formation of persons' conceptions of the good, and to the exercise of their deliberative reason.—cut this?]

protected by the Due Process Clause, is far weaker than the protection accorded First Amendment freedoms.¹⁰⁸ Furthermore, in eminently plausible Rawlsian terms, the purpose of negligence law, like the purpose of criminal law, is to uphold basic natural duties—those duties which prevent us from injuring the life or limb of other persons.¹⁰⁹ This roots the authority of tort law not in Rawls' first principle of justice, the Constitution, or any other institutional arrangement, but in pre-existing natural duties.¹¹⁰

The relevance of Rawls' account of the equal basic liberties is thus not direct, but general and analogical. The idea of reconciling liberty and security so that they provide the most favorable conditions for representative persons to pursue their aims, aspirations and projects over the course of their lives is a useful one. Accidental risk imposition pits the freedom of injurers and the security of victims against one another. A fuller understanding of the concepts of freedom of action and security will enable us to develop the benchmarks of comparison necessary for determining which accidental risk impositions are reasonable and what behavior constitutes due care.

C. Judging Levels of Risk

For contractualism, the problem of accidental harm is a problem of *mutual freedom*. Contractualism conceives of accidental harm as a problem of *freedom* because it views “the capacity for critically reflective, rational self-governance” as the most important feature of human (moral) agency.¹¹¹ By virtue of this capacity, we have both the power to shape our lives in accordance with some conception of their point, and a fundamental interest in doing so.¹¹² Contractualism assigns

¹⁰⁸ Compare *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (subjecting the common law tort of defamation to constitutional scrutiny), and *Shelley v. Kraemer*, 334 U.S. 1 (1948) (subjecting a scheme of private restrictive covenants to constitutional scrutiny). If, through the adoption of some extreme measure, a state's tort system failed to respect an important liberty, that measure would be subject to scrutiny under the Due Process Clause. Cf. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (upholding a state's restrictions on the right of property owners to exclude trespassers against a Due Process Clause challenge).

¹⁰⁹ RAWLS, *JUSTICE*, *supra* note 28, at 114,314. Within the social contract tradition, the view that tort law originates from a natural duty is at least as old as John Locke's *Second Treatise of Government*. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 6 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) (“The *state of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind [that] no one ought to harm another in his life, health, liberty, or possessions ”)

¹¹⁰ Natural duties do not depend on the presence of institutions for their very existence, while artificial duties do. For an explication of the distinction between artificial and natural duties in a related context, see generally Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199 (1990).

¹¹¹ T.M. Scanlon, Jr., *The Significance of Choice*, in 8 THE TANNER LECTURES ON HUMAN VALUES 149, 174 (Sterling M. McMurrin ed., 1988). Scanlon observes that his contractualist conception of moral personality, with its emphasis on our capacity to govern our preferences through higher order powers of rational reflection, resembles the concept of personhood developed by Harry Frankfurt. *Id.* at 175; see HARRY G. FRANKFURT, *Freedom of the Will and the Concept of a Person*, in THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 11, 11-12,22-25 (1988) (arguing that the capacity for “second-order” desires and judgments is central to human agency and freedom of the will). For a discussion of the similarities and differences between these conceptions, see Scanlon, *supra*, at 175; Samuel Freeman, *Contractualism, Moral Motivation, and Practical Reason*, 88 J. PHIL. 281, 299-302 (1991).

¹¹² Rawls describes this capacity to shape our lives as our capacity for a conception of the good, which is “the capacity to form, to revise, and rationally to pursue ... a conception of what we regard for us as a worthwhile

priority to the basic liberties that are essential to the adequate development and full exercise¹¹³ of our power to ensure that our lives answer our aspirations. Because freedom is the social condition most critical to the realization of our fundamental interest in leading our lives in accordance with some conception of the good, it receives priority over other interests, such as wealth or income. This priority does not mean that either freedom of action or security is absolute. Each can be restricted to serve the interest of the other,¹¹⁴ and their competing claims must be balanced against each other in a way which secures, so far as possible, the most favorable conditions for persons to pursue their conceptions of the good. So too, priority does not mean that efficiency considerations (such as optimal loss-spreading) must be wholly excluded from the law of accidents. What it means is that tort doctrine cannot pursue efficiency objectives until it reconciles the competing liberties of freedom of action and security in a way that secures fully adequate conditions for persons to pursue their conceptions of the good.

