

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

8-24-2011

### Rights-Based Theories of Accident Law

Gregory J. Hall

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Ethics and Political Philosophy Commons](#), [Jurisprudence Commons](#), [Public Law and Legal Theory Commons](#), and the [Torts Commons](#)

---

#### Repository Citation

Hall, Gregory J., "Rights-Based Theories of Accident Law" (2011). *Faculty Scholarship at Penn Law*. 376.  
[https://scholarship.law.upenn.edu/faculty\\_scholarship/376](https://scholarship.law.upenn.edu/faculty_scholarship/376)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# Rights-based Theories of Accident Law

*Gregory J. Hall\**

## Introduction

No extant theory of accident law adequately addresses a central normative concern in accidents: What criteria should determine the amount of precaution an individual must employ to avoid being justifiably assigned others' costs from an accident?

The central normative concern is central in assigning accident costs for at least two reasons. First, disputes about who should bear the costs of accidents often hinge on determinations of the amount of precaution one or more individuals should have taken in the acts that led to the accident. Second, from the perspective of a person interested in not having to pay for the accident costs others incur, that person wants to know at least the minimum amount of precaution that she should employ to avoid having to justifiably bear others' accident costs.<sup>1</sup> In short, she wants to know how careful she should be to avoid being (successfully and justifiably) sued.

For example, much controversy exists over whether drivers should be phoning while driving. Suppose Eman is phoning while driving when he and Woomin accidentally collide. Woomin was driving as well but was not phoning or breaking any traffic laws or doing anything else that would increase the dangerousness of driving. The accident seems like it would not have occurred if Eman had not been phoning while driving. Both Eman and Woomin suffer bodily injury and property damage to their vehicles.

---

\* Gregory J. Hall, Sharswood Fellow in Law and Political Theory at the University of Pennsylvania Law School. I would like to thank Stephen Perry, Anita Allen, Kok-Chor Tan, and Samuel Freeman whose insights and vision have made this project possible. I would also like to thank Adrienne Martin and her class in Scholarship in Ethical Theory at the philosophy department at the University of Pennsylvania for their comments when I presented to them an earlier draft of this paper. Ideas in this paper were also presented to the Penn Law Faculty Roundtable from whom I received constructive suggestions. Much thanks goes to Gideon Parchomovsky and Jean Galbraith for their critical feedback on the manuscript and Ellen Qualey for her research assistance. This paper was made possible by a generous fellowship from the University of Pennsylvania Law Review.

<sup>1</sup> This concern could be only a descriptive concern about what actual courts are likely to do, but I am assuming the person is also concerned what should be done at least so that she has some argument to defend herself in court and because she wants the law to be morally justifiable.

If Woomin seeks compensation for her accident costs from Eman and he disputes his responsibility for her costs, resolution of the dispute may hinge on whether Eman employed too little precaution by phoning while driving. For the future, Eman and other drivers have an interest in knowing whether phoning while driving employs too little precaution such that they should be assigned the costs of others if an accident results.

Despite the importance of the central normative concern, social-utility-based theories of accident law and rights-based theories of accident law do not adequately address this concern in different ways.<sup>2</sup> Social-utility-based theories of accident law state the criteria that they endorse for the central normative concern but fail to adequately justify the criteria. In particular, theories that employ efficiency or some form of cost-benefit reasoning to assess accident law seem to think that it is obvious why their criterion is the proper one to use.<sup>3</sup> Thus, they provide little to no justification for their criterion's application to assigning accident costs. Other social-utility-based theories such as the theory advocated by Louis Kaplow and Steven Shavell use social welfare as the metric for assigning accident costs.<sup>4</sup> Even though the theory tries to justify social welfare as opposed to fairness as the criterion to assign accident costs, the theory does not defend a particular way to weight the components of social welfare.<sup>5</sup> Without particular weights, social welfare analysis does not provide a determinate theory for assigning accident costs.<sup>6</sup>

While social-utility-based theories do not adequately justify their criteria for assigning accident costs, rights-based theories of accident law have different shortcomings. However, the shortcomings of rights-based theories have not received much attention.<sup>7</sup> The project for this article is to uncover these shortcomings to clear the way for a new theory of assigning accident costs, a theory that has a robust justificatory basis.

---

<sup>2</sup> Steven Hetcher makes a similar point but phrases it in terms of these theorists ignoring the significance of the jury's role in tort law. Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 633-36 (2003).

<sup>3</sup> WILLIAM M. LANDES AND RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987). GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

<sup>4</sup> LOUIS KAPLOW AND STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 3 (2002).

<sup>5</sup> Daniel Farber, *What (If Anything) Can Economics Say About Equity?* 101 MICH. L. REV. 1791, 1793 (2003).

<sup>6</sup> Ultimately I find the social-utility-based approach unsatisfying because it cannot account for John Rawls's idea of the separateness of persons, certain interests of a person should not be sacrificed for the benefit of society. JOHN RAWLS, *A THEORY OF JUSTICE* 26-27 (1971).

<sup>7</sup> See LOUIS KAPLOW AND STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 91-93 (2002). They are some of the most vocal critics of how rights-based theories fail to address the central normative concern.

Broadly stated, the shortcoming of rights-based theories is that these theories barely address the central normative concern—What criteria should determine the amount of precaution an individual must employ to avoid being justifiably assigned others' costs from an accident?<sup>8</sup> Such an omission is puzzling because rights-based theories address many other components of extant tort law's doctrine and institutional structure. These theories usually cover the central normative concern by endorsing the reasonable person standard.<sup>9</sup> However, rarely do these theories provide criteria to determine what the reasonable person standard requires in specific situations.<sup>10</sup> Even when they provide some content to the reasonable person standard by appeals to intuition, convention, or usual practices, they do not provide a justification for using such content to assign accident costs.<sup>11</sup>

---

<sup>8</sup> Some theorists are an exception to this claim because they advocate for some form of social tort insurance. See David H. Blankfein Tabachnick and Kevin A. Kordana, *On Belling the Cat: Rawls & Tort as Corrective Justice*, 92 VIRGINIA LAW REVIEW 1279 (2006); Ronen Avraham and Issa Kohler Housmann, *Accident Law for Egalitarians*, 12 LEGAL THEORY 181 (2006); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in David Owen, ed., PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (1995); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 808–814 (1967); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985); Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?* 6 LAW & PHIL. 1–23 (1987); Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990). I exclude these theorists from my present considerations because I am assuming that accident costs from at least some acts should be borne only by the individuals involved in the accident rather than by society as a whole.

<sup>9</sup> I have in mind primarily Ernest Weinrib. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 147-52 (1995). Arthur Ripstein is also an example of such a theorist even though he adds some further criteria. Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811 (2004). Benjamin Zipursky and Jules Coleman are examples although it is not clear that they are engaged in normative (as opposed to descriptive) tort theory. Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEORGETOWN L. J. 695 (2003); JULES COLEMAN, *RISKS AND WRONGS* (1992). Kaplow and Shavell also note that it is unclear the extent to which tort theorists in the rights-based tradition (my term) are engaged in descriptive theory or normative theory. Kaplow and Shavell at 91-93.

<sup>10</sup> George Fletcher is a notable exception to this generalization. George Fletcher, *Fairness and Utility in the Law of Torts*, 85 HARV. L. REV. 537 (1972). Jody Kraus emphasizes the importance of legal theory coming up with determinate answers to particular cases. Jody Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773 (2007).

<sup>11</sup> Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 119 (Gerald Postema ed., 2001). JULES COLEMAN, *RISKS AND WRONGS* (1992). However, doing so is not Coleman's purpose.

Returning to the example of phoning while driving, none of the rights-based theories of assigning accident costs provide adequate answers to whether phoning while driving employs too little precaution. Thus, these theories do not provide adequate answers about how the costs from Eman and Woomin's accident should be assigned.

With such inadequacies, the rights-based approach to accident law has (not surprisingly) lost much ground in legal academia to the social-utility-based approach. By highlighting the inadequacies in extant rights-based theories of accident law, I aim to show what issues a rights-based theory must meet to advance a compelling alternative to the social-utility-based approach.

After preliminaries, I sketch the reasonable person theory of assigning accident costs. Although ambiguous, the reasonable person theory can be interpreted as a rights-based theory. Due to its enigmatic and ambiguous use of 'reasonable,' the reasonable person theory of assigning accident costs cannot be relied on to answer the central normative concern. Next, I offer Kantian political theory as a compelling paradigm to determine if any other more developed rights-based theory of assigning accident costs is adequate and persuasive. Once I demonstrate the particular shortcomings of each extant rights-based theory, I briefly outline a democratic theory of assigning accident costs that has a chance of adequately addressing the central normative concern.

## **I. Preliminaries**

Even though I focus on theories of tort law, I do *not* think the extant institution of tort law is theoretically the most important place to examine how we should assign the costs of accidents. Instead, I focus on tort law (accident law in particular) because I think that by eliminating its murkiness, we can address the central normative concern more clearly from a non-institutional perspective.

This non-institutional perspective does *not* first explore, for example, which decision-makers should decide how to assign accident costs. Since some kinds of decision-makers (e.g. courts or insurance companies) may be better at assigning accident costs depending on the requisite criteria, I address the criteria identified in the central normative concern first. Answering the central normative concern first may help us determine how to shape the institution(s) to assign accident costs because institutional

issues are likely partly dependent on the answer to the central normative concern.<sup>12</sup>

By now, it may be apparent that I am interested in the normative question of how to assign costs from *accidental* harm as opposed to *intentional* harm. So, when I refer to tort law or tort theory, I am exclusively referring to the aspects that govern accidental torts rather than intentional torts. While we have an intuitive sense of what accidental harm is, explicitly defining it is tricky.<sup>13</sup> Stephen Perry provides a helpful definition: unintentional (accidental) harm is “harm to which an agent causally contributed but that he did not intend to bring about and that he was not substantially certain would occur.”<sup>14</sup>

Several aspects of accidents and accident law are not my inquiry. I am not addressing what constitutes causation of harm, what is the scope of one’s duty to take care not to injure others, what types of harm should be compensable, or how one should assess compensation for accidental harm. Instead, I am only addressing what sorts of acts should be the bases for compensation when these acts lead to accidental harm (i.e. the central normative concern).

---

<sup>12</sup> While extant tort law makes the bilateral relationship salient, other institutional mechanisms could recognize the bilateral relationship. Even social tort insurance could maintain a bilateral relationship by conditioning compensation on a showing of fault (such as requiring the police officer on the scene to determine fault) and requiring the faulty party to pay higher premiums going forward. Although the evidentiary burden would be less, this kind of system would monetarily affect the parties to the accident in the same way as the tort system (assuming liability insurance).

<sup>13</sup> Comments e, d, and f in Restatement 2<sup>nd</sup> of Torts § 282 imply that that negligent torts are all remaining torts after one has separated the intentional torts, the reckless torts, and torts of strict liability. This provides a negative definition rather than a positive definition of a negligent tort making it seem easier to say what negligence is not compared to saying what negligence is. The Restatement uses negligence to mean “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” Restat 2d of Torts, § 282.