Conceived as a problem of freedom, then, accident law principally aims to reconcile two conflicting aspects of individual freedom: freedom of action—freedom to impose risks of accidental injury and death on others; and security—freedom from accidental injury and death. Because freedom of action and security are institutional conditions whose value is largely independent of *particular* conceptions of the good, criteria of due care that reconcile them in the most favorable way will be mutually beneficial for people who affirm diverse and incommensurable conceptions of the good. Because shaping our lives in accordance with our aspirations is our most important interest, both freedom of action and security are precious. Freedom of action is precious because living any worthwhile human life requires exposing both oneself and others to risks of injury and death. Without this freedom we could not, for example, drive to work, fly airplanes, or buy products that are not perfectly safe. The less free we are to impose risks on others, the more we are restricted in

human life." RAWLS, POLITICAL LIBERALISM, *supra* note I, at 302. Rawls also refers to the pursuit of a conception of the good as the "rational" in contradistinction to the "reasonable." *See id.* at 48-54. Rawls' understanding of the capacity for a conception of the good, however, is different from the economic concept of rationality, which boils down to the instrumentally intelligent pursuit of preferences. Conceptions of the good are sovereign with respect to preferences. Social contract theory supposes that we are rational when our preferences express the aims and aspirations that we are prepared, on due reflection, to affirm. *Id.* at 212. It also accepts "the Kantian (not Kant's) view that what we affirm on the basis of free and informed reason and reflection is affirmed freely; and that insofar as our conduct expresses what we affirm freely, our conduct is free to the extent it can be." *Id.* at 222 n.9. Thus, our preferences are free and rational when they express conceptions of the good that we affirm freely

¹¹³ *Id.* at 308, 310-14. This criterion is one of two governing the identification of the list of basic liberties. Under the second criterion, social contract theory assigns lexical priority to those liberties necessary for the development and exercise of a capacity for a sense of right and justice. *Id.* at 308, 315-24. Applying these criteria, Rawls identifies the equal basic liberties as "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law." *Id.* at 291. Recall that freedom of action and security are among the supporting basic liberties, which include the freedoms specified by: "the liberty and integrity (physical and psychological) of the person." Rawls, Fairness, *supra* note 28, at 92.

¹¹⁴ Tort liberties may also be restricted in the name of basic liberties. The right to recover for defamation, for instance, is limited by the need to protect freedom of political speech. *New York Times Co. v. Sullivan*, 376 U.S. 254,273 (1964) ("[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct "). The restriction of tort liberties, however, is not my concern in this Article.

the pursuit of our own aims and aspirations. Yet without a reasonable amount of freedom from accidental injury and death, we lack favorable conditions for working our will upon the world. The first task of accident law is thus to reconcile freedom of action and security in a way that provides the space that we each need to lead our lives in accordance with our aims and aspirations.

The problem of accidental harm is a problem of *mutual* freedom because people affirm diverse and incommensurable aims and aspirations which are in natural, though not fatal, conflict.¹¹⁵ Principles of mutual freedom differ markedly from those of individual freedom. Individually, we are free to expose ourselves to risks that would be unreasonable to impose on others. In pursuit of our own aims and aspirations, we may rationally run some risks that would be unreasonable for us to impose on others who do not share our aims and aspirations. To put it programmatically: The risks that any given individual should subject herself to are properly determined by criteria of (individual) *rationality*; the risks that each of us should be entitled to impose on each other are properly determined by criteria of (interpersonal) *reasonableness*

The *rationality* of exposing oneself to a risk depends on the values served by the exposure, the importance to oneself of furthering those values, and the efficacy with which the exposure will further those values. The canons of rationality thus give wide rein to individual subjectivity, and are naturally expressed in the language of cost-benefit efficiency.¹¹⁶ Individuals are free to value the burdens and benefits of risks by any metric they choose, and it is surely natural for them to value burdens and benefits by their own subjective criteria of well-being. It is also perfectly rational for individuals to run risks, measured by their own subjective criteria of well-being, whenever the expected benefits of so doing exceed the expected costs, and to decline risks whenever the reverse is true.

Contractualism holds that one should not apply canons of rationality to problems of interpersonal risk imposition because it supposes that “[t]he diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is . . . a permanent feature of the public culture of democracy. Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable-and what's more, reasonable-comprehensive doctrines will come about and persist¹¹⁷ Given this diversity, there is no *shared final* end-such as the pursuit of maximal preference satisfaction, or the maximization of wealth-that can be used to commensurate costs and benefits to different people. In the absence of a shared final end, voluntarily exposing ourselves to risks in the pursuit of our own ends differs fundamentally from exposing others to those risks. *Given the diversity of our aims and aspirations, the general justification for bearing risks imposed by others lies in our reciprocal right to expose others to equal risks.* The right to impose risks *on* others justifies bearing equal risk impositions *by*

¹¹⁵ Our sense of justice-our capacity to honor principles that reasonably reconcile the competing claims of freedom of action and security for a plurality of persons-makes a regime of mutual freedom possible. Law backs our sense of justice with force. By so doing, it helps to ensure that others will also honor fair principles of social cooperation, thereby supplying further reason for us to honor those principles.

¹¹⁶ This description of efficiency is merely an intuitive description, rather than a rigorous, microeconomic definition. The discussion of the Hand Formula, and its economic interpretation, shows how this intuitive notion of efficiency can be developed into a more precise economic conception. *See* text accompanying notes 59-84 *infra*.

¹¹⁷ RAWLS, POLITICAL LIBERALISM, *supra* note --, at 36.

others, because the right to impose risks secures the freedom of action essential to the pursuit of a conception of the good over the course of a complete life. Thus, the general justification for interpersonal risk imposition is mutual benefit; whereas the general justification for subjecting oneself to a risk is allegiance to the end that imposition furthers.

We now can see more clearly both why Fletcher and Fried were right to emphasize reciprocity of risk, and how their variants of reciprocity theory are incomplete. They were profoundly right to emphasize reciprocity, because perfect reciprocity of risk defines a perfectly fair situation. When risks are perfectly reciprocal, each person's security is equally burdened and each person's freedom of action is equally benefitted. But Fletcher and Fried's variants of reciprocity theory are incomplete because they do not fully articulate canons of reasonableness that properly reconcile the competing claims of security and freedom of action. *Perfect* reciprocity of risk requires that risks of equal probability and magnitude be imposed *for equally good reason*.

When equal risks are imposed for unequal reasons—for example, one driver drives ninety miles per hour to get to the beach early and another does so to get a critically ill person to a hospital—true mutuality of benefit, and thus true reciprocity of risk, does not exist.¹¹⁸ Someone exposed to a speeding beachgoer has two related grounds of complaint. The first is that the speeder compromises her security in pursuit of a trivial end. The second is that conferring on her the right to impose such a risk does not set matters straight. The freedom to drive ninety miles per hour on the way to the beach does not offset the loss of security caused by exposure to other speeding beachgoers; the increase in freedom of action is of little value, while the loss of security is substantial.

Put differently, a regime which permits beachgoers to drive ninety miles per hour fails the test of mutual benefit (or reciprocity) because it licenses a burden to security (exposure to the risk of drivers speeding in pursuit of trivial ends) that exceeds the benefit to freedom of action (the right to expose others to equally grave risks for equally trivial reasons). The reverse is true in the case of the driver who speeds on her way to the hospital with a critically ill person. Because saving life and limb is immensely important, the freedom to do so is commensurately valuable. The benefit conferred by the freedom to impose this risk more than offsets the loss of security occasioned by granting others the same freedom.

Generalizing from this example, we can say that risk impositions are unreasonable when they fail the test of mutual benefit. They fail that test when they burden freedom of action more than they benefit security, or vice-versa.¹¹⁹ Thus the *reasonableness* of imposing a risk on someone else turns on whether the increase in freedom conferred by the right to impose that risk more than offsets the decrease in security effected by permitting the imposition of that risk. In a world where persons affirm diverse and incommensurable conceptions of the good, applying this criterion depends on identifying yardsticks of well-being whose importance is independent of any *particular*

¹¹⁸ Compare the example and discussion in FRIED, *supra* note 6, at 187-91 (showing that an unreasonable risk is one that imposes a greater risk than is justified by the end for which it is imposed).

¹¹⁹ This generalization assumes that the negligence standard is proper when evaluated by social contract criteria. *See* text accompanying notes 216-242 *infra* (describing social contract theory's test of reasonable acceptability).

conception of the good.¹²⁰ Freedom of action and security are such yardsticks, albeit highly abstract ones. Rather than affirming any *particular* conception of the good, they allow us to form and revise *a* conception of the good and to live our lives in accordance with such a conception. Freedom of action and security are vital institutional conditions for the pursuit of most conceptions of the good, especially if we view this pursuit as a lifelong endeavor.

Evaluating the reasonableness of particular risk impositions (the task of due care doctrine) thus requires making the concepts of freedom of action and security more concrete. This evaluation requires the use of normalizing assumptions regarding the importance of various freedoms and risk impositions to the pursuit of a worthwhile life.

[Subsequent sections will attempt to theorize and interpret major negligence doctrines.]

¹²⁰ See T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 668 (1975) (arguing that comparing the strength of competing claims of well-being on the basis of their "urgency" is superior to comparing the subjective intensity with which those claims are held because it represents "the best available standard of justification that is mutually acceptable to people whose preferences diverge").