<sup>14</sup> Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* (Gerald Postema ed., 2001). This definition can be made more precise because, as it stands, Perry’s definition seems to include harm from an intentional tort. The perpetrator of an intentional tort intends to cause harm to which the victim also causally contributed. So, the definition could be made more precise though also more cumbersome: accidental harm is harm to which an agent causally contributed but that neither he nor one other causally-related person intended to bring about and that those two were not substantially certain would occur. Note that harm can be accidental with regard to one person while intentional with regard to another person. Also, accidental harm could also extend to harm to which no agent causally contributed such as when lightning strikes a tree in an undiscovered island. Tort law does not address this latter kind of case.

## II. The Reasonable Person Theory

Although reasonable person legal doctrine as found in United States tort law can be ambiguous, one plausible interpretation conceives of it as a rights-based theory. I begin with this rights-based reasonable person theory to demonstrate that rights-based tort theories cannot rely on it to answer the central normative concern. Additionally, unveiling the shortcomings of the reasonable person theory demonstrates one inadequate rights-based theory while simultaneously demonstrating the need to adequately answer the central normative concern.

The reasonable person theory of assigning accident costs as found in United States tort law is challenging to articulate because many judges developed it over time through the common law. The reasonable person theory has also been articulated or commented on in various ways by legal theorists. In formulating the reasonable person theory, I am *not* trying to synthesize all of these various sources or versions. Rather, by ‘reasonable person theory’ I mean to outline the general way the extant accident law in the United States common law approaches negligence as well as how it distinguishes negligence from strict liability.<sup>15</sup> To do so, I explicate the Restatement 2<sup>nd</sup> of Torts because it attempts to synthesize the case law.

### A. *Ambiguities Uncovered*

In analyzing the Restatement’s version of the reasonable person theory, I aim to capture the extent to which judges and commentators have formulated accident law doctrine.<sup>16</sup> I say the ‘extent’ because I argue that judges and commentators do not provide enough clear legal doctrine to explain and justify particular decisions in accident cases.<sup>17</sup> Also, it is unclear whether one aspect of the Restatement 2<sup>nd</sup> of Torts reflects actual judicial practice at the trial level. These shortcomings of the law, as evidenced in the Restatement, are what I take to be the impetus for legal theorists to try to explain and justify accident law in terms of a more robust theory of the reasonable person, cost-benefit analysis, or reciprocity.

The reasonable person theory assigns the costs of an accident to the individuals involved in the accident rather than to the community as a

---

<sup>15</sup> Alongside the reasonable person theory to accident law exists the doctrine of strict liability. Strict liability only applies to limited, specific kinds of acts—usually extraordinarily dangerous acts—which judges have carved out. I address strict liability later.

<sup>16</sup> I ignore differences among the states concerning their tort doctrine because my focus is on a characteristic that I believe the states all share.

<sup>17</sup> Jody Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773, 1775 (2007).

whole.<sup>18</sup> As the default, the reasonable person theory assigns each accident cost to each person or group<sup>19</sup> who incurred that cost.<sup>20</sup> The reasonable person theory allows a reassignment of the costs from the default assignment if one of the parties to the accident can demonstrate that another party acted negligently.<sup>21</sup> Acting negligently means, according to this theory, that the person acted unreasonably according to the objective reasonable person standard (described below).<sup>22</sup> If one or more parties involved in an accident acted unreasonably, the reasonable person theory deems that person or persons at fault for the accident. For only one at fault party, the costs of the other parties to the accident may be reassigned to the at fault party. If more than one party is at fault, the costs of the accident may be reassigned either jointly or in proportion to their degree of fault (unreasonableness).<sup>23</sup>

To illustrate, recall the accident between Woomin and Eman resulting from Eman's phoning while driving. If Woomin chooses, the reasonable person theory allows her to instigate a legal action to get Eman to pay certain of her costs from the accident, if she can demonstrate that Eman acted unreasonably.<sup>24</sup> If Eman acted unreasonably by phoning while

---

<sup>18</sup> Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 439 (1990).

<sup>19</sup> One group could be a government, but the reasonable person theory is treating the government like a person rather than as a mechanism to spread the costs to members of society.

<sup>20</sup> Restat 2d of Torts, § 281. What counts as an individual incurring a cost is the damage to his property, injury to his body, economic losses based on what the person would have gained without the accident, and other losses that setback a person's interests. Traditionally, economic losses that do not result from a physical injury to the person's property or body are still losses to the person but are not compensable losses in tort doctrine.

<sup>21</sup> The reasonable person theory was developed by judges in the context of tort law adjudications although nothing about the approach prohibits it from being used in other institutional settings. Since judges developed the reasonable person theory in an adversarial legal system, the individual seeking compensation from another must prove that the other person was at fault for the accident while the alleged faulty party must defend herself to avoid receiving a judgment requiring her to compensate the individual seeking compensation.

<sup>22</sup> Restat 2d of Torts, § 283.

<sup>23</sup> Which of these two options is available in an accident case depends on the particular way the courts in each state have developed this aspect of tort doctrine.

<sup>24</sup> Who else is involved in the accident has often been interpreted broadly to include individuals who were not present during the accident but had some tie to the accident such as employers whose employees were involved in the accident and producers of a product involved in an accident. The potential candidates to bear the costs of the accident, while broad, has not been expanded to society as a whole in U.S. tort law.



driving, the reasonable person theory would reassign Woomin's accident costs to him.

As stated above, the reasonable person theory defines its species of fault according to the objective reasonable person standard. To sketch the objective reasonable person standard, I rely on the Restatement 2<sup>nd</sup> of Torts.

The words "reasonable man" denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.<sup>25</sup>

While the Restatement's denotation of the concept of reasonable person indicates the *categories* of qualities that are important to the concept and the purpose of the concept, it does not tell us exactly what those qualities are for specific situations. For instance, would the reasonable person phone while driving? Would phoning impede too much her attention and perhaps judgment while driving? Not listing the specific qualities for each category needed under what conditions is understandable due to the variety of acts individuals can undertake, the complex ways acts can intersect, rule of law principles, and the limits of human foresight. Due in part to these considerations, judges developed the reasonable person theory in the form of a standard rather than a more precise rule or list of rules.

The Restatement does state that these *categories* of qualities (attention, knowledge, intelligence, and judgment) are filled out by what 'society requires of its members.' However, two problems arise with this society-phrase. First, it is not clear how this society-phrase is a restatement of tort law at the trial court level.<sup>26</sup> Jury instructions do not explicitly instruct jurors to decide what 'society requires of its members;' jury instructions simply ask jurors to determine what a reasonable person would have done in the defendant's situation.<sup>27</sup> If we ignore the society-phrase in the Restatement because it is not used in jury instructions, we have even less

---

<sup>25</sup> Restat 2d of Torts, § 283. Note that the Restatement 2<sup>nd</sup> uses the sex-specific term 'man' when it seems to mean 'person' which is why I rename the test. "The fact that this judgment is personified in a "man" calls attention to the necessity of taking into account the fallibility of human beings." Restat 2d of Torts, § 283. I do not mean to preclude the feminist critique that the standard has been a male standard. By using 'reasonable person' instead, I attempt to use a sex-neutral standard consistent with the other language that the Restatement 2<sup>nd</sup> uses.

<sup>26</sup> Some appellate decisions have phrased the reasonable person standard in terms of the "community ideal of reasonable behavior."<sup>26</sup> However, it is not clear whether the court is merely rehashing the Restatement 2<sup>nd</sup> of Torts or whether the court is providing clarity and direction to trial courts.

<sup>27</sup> This claim is based on a survey of many states model jury instructions for negligence cases. See document on file with the author.

guidance about what should flesh out the reasonable person standard. Getting from reasonable person jury instructions to a notion that the objective reasonable person standard should be filled out by what ‘society requires of its members’ requires a few steps of reasoning that are not provided by jurists or commentators.

The second problem is that, even if we retain the Restatement’s added phrase, we still cannot adequately flesh out the reasonable person standard. To determine precisely what ‘society requires of its members,’ ambiguities need clarifying. What ‘society requires of its members’ is ambiguous in at least two ways. The phrase does not spell out what constitutes the relevant ‘society.’ Is it the neighborhood, the town, the county, the nation-state, a region of nation-states, the hemisphere, the world?

The other ambiguity concerns the nature of the society’s requirement. The use of society doing the requiring is murky from the outset because it is a personification of society. Determining what ‘society requires’ at least involves some sense of how individuals’ actions (including their beliefs) combine together into an action of ‘society requiring.’

Setting the personification issue largely aside, another ambiguity involves two possible interpretations of what ‘society requires of its members.’ The society-phrase could refer to the demands of morality. Under that interpretation, society is a shorthand way of expressing the objectively correct moral point of view. With this interpretation inserted explicitly into the text, the Restatement would read:

The words "reasonable man" denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which *morality* requires of *individuals* for the protection of their own interests and the interests of others.<sup>28</sup>

Indeed, the further qualification that the ‘reasonable person’ standard be objective<sup>29</sup> favors this moral interpretation because the moral point of view is often associated with an objective point of view.<sup>30</sup>

Another interpretation of what ‘society requires of its members’ could be what are the actual social norms or conventions (conventions, for short) of a particular society. These conventions could be codified in bodies of laws or regulations. For example, when driving the reasonable person may

---

<sup>28</sup> Restat 2d of Torts, § 283 modified as indicated in italics.

<sup>29</sup> Restat 2d of Torts, § 283.

<sup>30</sup> David Hume, John Locke, and John Rawls all use constructs that abstract from subjective knowledge to argue for the correct view of moral claims. DAVID HUME, A TREATISE OF HUMAN NATURE 580 (1888). JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT 189 (1821). JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

follow all traffic regulations. The norms could also remain informal without explicit validation by any part of the government. An example of a possible convention is, As soon as possible, clean up a spill that causes slippery conditions on a surface (which you own) that people often traverse.

The convention-based interpretation of the reasonable person standard may seem to follow more directly from the Restatement's text than the morality-based interpretation because a social group (society) is doing the requiring. However, once again, the convention-based interpretation does not obviously comport with jury instructions in trial courts, where the Restatement's phrase 'what society requires of its members' is not used. Jurors are only instructed to determine what the reasonable person would have done without disambiguating whether they are being asked for an answer based on morality or an answer based on facts about the conventions of their society.<sup>31</sup>

The rest of the text of the Restatement does not resolve the ambiguities identified above. The Restatement adds to its denotation of 'reasonable man' what it conceives of as the "standard of the reasonable man."

Standard of the "reasonable man." Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.<sup>32</sup>

---

<sup>31</sup> See model jury instructions for the states. For example, here is an example of jury instruction from Vermont adapted to the case of Woomin and Eman: Woomin claims that Eman was negligent in phoning while driving. Eman was negligent if he was not reasonably careful in phoning while driving. That does not mean that Eman had to use the greatest possible care, like an unusually cautious person. Rather, he had to exercise the same care a reasonable person would have done in her same circumstances, taking into account the foreseeable risk of injury caused by her actions. Not every injury is caused by negligence; sometimes accidents happen even when people act reasonably. Vermont Civil Jury Instruction Committee, *Negligence*, <http://www.vtbar.org/Upload%20Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/Negligence.htm> accessed on January 5, 2011.

Note that the jury is not asked to determine if the defendant had reasons to do what she did. That would be a question of whether the defendant acted rationally rather than reasonably—to put it in Rawlsian terms. Instead, the jury is asked to determine if the person behaved reasonably, but they are not told what reasonable means in the particular context that the defendant was in. That is the question they are to answer without further guidance.

<sup>32</sup> Restat 2d of Torts, § 283. Here the Restatement seems to equate negligence with the standard of the reasonable person. While the statement about negligence is a fair characterization, putting that sentence just after the phrase 'standard of the reasonable man' is misleading because the 'standard of conduct demanded by the community' (as recognized in extant tort law) is higher, lower, or more specific than the pure reasonable person standard when the age, technical knowledge, or the agent's choices are factored into the standard of conduct.

The use of ‘community’ here instead of ‘society’ suggests that the relevant group is smaller than the whole world and consists of a group with some commonality. However, the text does not explicitly define its previous use of ‘society’ in terms of community. Thus, if the two phrases indicate two different relevant groups, the Restatement contradicts itself.

Even if we interpret ‘community’ as superseding or coextensive with the Restatement’s use of ‘society’ as the relevant group, the neighborhood, the town, the county, the state, the nation-state, and even groups not exclusively within a political or geographical boundary remain viable candidates for what constitutes the community. Hence, the ambiguity regarding the scope of the community that does the ‘requiring’ or the ‘demanding’ remains.

Assuming that ‘community’ is what the Restatement means, the use of ‘community’ may seem to resolve the ambiguity concerning whether morality or conventions fill out the reasonable person standard. ‘Community’ suggests something less than the moral point of view, something particularized to a specific group of people. If so, then what the community requires (or demands) is adherence to its norms and conventions rather than adherence to the requirements of morality.

While drawing this implication from the use of ‘community’ may push us toward the convention-based interpretation, the implication does not necessarily follow. ‘Community’ could be a term indicating the moral point of view because the community could require that its citizens follow the requirements of morality. Moreover, the next part of the text pushes us towards the morality-based interpretation. It reads as follows:

The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites...<sup>33</sup>

Stating that the standard that the community demands must be objective suggests the moral point of view, as mentioned above. Norms and conventions may not be objective but may rather be the subjective beliefs or preferences of all or part of the individuals in the community. Furthermore, stating that the standard must be external also suggests the moral point of view because such would be external to the community’s norms and conventions.

The rather-than-phrase could mean that the standard is objective and external only relative to any particular individual in the community instead

---

<sup>33</sup> Restat 2d of Torts, § 283.

of objective and external to the whole community. However, the morality-based interpretation would also be objective and external relative to any particular individual. So, both interpretations are still possible.

The since-phrase may push us towards the morality-based interpretation. By stating that the standard must be the same for “all persons,” it suggests the moral point of view because the requirements of morality are usually the same for all persons. In contrast, community norms and conventions vary between communities. However, “all persons” could be all persons in the community. So, both interpretations remain viable.

Importantly, the text does not justify why *either* the morality-based interpretation or the convention-based interpretation should be decisive in a legal action.<sup>34</sup> Besides not informing us why the reasonable person theory is justified, this lack of justification perpetuates the ambiguity in the reasonable person theory between the morality-based interpretation and the convention-based interpretation of what the community demands.

Another piece of the Restatement further exacerbates this ambiguity.

Weighing interests. The judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it.<sup>35</sup>

This comment appears to be offering a third way, often called the Learned Hand test, to determine whether an actor is reasonable. Some claim that weighing interests according to the Learned Hand test is exactly what a reasonable person would do.<sup>36</sup> However, weighing interests to gauge whether “the magnitude of the risk outweighs the value which the law attaches to the conduct” may not always be the same as doing what the community demands of its citizens (at least under the convention-based interpretation). For example, the community may *not* demand that citizens avoid phoning while driving even though the magnitude of the risk of an accident may outweigh the value of phoning while driving. At least, the Restatement does not state that what the community demands of its citizens *is determined by* this weighing of interests. Thus, the weighing-interests-

---

<sup>34</sup> Particular judicial opinions may offer some justification. But, since the Restatement does not mention these, I take it that the reasonable person theory has not affirmed a particular interpretation.

<sup>35</sup> Restat 2d of Torts, § 283.

<sup>36</sup> Posner initially made this claim. Richard A. Posner, *A Theory of Negligence*, 1 THE JOURNAL OF LEGAL STUDIES 29, 32-34 (1972).

based interpretation of the reasonable person standard can conflict with the convention-based interpretation.<sup>37</sup>

The weighing-interests-based interpretation could be a clarification of the morality-based interpretation of what a community demands of its members. It seems to capture the law and economics approach to negligence, which endorses a morality-based version of the Learned Hand test.<sup>38</sup>

On the other hand, since this connection is not done explicitly, we are left with the ambiguity because the weighing-interests-based interpretation is not the only morality-based interpretation available to instantiate the morality-based interpretation of the reasonable person standard. Other possible morality-based interpretations include intuitionism, pragmatism, and rights-based theories. While all of these moral theories may agree on what the reasonable person would have done in some cases, in other cases the theories come up with different answers.<sup>39</sup> So, merely identifying one morality-based interpretation without tying it to what the community demands does not resolve the ambiguity of what constitutes the objective reasonable person standard.

To be clear, I am not denying that one theory could unite the seemingly incongruous parts of the Restatement such that the reasonable person theory would offer determinate answers on how to assign accident costs. The law and economics approach seems to do just that. What I am claiming is that the reasonable person theory as developed in the common law and articulated in the Restatement does not *by itself* provide determinate answers on how to assign accident costs in many cases. In other words, as far as I can tell, the ambiguities I identified above in the phrase ‘what society requires of its members’ are not resolved in the reasonable person theory as developed in the common law. The phrase remains ambiguous relying on the decision-maker (e.g. judge or jury) to adopt (intentionally or unintentionally) one version of the ambiguities.

---

<sup>37</sup> In the Ford Pinto case and other similar cases not only do juries find companies who weigh interests in the Learned Hand test style negligent and liable for the costs of the accident, but juries also attach punitive damages on top of the costs of the accidents. This suggests that Learned Hand test reasoning, at least in some cases, does not equate with the jurors’ understanding of reasonableness at all. Instead, Learned Hand test reasoning may equate with recklessness worthy of punishment. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* 52 STAN. L. REV. 547 (1999-2000).

<sup>38</sup> Kenneth W. Simmons, *Tort Negligence, Cost-Benefit Analysis and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1172-73 (2008).

<sup>39</sup> Simmons at 1173-80.

### *B. Strict Liability Separated*

The reasonable person theory (negligence) could be used to assign the costs from *all* accidents. However, judges separately developed strict liability, a standard of care for narrow kinds of acts that the judges identified.<sup>40</sup> Judges have applied strict liability to accidents resulting from livestock or abnormally dangerous animals that individuals maintain on their property. Another category judges have applied strict liability to is abnormally dangerous acts. This category of strict liability is laid out in the Restatement as follows:

One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

Strict liability is strict because the agent doing the abnormally dangerous act is subject to liability even if the agent met the objective reasonable person standard and even if the agent met a seemingly stricter standard of exercising the “utmost care to prevent the harm.” So, having caused a foreseeable harm via an abnormally dangerous act is usually enough to establish liability for accident costs whereas with negligence (reasonable person theory) causation alone is necessary but not sufficient to establish liability.<sup>41</sup>

Strict liability could be used to assign the costs of all accidents as long as the person seeking compensation can prove that another person “caused” the accident.<sup>42</sup> Richard Epstein has espoused such a theory.<sup>43</sup> Common law judges did not go this route choosing instead to use the reasonable person theory in one domain and to use the strict liability approach in other limited domains. Keeping these domains separate is entrenched in the common law. However, common law judges have not provided a deep theoretical

---

<sup>40</sup> This description is not meant to be a historical description, nor does it take a position on the issue of whether strict liability was formerly applied ubiquitously and negligence added later.

<sup>41</sup> Strict liability is not absolute liability because some qualifications can absolve one of liability. See for example, Restat 2d of Torts, § 519, Comment on Subsection (2)e; *Madsen v. East Jordan Irr. Co.*, 101 Utah 552; 125 P.2d 794; 1942 Utah LEXIS 24 (1942) (where defendant was not held strictly liable because the type of harm that occurred to the neighboring mink farm was not foreseeable breaking the legal causal link).

<sup>42</sup> Perry argues that cause in such a theory must have some normative component to it. Stephen R. Perry, *Libertarianism, Entitlement, and Responsibility*, 26 PHIL. & PUB. AFF. 351, 381 (1997).

<sup>43</sup> Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

justification for the division between negligence (reasonable person theory) and strict liability.<sup>44</sup>

The lack of a theoretical justification for the division between strict liability and negligence (reasonable person theory) make the judicial answer to the central normative concern murky. Along with the ambiguities within the reasonable person theory identified above, the murkiness of accident law is severe. Unsatisfied with this murkiness, theorists have tried to flesh out what the objective reasonable person standard requires. Before we can evaluate these attempts to flesh out the reasonable person standard, we need a criterion to evaluate whether these attempts are successful. In the next section, I outline such a criterion.

### III. Kantian Normative Political Theory

As I stated at the outset, the social-utility-based approach and the rights-based approach dominate the theory of assigning accident costs. While social utility theories fail to adequately defend their criteria, I am not taking issue with the social-utility-based approach in this article. Instead, I am focusing on two problems with extant rights-based theories. First, rights-based theories fail to provide complete, determinate criteria for assigning accident costs. I have already shown that the reasonable person theory is riddled with this problem. Second, even those who provide some criteria for assigning accident costs fail to adequately justify those criteria. To make salient these two problems, I provide Kantian political theory through which we may evaluate these theories of assigning accident costs.

I recommend Kantian political theory because rights-based theories of assigning accident costs often claim to be based on this major branch of normative liberal political theory. The branch includes John Locke, Jean Jacques Rousseau, Immanuel Kant, John Stuart Mill's *On Liberty*, and John Rawls. I focus on a distinctly Rawlsian version of this branch. Although I do not have space to defend the persuasiveness of this branch of political theory, I take it that the persuasiveness of Kantian normative liberal political theory (Kantian political theory, for short) is evident based on its prominence in political theory literature and in the forthcoming arguments.

A foundational element of Kantian political theory is the concept of the free and equal person. Determining the requirements of Kantian political theory involves reasoning about what kind of society treats persons with

---

<sup>44</sup> Some tort theorists have tried to reconcile or justify the division between negligence and strict liability.



equal concern.<sup>45</sup> Another way to state this form of reasoning is by considering what kind of society free and equal persons would choose given limitations about what can bias their choices.<sup>46</sup> The outcome of the most persuasive reasoning from the basis of free and equal persons provides the structure of the political society required by morality according to Kantian political theory.

Based on Rawls's work, the free and equal person would choose the kind of society where she could develop her most valued capacities.<sup>47</sup> One of these capacities is her ability to develop, revise, and pursue her own life plan; this capacity reflects her value of being free.<sup>48</sup> The free and equal person does not want to pursue her life plan regardless of how it affects other people. Instead, she values her capacity to cooperate with other people based on fair terms of social cooperation; this capacity reflects her value of being equal.<sup>49</sup> Another part of being equal means that a free and equal person does not make choices that discriminate against persons based on morally arbitrary characteristics such as their gender, wealth of their society, ethnicity, sexual orientation, or place in history.<sup>50</sup> Putting these together, the free and equal person would choose a kind of society where each individual can pursue each individual's own life plan according to fair terms of cooperation that do not discriminate against persons based on morally arbitrary characteristics. Determining what fair terms the free and equal person would choose provides the structure of the political society required by Kantian political theory.

As fair terms, the free and equal person would choose a *normative* division between the domain of the individual and the domain of the social.<sup>51</sup> This normative division provides the individual space to pursue her life plan while making sure other individuals are also able to pursue

---

<sup>45</sup> This formulation is based off of Ronald Dworkin's writings. RONALD DWORKIN, SOVEREIGN VIRTUE 1 (2000).

<sup>46</sup> This formulation is based off of John Rawls's writings. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 14-15 (2001). For my purpose, reasoning in either of the Rawlsian way or the Dworkinian way at this level of abstraction seems to lead to the same conclusions. So, I do not address any possible differences between these formulations of Kantian political theory.

<sup>47</sup> JOHN RAWLS, POLITICAL LIBERALISM 18-19 (1993).

<sup>48</sup> *Id.* at 30-31.

<sup>49</sup> *Id.* at 19.

<sup>50</sup> These are some of the restraints on what free and equal individuals may choose as fair terms based on Rawls's construct of the veil of ignorance. *Id.* at 304-309.

<sup>51</sup> This claim is normative; it does not deny that the social shapes the individual as feminists have pointed out. Carol Hanisch, *The Personal is Political*, in FEMINIST REVOLUTION 204 (1979).

their life plans on fair terms.<sup>52</sup> The domain of the individual is the domain of permissible actions, as a matter of political justice, that individuals may do without having to take into consideration how those actions may affect other individuals or society as a whole.<sup>53</sup> For example, an individual should be able to believe what she finds persuasive even if those beliefs are unpopular or disappoint others. Allowing the individual to believe as she wants facilitates her forming and affirming her own life plan. The domain of the individual must be expansive enough to allow for a broad range of life plans. Having an expansive domain of the individual where an individual may permissibly form and pursue her life plan reflects the free aspect of the free and equal person.<sup>54</sup>

Despite being free to pursue a life plan, an individual may not pursue just any life plan. An individual may not permissibly pursue being a serial murderer because it substantially interferes with other individuals pursuing their life plans. Moreover, an individual may not pursue a permissible life plan by impermissible means. An individual cannot permissibly secure, as part of her life plan, home ownership by defrauding a seller of a home. To establish and enforce the fair terms upon which individuals may pursue their life plans, the free and equal person would choose to have in a political structure a separate normative domain, the domain of the social.

The domain of the social includes what government can, cannot, and must do with regard to persons as well as specifies what individuals can, should not, and must do with regard to other individuals or the government. For example, the government should not force someone to testify against herself in a criminal trial. An individual should not take another person's bicycle without permission except perhaps in extreme situations. Choosing a domain of social rules that govern the fair terms reflects the free and equal person's desire to be equal.

Putting these two parts together, the free and equal person would choose a normative political division between what society (government or other individuals) may do to a person and the individual's claim to a domain of her life where she is free from any requirements to do things for the

---

<sup>52</sup> I am indebted to Arthur Ripstein for identifying the importance of this division for assigning accident costs. Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004).

<sup>53</sup> I say 'as a matter of political justice' because I am only including those actions that society or government should not require of its population. I mean to exclude those actions that may be required by interpersonal morality because I am focusing on the relationship between the individual and the society and the relationship between individuals qua citizens of a coercive social structure.

<sup>54</sup> Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004).

government or for other persons. We need not search for objections to this normative division because I think most would agree that Kantian political theory requires this kind of division.<sup>55</sup> Theorists may disagree on the exact contours of the social domain and the individual domain, but they acknowledge the normative division in some form as part of Kantian political theory.<sup>56</sup>

The normative domain of the society and the domain of the individual do not merely determine what each respectively may and may not permissibly do. The domains also include what the individual is responsible for and what society is responsible for, as indicated by the ‘must’ in the above formulations. As part of the social domain, the government creates the fair terms of social cooperation by doing such things as forming laws and institutions, regulating transactions between individuals, and providing public goods. By establishing the fair terms of interactions, the government makes possible various life plans that individuals may pursue within that structure. The structure also indicates to individuals what their fair share of resources (including wealth) is and allows them to plan their lives based on their expected fair share of resources.

In the domain of the individual, the responsibility of each individual is to create her determinate life plan based on what she can realistically expect as her fair share of resources.<sup>57</sup> In pursuing her life plan, the individual is responsible for obeying the fair terms of cooperation that govern the conditions in which she and others can pursue their determinate life plans.<sup>58</sup>

Kantian political theory provides a way to assess theories of assigning accident costs. The most persuasive theory of assigning accident costs is the one that free and equal persons would choose as part of the fair terms of social cooperation. Such a theory would be the best interpretation of Kantian political theory on the issue of assigning accident costs. In the next

---

<sup>55</sup> See for example, Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004).

<sup>56</sup> One can see an example of this kind of issue in the disagreement between Rawlsians and G.A. Cohen regarding extent to which individual choices about their salary or their occupation are subject to the demands of social justice. See G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* Chpts. 4-5 (2008).

<sup>57</sup> John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 165-169 (A. Sen & B. Williams eds., 1982). See Ripstein’s account of these ideas. Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004).

<sup>58</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 19 (1993).

section, I examine whether rights-based theories that are inspired by social utility theory are good interpretations of Kantian political theory.

#### **IV. Rights-based Versions of Social Utility Theories**

##### *A. Negligence as Narrow Utilitarianism*

I start with a theory of negligence that is not obviously a rights-based theory. When properly distinguished from what I call ‘general utilitarianism’ narrow utilitarianism can be construed as a rights-based theory of negligence or, at least, a mixed theory. The narrow utilitarian concept of negligence states that an actor is negligent if she did not employ all cost-justified precautions in her act that led to the accident. Cost-justified precautions are precautions that cost less than the cost of the probable harms that could be avoided by the precaution. If an actor is negligent, then she should be assigned the accident costs of the other parties to the accident assuming that the other parties were not negligent. One way to formulate narrow utilitarianism as a rights-based theory is:

Each person has a right to be compensated if harmed from another’s act that failed to take all cost-justified precautions.

For example, to reduce the errors in surgery, medical providers could write on the body of the patient with a marker indicating what is to be done and what is not to be done. Suppose this precaution costs \$100 per patient. If employing this precaution of body writing avoided less than \$100 worth of harm taking into account the probability of such harm, then the precaution would not be cost-justified. If the precaution could avoid more than \$100 of harm, then the precaution on surgery patients is cost justified. Assuming body writing is cost justified, then a medical provider that did not do it would be negligent and be assigned the costs of any resulting harm from the misplaced surgery.

Narrow utilitarianism is a form of Learned Hand-style reasoning.<sup>59</sup> The law and economics paradigm often states this conception of negligence in terms of a formula.<sup>60</sup> A person is negligent when the burden of a possible precaution (B) was less than (<) the probable loss (PL).<sup>61</sup> A person is not negligent if, for all relevant precautions, B>PL. If no party to an accident was negligent in their act that led to the accident, then each party bears the costs she incurred from the accident. Narrow utilitarianism does not

---

<sup>59</sup> Other forms of Learned Hand-style reasoning reflect costs and benefits in other terms.

<sup>60</sup> Richard A. Posner, *A Theory of Negligence*, 1 THE JOURNAL OF LEGAL STUDIES 29, 32 (1972).

<sup>61</sup> *Id.* at 32. Note that we are analyzing the ex ante choice. So, there is uncertainty where the benefit or loss will occur and how much that benefit or loss will be.

concern itself with the administration costs of the tort legal system in determining negligence just like judges do not look at the cost of adjudication in determining whether a particular speech act is protected by the First Amendment. These administration costs are part of the cost of government protecting the rights of individuals.

Narrow utilitarianism is narrow because it does not look beyond the individuals involved, the kinds of actions they did, and their possible precautions to determine who should bear the costs of the accident.<sup>62</sup> A wider approach 'general utilitarianism' would assign accident costs in whatever way minimizes the sum of accident costs and administration costs of dealing with the assignment of accident costs.<sup>63</sup> Since general utilitarianism aims to minimize accident costs and administration costs, general utilitarianism is not constrained by requirements of direct causation or outcome responsibility because administration costs for determining such issues could be costly. To save administration costs of lengthy trials, general utilitarianism could require assigning accident costs to all members of society through social tort insurance. Another example is that general utilitarianism could require assigning accident costs to individuals not involved in certain accidents such as a third party who is the cheapest-cost-avoider of such accidents to incentivize similar third parties to intervene in the future to prevent such accidents.<sup>64</sup>

Another reason narrow utilitarianism is not general utilitarianism relates to the acts of the parties involved.<sup>65</sup> The general utilitarian is not only concerned with minimizing accident costs and administration of accident costs, but she is also concerned with how much utility individuals are producing by their acts.<sup>66</sup> So, the general utilitarian would also evaluate whether the individuals involved in the accident should have engaged in entirely different acts rather than merely assessing whether the individuals engaged in all cost-justified precautions for the kind of act they did.

---

<sup>62</sup> Richard Posner's claim about utilitarian or economic interpretation of negligence in tort began as a descriptive claim. Richard A. Posner, *A Theory of Negligence*, 1 THE JOURNAL OF LEGAL STUDIES 29, 32-34 (1972). Posner thinks that courts have been using a utilitarian-type economic analysis to determine whether or not an act is negligent. Posner at 34. In contrast, I take the utilitarian form of negligence as normative.

<sup>63</sup> Guido Calabresi, *Neologisms Revisited*, 64 MD. L. REV. 736, 743.

<sup>64</sup> Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 85n21 (1975-1976).

<sup>65</sup> Narrow utilitarianism may have a limited scope in other ways. It may not seek to convert strict liability into the negligence standard. Neither need it seek to apply utilitarianism in any other legal domain.

<sup>66</sup> I am not claiming any theorist of accident law has espoused this view. Rather, this view results from a whole scale commitment to utilitarianism.

To illustrate, suppose two car drivers collide. The narrow utilitarian would ask whether each driver took all cost justified precautions related to driving in those circumstances to determine if either driver was negligent. In contrast, the general utilitarian would also ask whether either driver could have maximized utility by staying home, walking, taking public transit, bicycling, moving closer to one's regular destinations, and numerous other alternatives to driving that day for that purpose. If so, then the utilitarian could condemn as negligent one or both of these drivers even if their driving considered alone involved all cost justified precautions related to driving.

How the general utilitarian would assign accident costs from the accident would depend on a number of factors. For example, did one or both individuals maximize utility by driving in that instance for that purpose? What other options were available to incentivize these individuals and others to choose the act (possibly not driving at all) that would maximize utility in the future? What institutional structure for assigning accident costs maximizes the net utility of the individuals involved? The general utilitarian could consider many other possible issues as they relate to social utility.

To repeat for emphasis, the general utilitarian would assess whether the actors should have engaged in entirely different actions rather than only the more limited inquiry of whether the actors employed all cost justified precautions. To my knowledge, this implication of general utilitarianism has not been noted by accident law theorists. However, it follows directly from the general utilitarian's commitment to maximize social utility.

So far, I have merely stated what negligence is according to narrow utilitarianism and contrasted it with (a non-rights-based theory) general utilitarianism. As stated, narrow utilitarianism does not suffer from the first problem with rights-based theories, the problem of offering incomplete criteria for assigning accident costs. Ignoring measurement problems, narrow utilitarianism provides clear enough criteria to assign accident costs.

Narrow utilitarianism, as a rights-based theory, struggles with the second problem, justification. The most straightforward justification for narrow utilitarianism might appear to be utilitarian moral theory (utilitarianism, for short).<sup>67</sup> Put roughly, utilitarianism requires individuals to maximize net social utility (happiness or something similar) because

---

<sup>67</sup> Narrow utilitarianism could be justified as a pragmatic approach to law. Richard Posner may advocate such. See Richard A. Posner, *What Has Pragmatism To Offer Law?*, 63 S. CAL. L. REV. 1653, 1663 (1990).

utility is the highest human good. Utilitarianism is usually the justification for general utilitarianism.

Since narrow utilitarianism conflicts with general utilitarianism, narrow utilitarianism cannot be justified by the same justification as general utilitarianism. Narrow utilitarianism does not assess whether individuals involved in the accident maximized utility compared to other kinds of acts. Also, narrow utilitarianism accepts the responsibility constraints of direct causation and outcome responsibility. These responsibility constraints prevent narrow utilitarianism from maximizing utility because it forecloses alternative bearers of accident costs other than those involved in the accident. Thus, narrow utilitarianism must find its justification from somewhere other than utilitarian moral theory.

Another possible justification of narrow utilitarianism is Kantian political theory. Narrow utilitarianism could embody what it means to treat individuals as free and equal persons for assigning accident costs. Narrow utilitarianism seems to treat others as free (in a moral sense) because it does not require that individuals maximize utility in all of their acts (as general utilitarianism does). So, narrow utilitarianism seems to allow expansive space for individuals to pursue their life plans without having to twist their life plans into the straightjacket of what best benefits society. This aspect of narrow utilitarianism addresses the free aspect of Kantian political theory.

Narrow utilitarianism seems to treat individuals as equals because it does not evaluate the acts of individuals in terms of certain kinds of acts that are better or worse pursuits. Instead, narrow utilitarianism only looks at the costs of precautions for an act and compares them to the costs of possible harms. On a per unit basis, a unit of precaution and a unit of harm count the same for each individual and each act, making narrow utilitarianism seem to treat each individual's pursuits equally. By not prejudging kinds of acts and by comparing acts based on units of cost that are the same for everyone, narrow utilitarianism seems to reflect what it means to treat everyone as equal in Kantian political theory.

In fact, I think, for the reasons stated above, narrow utilitarianism is a plausible interpretation of Kantian political theory. To repeat from above, the right would be, Each person has a right to be compensated if harmed from another's act that failed to take all cost-justified precautions. While narrow utilitarianism is a plausible rights-based interpretation of Kantian political morality, I do not think it is the best interpretation.

The first shortcoming is that narrow utilitarianism does not evaluate the worth of the purpose of an act. Narrow utilitarianism is blind to the purpose

of an act insofar as it only looks at the costs of precaution and the costs of possible harm. Earlier I described this aspect of narrow utilitarianism as a good attribute of the theory, an attribute that may satisfy the moral requirement to treat persons as equals. However, the problem of not including some evaluation of the purpose of the act is that the interests of the potential harmed are not given equal weight. For instance, individuals can be subjected to risks from acts that have trivial value (trivial acts, for short). Since narrow utilitarianism exposes individuals to harm from trivial acts without the possibility of compensation, narrow utilitarianism fails to adequately treat those exposed to harm from trivial acts as equals.

Borrowing an example from Gregory Keating, consider an ambulance driver who is rushing a critically ill patient to a hospital.<sup>68</sup> The ambulance driver is taking all cost justified precautions. Since the patient faces serious disability or death without urgent hospital care, narrow utilitarianism justifies that the ambulance driver can drive fast (up to a point) despite the risk of harm posed to pedestrians and other motorists. In contrast, consider a car full of beach enthusiasts rushing to the beach. The beach goers are quite anxious to get to the beach for various reasons (important to the beach goers) such as making it in time for the barbecue and catching the waves before dark. The road to the beach has only a few other vehicles. Since the beach enthusiasts have so much to lose by driving slower and the road has few other vehicles, the driver of the beach enthusiasts is cost justified in driving quite fast to the beach.

Suppose accidents occurred from the driving of both the ambulance and the beach enthusiasts. Narrow utilitarianism would find the drivers not at fault (negligent) because both drivers took all cost justified precautions. This implication disturbs me. Since beach going is a form of leisure (for most beach goers), traveling to the beach is not important enough to require that individuals only take cost justified precautions.<sup>69</sup> When engaged in leisure acts, we would want individuals to take more precaution than what is cost justified to reflect this evaluation of the act. At the same time, getting the injured to the hospital is a highly valuable act. Putting these together, even though both drivers took all cost justified precautions, we may disagree with the narrow utilitarian by adjudging that the ambulance driver was *not* at fault and that the beach driver was at fault. In so doing, the ambulance driver would not be assigned the costs for her accident whereas the beach driver would be assigned the costs for his accident.

---

<sup>68</sup> Gregory Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STANFORD L. REV. 311, 324-25 (1996).

<sup>69</sup> Keating seems to mean something similar by stating beach-going is a “trivial end.” Keating at 325.



Free and equal persons would not want to be subject to risks just because they are cost-justified. It is true that free and equal persons have interests in pursuing their chosen acts and so would want wide latitude in what acts they can pursue without being subject to bearing the costs of any resulting accidents. However, free and equal persons do not want to be subject to risks of harm for purposes that are not valuable enough (trivial acts). Instead, we need a compromise between allowing an individual the freedom to pursue the acts that she wants and the interests that those subject to risk have of being free non-compensable harm from trivial acts.

The advocate of narrow utilitarianism may think that the value of the purposes of the act can be factored into the test advocated by narrow utilitarianism. While the value of the purposes of an act could be factored into some equation to determine liability, that revised equation would no longer be narrow utilitarianism as it is usually presented. Additionally, any attempt to put the costs of bodily injury into a formula that weighs it mathematically against other costs fails to capture that most individuals would prefer no injury at all to having been injured and compensated.

Those who advocate narrow utilitarianism do not include the evaluation of the act in the equation. They may exclude it because they think that leaving it out treats equally each person's interests in pursuing their own acts. However, they neglect the interests that the potential harmed have in not being subject to non-compensable harm for trivial acts. Neglecting this aspect fails to treat equally those subject to risks because it gives individuals too wide of discretion in imposing risks on others.

### *B. Rights-Based Social Welfare Theory*

Some may think that a social welfare test similar to what is advocated by Louis Kaplow and Steven Shavell would solve the problem of trivial acts that I leveled against narrow utilitarianism.<sup>70</sup> In fact, Kaplow and Shavell go to the opposite extreme. Their theory includes, insofar as it affects the preferences of individuals, the value of anything involved in the accident and in the administration of assigning accident costs.<sup>71</sup> Their theory sums up all the various preferences that are satisfied by each option of assigning accident costs to determine which option maximizes the (weighted) preferences of all involved. Kaplow and Shavell only exclude in their social welfare theory under the title of 'fairness' those considerations that do not affect preference satisfaction at all.<sup>72</sup> The right espoused by the rights-based social welfare theory would be the right to compensation for

---

<sup>70</sup> Kaplow and Shavell at 52.

<sup>71</sup> *Id.* at 18.

<sup>72</sup> *Id.* at 39.

harm from an act that does not comport with the social welfare regime that maximizes utility.

A rights-based social welfare theory may seem to have a way to avoid the problem of narrow utilitarianism in the beach enthusiasts case. Social welfare theory does so by weighting lower the welfare from beach going than the welfare from ambulance driving. By reducing the welfare of beach going through weighting it differently, the precaution needed to avoid liability for such acts is greater than required by narrow utilitarianism. So modified, social welfare theory would still require cost-justified precautions, but by weighting lower the beach going act than other more valuable acts, greater precaution is required to make beach going cost justified.

Rights-based social welfare theory is afflicted with the first problem of rights-based theories, the problem of incompleteness. In fact, social welfare theory fails to answer an issue key to its own formulation. That key issue is how much should each act be weighted.<sup>73</sup> Social welfare theory tells us to pursue the option that gives the highest social welfare once the acts are weighted. However, social welfare theory does not tell us how to weight each act.<sup>74</sup> The rights-based social welfare theory considered above has no determinate content without some theory that persuasively weights the factors in the function. Thus, without content, social welfare theory is not a viable theory of assigning accident costs. To that extent, we do not need to and are perhaps unable to consider whether the rights-based social welfare theory has a defensible justification.

So far, I have considered rights-based theories that have their theoretical origins in utilitarian theory but were modified to express rights-based theories. Not surprisingly, these theories are deficient expressions of Kantian political theory because they are incomplete or fail to evaluate the acts involved in a persuasive or justifiable way. I will now turn to theories that seek to express Kantian political theory as it applies to assigning accident costs.

## V. Kantian Rights-based Theories

### A. *Weinrib's Corrective Justice Theory*

Ernest Weinrib provides a distinctly Kantian account of tort law by arguing that tort law's characteristics reflect the moral dimensions of the

---

<sup>73</sup> Daniel Farber, *What (If Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791, 1793 (2003).

<sup>74</sup> *Id.*

Kantian commitment to liberty.<sup>75</sup> Weinrib's theory emphasizes the bilateral nature of tort law's institutional structure to argue that tort law's purpose is to right the person wronged when that wrong led to an accident.<sup>76</sup>

Regarding the central normative concern, Weinrib endorses what he terms the "English and Commonwealth" approach to reasonable care.<sup>77</sup> In contrast to narrow utilitarianism, Weinrib claims that the English and Commonwealth approach ignores "almost completely" the burden of precaution for reducing risk.<sup>78</sup> Instead, this approach focuses on the risk of harm and the magnitude of the harm that is risked to determine if an actor was negligent.<sup>79</sup>

Weinrib outlines two parts to the English and Commonwealth approach. First, the approach determines whether the risk was reasonably foreseeable in the sense that "there is a threshold degree of risk that a reasonable person ought not to ignore."<sup>80</sup> Only if this threshold is met does the English and Commonwealth approach address the burden of the precaution issue, according to Weinrib, although the details of this aspect need not concern us. Second, if the risk exceeds the threshold degree of risk that a reasonable person ought not to ignore, "it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk."<sup>81</sup> In other words, the trial court determines whether the risky act was reasonable to take under the circumstances.

While Weinrib provides criteria for analyzing the concept of reasonable care, he does not offer enough criteria. His theory does not offer determinate answers to specific cases to the central normative concern. At both steps in the English and Commonwealth approach, Weinrib leaves some form of the term 'reasonable' in the criteria. Weinrib does not tell us either how much risk meets the initial threshold for it to be unreasonable to ignore or how to determine that amount of risk. He also does not tell us how a tribunal should decide whether a risky act that passed the first-stage threshold was reasonable or not. In the end, Weinrib's theory contains a gap. Weinrib needs to fill this gap to have a determinate theory of assigning accidents.

---

<sup>75</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 84 (1995). Weinrib often speaks of private law in general. By inference, here and elsewhere I take his claims to apply to tort law as a subset of private law.

<sup>76</sup> *Id.* at 63-66.

<sup>77</sup> *Id.* at 147-48.

<sup>78</sup> *Id.* at 148.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 149.

<sup>81</sup> *Id.* (quoting *Wyong Shire Council v. Shirt* at 221).

Like the rights-based social welfare theory, Weinrib's theory suffers from the problem of incompleteness. Without being complete, we need not and cannot assess its justification for how it addresses the central normative concern. Hence, Weinrib's theory does not provide an adequate rights-based theory of assigning accident costs.

### *B. Ripstein's Freedom and Security*

Arthur Ripstein advances a theory of responsibility for accident costs within Kantian political theory.<sup>82</sup> He seems to be focusing exclusively on explaining and justifying tort law as found in its extant institutional setting.<sup>83</sup> For my purposes, I focus only on the part of his theory about what constitutes the standard of care for negligence in tort law, which is roughly the same issue as the central normative concern. Ripstein argues that determining negligence involves "weighing liberty against security" within the construct of the reasonable person. For Ripstein, the reasonable person "moderates his or her actions in light of the legitimate claims of others."<sup>84</sup>

However, Ripstein does not state how to weigh liberty against security or what specifically are the legitimate claims of others. He uses phrases such as "appropriate care"<sup>85</sup> to describe the amount of precaution needed and "undue risk" to describe a risk that inappropriately weighs liberty against security. Yet, he never fleshes out the details of what is appropriate care or what is undue risk, seeming to leave such decisions to courts without further guidance.<sup>86</sup>

At one point, Ripstein states, "specific liberty interests and security interests are protected, based on a conception of their importance to leading an autonomous life."<sup>87</sup> However, Ripstein does not provide us that conception. Furthermore, it is not clear how reasoning about the importance of liberty and security interests to autonomy is going to get us enough detail to make the highly detailed decisions about whether acts, that Ripstein describes as "activities in contexts," are reasonable.<sup>88</sup> Later, Ripstein does point out that customary risks will often coincide with

---

<sup>82</sup> ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* 12 (1998). Arthur Ripstein, *Tort Law in a Liberal State*, 1 *JOURNAL OF TORT LAW* 1, 7 (2007).

<sup>83</sup> I conclude this from Ripstein's detailed description of tort doctrine without questioning many of its parts. ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* 48-58 (1998).

<sup>84</sup> *Id.* at 56.

<sup>85</sup> *Id.* at 57.

<sup>86</sup> *Id.* at 56.

<sup>87</sup> *Id.* at 55.

<sup>88</sup> *Id.* at 51

appropriate risks and undue risks.<sup>89</sup> However, he does not flesh out the importance of this coincidence or how to determine when customary risks do not coincide with appropriate risks.

As a result, Ripstein's theory does not go far enough in addressing the central normative concern. Ripstein adds something to the reasonable person theory by pointing out two key interests that concern the reasonable person. However, he does not provide enough criteria to determine how these further interests of security and liberty are to be justifiably weighed. Thus, Ripstein's theory lacks the specificity needed to determine the actual results of how to justifiably assign costs of particular accidents. Due to the incompleteness of Ripstein's theory, it does not offer a viable rights-based theory on the issue of the central normative concern.

On behalf of Ripstein, we could try to fill out how to trade off the interests of security and liberty by appealing to moral intuition or to ideal or actual deliberative procedures. The appeal to moral intuition to fill out the balancing of the interests of security and liberty is unsatisfying because it does not solve the problem of when moral intuitions conflict within an individual and between individuals. Moral intuition is also problematic because it seems to reify the status quo view of risks under the auspices of objective moral truth.

If Ripstein's theory were to spell out how the reasonable person would balance liberty and security by appealing to actual deliberative procedures, his theory would gain the specificity needed. However, under such an interpretation, Ripstein's identification of liberty and security does not seem to add much to a theory that uses actual deliberative procedures especially when these procedures could include more values than liberty and security.

If Ripstein's theory were fleshed out in terms of ideal deliberative procedures, such is difficult to evaluate without a concrete theory before us. General values such as liberty and security do not obviously lead to any particular conclusions about concrete risks. Spelling out how to balance interests of security and liberty in an ideal deliberative procedure seems unable to provide enough detail without a substantial addition of content to the theory.

As a result, we have no persuasive way to fix the incompleteness of Ripstein's theory. Like the other incomplete theories above, we need not and cannot assess the justification for Ripstein's theory. So far, none of the rights-based theories considered provide an adequate answer to the central normative concern.

---

<sup>89</sup> *Id.* at 71.

### C. Fletcher's Reciprocal Risk Theory

George Fletcher claims that Kantian political theory would accord each person the maximum amount of security compatible with the same amount of security for everyone else.<sup>90</sup> In this claim, Fletcher is trying to follow John Rawls's emphasis on reciprocity.<sup>91</sup> So, I refer to Fletcher's theory as 'reciprocal risk theory.' Put abstractly, if person X in a given interaction imposes more risk on person Y than person Y is imposing on X (in other words, if their mutual risk imposition is asymmetrical), then person X (the person imposing the greater risk) owes compensation to person Y if harm occurs. Fletcher thinks that according each individual reciprocal security (and risk) in this manner treats individuals as free and equal.

I think that reciprocal risk theory embodies a tension. Stephen Perry identifies this tension while pursuing a different tack, to wit, a theory of outcome responsibility.<sup>92</sup> To make this tension more explicit, I argue that reciprocal risk theory has two conflicting components. The first component compares the magnitude of the risks of each party's act to assign accident costs. The party that imposed the greater amount of risk on the other is liable for any harm that occurred to the other party.<sup>93</sup> I call this 'component A' of reciprocal risk theory.

Component A is the most obvious from Fletcher's text. Component A explains why strict liability is used for excessively risky acts such as crop dusting and blasting. The magnitude of the risks of these acts virtually always exceeds the risks of the acts of those harmed. Fletcher also uses component A to determine negligence liability when two people are engaged in the same kind of act.<sup>94</sup> He writes, "Negligently created risks are nonreciprocal relative to the risks generated by the drivers and ballplayers who engage in the same activity in the customary way."<sup>95</sup> All parties are not negligent when they engage in the same act in the ordinary way, such as when they are engaged in "ordinary driving."<sup>96</sup> Thus, component A can explain pockets of strict liability if one individual is engaged in a drastically

---

<sup>90</sup> George Fletcher, *Fairness and Utility in the Law of Torts*, 85 HARV. L. REV. 537 (1972).

<sup>91</sup> Fletcher at 550. Fletcher does not phrase his theory as based in Kantian political theory, but I think that is where his theory is best placed based on his reliance on John Rawls's work.

<sup>92</sup> Perry at 117-18.

<sup>93</sup> *Id.* at 548.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 547-48.

more risky act as well as negligence if individuals are engaged in the same act.<sup>97</sup>

‘Component B’ of the reciprocal risk theory is hard to disentangle from Fletcher’s writing because Fletcher sees component A and component B as overlapping or virtually the same. Since I see component B as distinct and in tension with component A, I must convincingly extricate it from Fletcher’s writing.

Component B involves Fletcher’s idea of background risks.<sup>98</sup> Background risks are all of the risks that accompany daily social life.<sup>99</sup> Fletcher includes in reciprocal risk theory how courts should assign costs from acts that are part of the background risk.<sup>100</sup> Since everyone creates background risks, Fletcher thinks, “all members of the community contribute in roughly equal shares.”<sup>101</sup> Recall Fletcher believes in the “principle of fairness: all individuals in society have the right to roughly the same degree of security from risk.”<sup>102</sup> Since fairness or reciprocity demands that everyone get the same amount of security, Fletcher reasons that no one needs to be compensated when an accident results from background risks.<sup>103</sup> Background risks are the risks that individuals must bear without compensation “as part of group living.”<sup>104</sup>

Fletcher provides an example, “If we all drive, we must suffer the costs of ordinary driving.”<sup>105</sup> From this example, we see that background risks are acts that all (or perhaps most) people do in the manner that all (or most) people do them. Component B is used when two parties to an accident are engaged in different kinds of acts that are both background risks. Component B does not look at whether one party actually imposed greater risk on the other. Instead, since both acts are background risks, their actual degrees of risk are not examined. Component B considers them as having the same level of risk for the purpose of assigning accident costs (even if in reality one background risk was riskier than the other). Since the risk imposition is symmetrical, neither party owes the other compensation.

I contend that component A of reciprocal risk theory is in tension with component B. Component A assigns accident costs based on the actual risk

---

<sup>97</sup> *Id.* at 549.

<sup>98</sup> *Id.* at 548-49.

<sup>99</sup> *Id.* at 547-48.

<sup>100</sup> *Id.* at 547-49.

<sup>101</sup> *Id.* at 547.

<sup>102</sup> *Id.* at 550.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 543.

<sup>105</sup> *Id.* at 543.

imposed by the acts. In contrast, component B ignores the actual risks of the acts and instead assigns accident costs based on what role (common or uncommon) that kind of act plays in the society. Thus, the two components to reciprocal risk theory use different criteria to assign accident costs.

The result of these two components of reciprocal risk theory using different criteria is that they may assign accident costs differently for the same case. For example, suppose a person engaged in ordinary driving gets into an accident with a person engaged in ordinary walking.<sup>106</sup> Component A would require the ordinary driver to compensate the ordinary walker because the former imposed a comparatively higher risk on the latter. However, component B would not require compensation from either party because both were engaged in background risks. Thus, the problem with reciprocal risk theory is that it has two components that assign accident costs in conflicting ways.

Fletcher may first respond by claiming that component A and component B actually overlap such that there is no tension between them. The key passage states, “If uncommon activities are those with few participants, they are likely to be activities generating nonreciprocal risks.”<sup>107</sup> Fletcher thinks that the domain of uncommon acts (non-background risks) will be coextensive with acts that are an order of magnitude of risk different from common risks. Stating the overlap from the other direction, Fletcher writes,

Similarly, dangerous activities like blasting, fumigating, and crop dusting stand out as distinct, nonreciprocal risks in the community. They represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares.<sup>108</sup>

So, component A is all that Fletcher seems to want to use. Since nonreciprocal risks impose an uncommon amount of risk, all nonreciprocal risks are in that sense non-background risks. In sum, for Fletcher, since uncommon risks are coextensive with nonreciprocal risks and common risks are coextensive with reciprocal risks, then the two components I identify collapse into component A, which compares the actual risks of the acts to assign accident costs.

In response to Fletcher’s attempt to unify component A and component B, I only need to show that component A does not handle adequately at least some accidents involving two background risks. These cases involve

---

<sup>106</sup> See also Perry at 115. Perry identifies the problem in Fletcher and proposes his solution.

<sup>107</sup> Fletcher at 547.

<sup>108</sup> *Id.*



two acts that are both common and one clearly imposes more risk on the other (in the sense important to component A).

Return to the case of the ordinary walker and ordinary driver.<sup>109</sup> Ordinary driving imposes a greater risk than ordinary walking indicating that component A would determine that the ordinary driver should compensate the ordinary walker. However, ordinary driving and ordinary walking are both background risks. In such cases, component B requires that neither party owes the other compensation. To arrive at that conclusion component A would have to ignore the obvious disparity in the risks of these ordinary acts. But, ignoring such goes against the motivating idea behind component A. So, reciprocal risk theory requires two conflicting assignments of costs for the same accident.

In a footnote, Fletcher mentions the case of the ordinary walker and driver. He states that these cases “require further thought.”<sup>110</sup> Fletcher thinks that these cases do not pose a significant problem because they are at the “fringes” of reciprocal risk theory.<sup>111</sup>

These cases seem hardly at the fringes. The numbers of accidents that result from people engaging in common acts involving significantly different amounts of risk are numerous. Even if only some of these common acts with different risks have as large of a disparity of risk as driving and walking, Fletcher does not tell us why we should ignore smaller differences.

In reality, common acts have risks that are large (driving), medium (bicycling), and small (walking). Although cumbersome, even more realistic would be recognizing that background risks lie on a continuum from most risky to least risky. If Fletcher wants all individuals to have the same amount of security, we should be concerned about making these distinctions even if the acts are common or ordinary. If so, then the types of accidents resulting from two ordinary acts with different amounts of risk are not “fringe” cases that can be saved for later. Instead, they are going to comprise a significant portion of accidents. If reciprocal risk theory addresses these cases, it swallows the tension I have identified between component A and component B. If reciprocal risk theory does not address these cases, then it is unable to completely handle all kinds of accidents.

Furthermore, there are cases where uncommon acts are not riskier than common acts. Suppose that a person is sword swallowing when she gets into an accident with an ordinary walker. While sword swallowing is

---

<sup>109</sup> See Perry at 115.

<sup>110</sup> *Id.* at 549.

<sup>111</sup> *Id.*

dangerous for the individual doing the swallowing, this uncommon act does not seem more harmful *to other people* than walking or many other common acts.

In such a case, we see a tension in reciprocal risk theory. Component A would determine no liability based on the similarity of risks to others between sword swallowing and ordinary walking. However, since sword swallowing is uncommon, it would not be a background risk indicating that the sword swallower should compensate the ordinary walker. The way to explain these diverging liability determinations is by acknowledging the two components of reciprocal risk theory. At the same time, we see that these two components are in tension because they lead to two conflicting ways to assign accident costs for the same case.

One way to resolve this tension is for reciprocal risk theory to assign each component to distinct kinds of accidents. The tension would not arise because the two components would never be applied to the same kind of accident. While such a resolution would eliminate the tension between the two components in reciprocal risk theory, I see no way to justify assigning component A exclusively to certain kinds of acts while assigning component B exclusively to different kinds of acts.

Another possible resolution to the tension is to make component B concerned with actual risk over complete lives rather than about the specific acts that lead to an accident. Fletcher seems to suggest that if Jack walks while Jill bicycles one day, they are in a reciprocal relationship because another day Jill walks and Jack bicycles.<sup>112</sup> Or, even if Jack does not bicycle, he may do some other act that imposes the same level of risk on Jill such as playing football.<sup>113</sup> By not requiring compensation for all acts that are background risks, component B focuses on individuals imposing (roughly) the same amount of risk on each other over complete lives.

Under this resolution, both components of reciprocal risk theory are concerned about actual risk but they differ on the timeframe in which they measure actual risk. Component A looks only at the acts that lead to the accident in question whereas component B looks at the aggregate risk over a complete life to balance out disparities in discrete cases of risk imposition.

The first problem with this attempt at resolving the tension is that the two components still would conflict with each other on whether to require liability in specific cases. Without independent reasons to treat an accident as one where we should take the lifelong view versus the immediate view,

---

<sup>112</sup> *Id.* at 547-48; 572.

<sup>113</sup> *Id.*

the two components would still recommend different assignments of accident costs in some cases.

The lifelong approach to assigning accident costs (a supposed version of component B) is an appealing interpretation of Fletcher because it coheres well with the Rawlsian rationale that animates his theory. Recall that rationale is that each person is to be guaranteed equal amounts of security.<sup>114</sup> Compensation makes up for a person's loss of security when they are harmed thereby restoring them to an equal amount of security as everyone else.

The problem with this resolution is that component A and component B are supposed to justify a legal duty for one person to compensate another person for a single harmful act. As Stephen Perry points out, the bilateral nature of this legal duty conflicts with the rationale that motivates Fletcher's reciprocal risk theory (and my supposed version of component B).<sup>115</sup> If compensation makes up for a loss of security, we would expect all individuals who engaged in a kind of risky act to compensate a person harmed not merely the one individual whose risky act happened to harm the person.<sup>116</sup> A rationale that seeks to distribute security equally would be better suited to social tort insurance where the cost of compensating for loss of security (harm) is distributed among all individuals who risk others' loss of security.<sup>117</sup> So, the attempt to save Fletcher from the tension between component A and component B by taking a lifelong view of risk does not mesh with much of Fletcher's text where he is trying to establish an individual's duty to another individual to compensate for harm.

The final problem of reformulating the reciprocal risk theory in terms of a lifelong distribution of equal security or risk among persons stems from the fact that component B does not guarantee that each individual will be exposed to even roughly the same amount of risk over her complete life. The reason is that not every individual engages in the same variety of acts to the same extent. So, just because component B allows one person to perform the same acts (background risks) as others does not mean that each person will be subject to roughly the same amount of risk over a complete life. The problem is that Uday always walks and may never do an act that counterbalances Jill's bicycling or Jack's football playing. Even if Uday does some comparable act, he may not do it as often as others do their riskier acts because he spends most of his time inside his house. Additionally, one person's background risk act can kill another person

---

<sup>114</sup> Perry at 118.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

cutting off that person's chance to impose risks on others to counterbalance the risk to which he was subjected.

Component B merely gives each person the formal or legal freedom to do the same acts without being assigned others' costs from any harm. Component B does not guarantee that everyone will be subjected to and able to subject others to roughly the same amount of risk because individual preferences may lead them to consistently impose different levels of risk on each other. We have no reason to believe that the differences would cancel out as we add more people into the equation. Thus, reciprocal risk theory does not seem to equalize actual risks over complete lives. So, this attempt to reconcile the tension between the two components of reciprocal risk theory fails.

Since the tension remains, reciprocal risk theory needs to pick between component A and component B. My guess is that Fletcher would pick component A and reject component B because component A most explicitly employs reciprocity, the value that Fletcher thinks animates his theory of tort law.

At most, component B provides 'legal reciprocity' in that everyone is subject to the same legal rules. However, almost any plausible regime of assigning accident costs will have legal reciprocity as long as accident costs are assigned based on the actions performed. To that extent, component B of reciprocal risk theory cannot claim to embody any unique form of reciprocity compared to all other regimes of assigning accident costs.

Perhaps Fletcher does not think of the reciprocity in component B as legal reciprocity. Rather, perhaps he thinks that background risks are reciprocal because the society accepts these risks as part of the hazards of their way of living. The reciprocity is that all members somehow have agreed that these risks are acceptable in that society. While this interpretation is appealing, I see only minimal textual basis in Fletcher's work that hints in this direction.

Furthermore, a plausible conception of reciprocity based on agreement to a regime of risk does not seem open to Fletcher because he does not place any requirements on how the accepted regime of background risks is established. If background risks are just what individuals do on a consistent basis, then stronger individuals or special interest groups would be able to unfairly impose their preferred risks as part of the background risks. If others have no say in what risks others can impose, not only is an agreement on the regime of risks unlikely but also reciprocity seems nowhere to be found. Since Fletcher does not have limitations on the way that background risks are determined in a society, he does not seem to establish that

component B is justified by a form reciprocity based on agreement on acceptable risks.

Even if Fletcher goes this direction with component B, the tension still exists between component A and component B (and mere legal reciprocity). The new interpretation of component B rests on most individuals in a community agreeing in some sense to a certain regime of risks. Component A does not appeal to any sense of agreement since it only looks at whether individuals actually impose the same risks on each other. Since a community can agree that unequal risk impositions of certain kinds should be free from liability, the tension between component B with this new interpretation and component A of reciprocal risk theory remains.

No other plausible interpretation of component B seems to be able to employ the same sense of reciprocity as component A. So, in the end, Fletcher equivocates on reciprocity in component A and in component B. Since I take Fletcher to primarily be advocating for the sense of reciprocity imbued in component A of reciprocal risk theory, I conclude that Fletcher would excise component B.

Unfortunately, component A by itself is not an appealing theory of assigning accident costs. One measurement problem with such a theory is that we do not have a persuasive way to compare the magnitude of risks between different acts when those risks are not clearly far apart on the risk spectrum. Whether walking while texting is riskier than playing Frisbee is difficult to tell.

A bigger problem is that assigning accident costs according to component A alone provides uncertainty. Whether one person is acting safely enough to avoid being assigned another's accident costs depends on what the other person who happens to be harmed is doing. A standard of care that is such a moving target would make it difficult for individuals to plan appropriately including buying appropriate levels of insurance. Such a regime would burden individuals' freedom to engage in acts they deem valuable. Thus, component A alone does not seem to be a good interpretation of what it means to treat a person as free according to Kantian political morality.

Component A alone would also favor individuals who prefer acts with low risk. Individuals with low risk preferences would likely be able to get the costs of their accidents assigned to the other person involved in the accident. Such an advantage for individuals with low risk preferences does not treat persons as equal according to Kantian political morality.

In summary, Fletcher's theory of reciprocal risk is inadequate either because its parts conflict or because its foremost part (component A) is not

a satisfying interpretation of Kantian political theory. Reciprocal risk theory does not provide us with an adequate rights-based theory of assigning accident costs.

#### *D. Perry's Accepted Pattern of Social Interaction*

In critiquing Fletcher's theory, Stephen Perry suggests his own theory of assigning accident costs. He writes, "the materialization of a risk that is normally incident to an accepted pattern of social interaction will not give rise to liability."<sup>118</sup> By this statement, Perry means that if an act of an individual accidentally harms another individual, the former does not have to compensate the latter as long as the former's act is part of an accepted pattern of social interaction. Unfortunately, Perry does not flesh out what he means by an 'accepted pattern of social interaction.'

Depending on how Perry fleshes out his theory, this theory may in fact accurately describe accident law doctrine.<sup>119</sup> Regardless, Perry seems to suggest that he is also advancing a normative theory.<sup>120</sup> For my purposes, I will assess Perry's theory as a normative theory because only as such does it address the central normative concern.

Although Perry's theory can be a normative theory, he does not offer a justification for that theory. Given that Perry suggests his theory while discussing Fletcher's theory and as a possible amendment to Fletcher's theory, I think it is safe to assume that Perry thinks his theory is justified within the Kantian rights-based tradition. However, I do not think that Perry is relying on Fletcher's principle about ensuring everyone equal security because Perry criticizes Fletcher's use of what seems to be a principle of social distributive justice to establish a right in corrective justice to determine a right that would pertain only between the two parties in an accident.<sup>121</sup> For Perry's theory to be persuasive, we need a more detailed justification than a vague appeal to Kantian rights. I will consider two possible justifications below.

Before then, I identify some possible problems internal to Perry's theory. Perry's theory has one of the problems I identified while trying to resolve the tension in Fletcher's theory: an accepted pattern of social interaction may not be justifiable for assigning accident costs because of the

---

<sup>118</sup> *Id.* at 119.

<sup>119</sup> One issue is whether the fact that, as a matter of legal doctrine, custom is not dispositive of the standard of care counts against Perry's descriptive theory of this aspect of tort law.

<sup>120</sup> Perry speaks of "moral warrant" and the "proper context" for assigning accident costs. Perry at 115.

<sup>121</sup> Perry at 118.

way the pattern became accepted. For example, if the society accepted an aspect of a pattern of interaction due to fraud, then the pattern is not a justifiable basis for assigning accident costs. The fraudulent aspect of the pattern means that the pattern was not legitimately accepted. Reading Perry charitably, we could assume that he too would invalidate aspects of a social pattern that were the result of fraud. If so, then Perry needs to complete his theory by stating how to assign accident costs where the relevant part of the accepted pattern of social interaction is invalidated by fraud.

Another problem with Perry's theory (also identified above with Fletcher) is that an accepted pattern of social interaction could violate constitutional rights. For instance, the accepted pattern of social interaction could violate the equal protection clause as it applies to race or sex. As pictured in the recent movie *The Help*, the accepted pattern of social interaction prohibited African American domestic workers from entering the house where they worked through the front door.<sup>122</sup> If an African American domestic worker slipped and fell while entering the front door of her employment, her violating the accepted social pattern may exonerate the homeowner/employer from being assigned the costs of the worker's harm. Such a legal implication would violate the domestic worker's constitutional right to be free from racial discrimination.

Perry may also endorse that the accepted pattern must not violate constitutional rights to be legitimate as a friendly amendment. Once again, he needs to spell out how to handle these sorts of cases for his theory to be complete and persuasive.

Aside from these amendments for Perry's accepted pattern theory to be persuasive, potential problems lurk for Perry's theory depending on how he fleshes the theory out. The problems concern the two attributes of the social interaction. Perry requires the social interaction to be both accepted and a pattern in some sense. Both of these attributes pose difficulties. First, Perry must not mean to require unanimous acceptance. Requiring that everyone accept the pattern dooms the standard to being impossible to satisfy. If not unanimity, how many must accept the pattern for it to be legally justified? If only a majority of the members of the society need to accept the pattern, how does that acceptance justify assigning accident costs to an individual who does not accept the pattern?

Moving on, another problem concerns the nature of the acceptance of the pattern. By 'accepted' does Perry require a conscious, deliberate avowal of the social interaction? Such a stringent requirement may be too high to apply in accident cases because often many individuals in a society

---

<sup>122</sup> *The Help*, Dreamworks (2011).

do not consciously and deliberately consider whether to accept acts that could lead to harm. At least, Perry must require that many people to have a pro-attitude toward the pattern of social interaction. What about those who are indifferent or undecided? What if 50% of the population has a pro-attitude toward one pattern and the other 50% has a pro-attitude toward a mutually exclusive pattern? Without answering these issues, Perry's theory is incomplete.

Potential difficulties lurk depending on what Perry means by the second attribute 'pattern.' Since Perry is speaking of what individuals are doing, he seems to mean by 'pattern' what individuals are actually doing with some sort of regularity. One difficulty concerns the conflict between these two attributes: 'accepted' and 'pattern.' The actual pattern of social interaction could not be accepted, or the pattern that most people accept is not being done. Suppose most individuals believe that drivers should not phone while driving. Yet, most individuals including those with this belief actually phone while driving. If harm results from such a scenario, Perry's theory provides no answer to how to assign accident costs.

Another difficulty with Perry's use of 'pattern' concerns acts that are not done uniformly. For example, suppose 15% of homeowners remove litter from their walkways daily, 40% do so weekly, 40% bi-weekly, and 5% monthly or less frequently. Is this complicated arrangement the pattern of social interaction? If so, then no one ever deviates from the pattern. Suppose someone were to slip and fall on litter on the walkway of a house whose homeowner removes litter bi-weekly. If no one is deviating from the (complicated, non-uniform pattern), then the homeowner whose walkway led to the accident met the extremely low or nonexistent standard of care. Pedestrians would have to walk at their own risk. This is a curious outcome given that 55% of the homeowners remove their litter at least weekly.

To avoid this problem, perhaps, Perry could appeal to which frequency for litter removal is accepted. However, how people actually act is strong evidence of what they accept. So, how would we determine if one of these frequencies is the accepted pattern of social interaction when what people are doing reflects no majority consensus?

It is possible that Perry could flesh out his theory in a way that satisfies these concerns. But, these concerns remain until his theory is fleshed out. Many of the concerns I have raised against Perry's theory need to be answered by the theory that I will sketch below. However, I believe that my theory persuasively answers these concerns, as I will demonstrate in a future piece.



Even if Perry can persuasively satisfy these concerns, we still lack a detailed justification for Perry's theory. Why should the accepted pattern of social interaction be the criterion for assigning accident costs?

As mentioned earlier, Perry may be committed to a Kantian, rights-based justification for his accepted pattern theory of assigning accident costs. One possible version of that justification is suggested by the way Perry formulates his theory. If certain acts are being done in a pattern, individuals have reason to rely on each other conforming to that pattern.<sup>123</sup> This reason is especially strong for acts where the benefits of the acts depend largely on everyone conforming to the pattern such as in traffic patterns. Given that reliance on the pattern is reasonable (perhaps rational) or at least understandable, someone who deviates from that pattern (a deviator) wrongs another individual who is harmed by the deviating act. This assumes that the harmed individual was conforming to the pattern of social cooperation. While not identical, the harmed's reliance interest in the pattern of social interaction is similar to the reliance interest an individual may acquire in the realm of contract law when one relies on another's promise despite the lack of contractual consideration. The reliance on the pattern of social interaction seems even stronger if the pattern is accepted and known by everyone that it is the accepted pattern.

While the idea of reliance can provide one reason why an accepted pattern of social interaction is a plausible basis for assigning accident costs, I do not think the justification runs deep enough into our considered convictions of how society should be organized to support the entire system of assigning accident costs. The reliance justification does not seem to be able to combat the reasoning of a deviator who acts for a different yet laudable reason. Suppose someone deviates from an accepted pattern of social interaction because doing so produces more utility. The deviator claims that producing more utility justifies deviation while the harmed claims that reliance on the accepted pattern delegitimizes deviation. The reliance theorist does not seem to have a response; the reliance theorist needs a more robust theory in order to overcome this possible objection by the deviator.

Another shortcoming of the reliance justification is that it does not explain how changes to the accepted pattern of social interaction can be effected legitimately. If an actual pattern of social interaction is no longer accepted, can one no longer rely on that pattern? If an accepted pattern is no longer being followed even though it is still accepted, can one no longer

---

<sup>123</sup> In conversation, Perry suggested this point as a possible justification for his view without endorsing the justification.

rely on that pattern? Must one rely on a new, emerging pattern even though it is not accepted? Can the government intervene to incentivize one pattern over another? The reliance justification does not seem to have robust enough theoretical resources to provide persuasive answers to these questions. The overarching problem in these questions is that the reliance justification does not provide justifiable mechanisms for the formation or change of accepted patterns of social interactions.

Another possible version of a Kantian rights-based justification for Perry's theory could be arguing that free and equal individuals in a society would choose the accepted pattern theory as fair terms of social cooperation. In Perry's accepted pattern theory, individuals are free to engage in whatever act they wish. As long as their act is part of the accepted pattern of social interaction, individuals do not have to bear any accident costs of others that result from their acts. Individuals are equal, one could argue, in that each individual gets to participate in the accepted pattern of social interaction. Accident costs are not assigned based on attributes of the individual but rather based on the individual's acts. If one individual deviates from the pattern and harms another, the deviator is assigned the accident costs of the individual that did not deviate from the accepted pattern. One could argue that the accepted pattern provides a realm of equality by setting the standard for assigning accident costs in this way.

Perry's theory may obtain freedom and equality of individuals to some extent. However, I do not think that it is the best interpretation of Kantian political theory. Concerning treating persons as free, while individuals are free to participate in the accepted pattern of social interaction under Perry's theory, they are not free to deviate from the accepted pattern without risking being assigned the costs of anyone accidentally harmed by their deviation. The accepted pattern of social interaction could encompass a wide swathe of acts or it could be narrow. Since Perry places no requirements on the breadth of the accepted pattern, the amount of freedom to act without risking liability may be large or small depending on what the accepted pattern is. Individuals who see themselves as free would likely want an alternative arrangement than Perry's theory in order to protect their freedom as much as fair terms of social cooperation allow.

Another shortcoming for Perry's theory is that it does not explain how those who do not accept the 'accepted pattern' are treated as either free or equal. Recall that Perry's theory cannot require everyone to accept every aspect of the 'accepted pattern of social interaction.' Doing so would risk requiring too high of a standard that no actual pattern could meet. Thus, some individuals in the society do not accept the accepted pattern of social

interaction. Let's call them 'dissenters.' Dissenters may be free like everyone else to act in accordance with the accepted pattern of social interaction without being subject to liability. However, they are likely powerless to alter an aspect of the accepted pattern given that they have a minority view on that aspect. Those that accept the accepted pattern of social interaction ('accepters') may also, as individuals, be powerless to change the pattern. However, the powerlessness of the accepters does not seem problematic because they accept the pattern whereas the powerlessness of the dissenters appears more problematic. At least, explaining how the dissenters are just as free as the accepters needs to be worked out.

Even if dissenters are just as free (in some sense) as the accepters, the dissenters do not seem to be treated as equals with the accepters. The accepted pattern of social interaction does not seem to value the dissenters' interests on an issue to the same extent as it values the accepters' interests. The difference in value results from the different treatment when assigning accident costs. Acts that involve the differing interests of the dissenters are subject to liability if another is harmed whereas the acts that involve the interests of the accepters are *not* subject to liability if another is harmed. If both dissenters and accepters were to act according to their respective interests, dissenters would bear more risk of being assigned others' accident costs than the accepters would bear. On face, dissenters do not seem to be treated as equals. Therefore, Perry's theory does not seem to treat persons as equal to a significant extent as required by Kantian political theory.

It is true that Perry's theory treats everyone as equals in that the same standard for assigning accident costs is applied to everyone in the same way. However, as I pointed out earlier, every plausible theory of assigning accident costs has this virtue because each theory would apply the same standard to everyone.

Since Perry's accepted pattern theory is incomplete and insufficiently justified, the question remains whether another theory of assigning accident costs better captures Kantian political theory. In the final section, I briefly outline a theory that answers the central normative concern. This theory could offer the best interpretation of Kantian political theory compared to any of the extant theories of assigning accident costs.

## **VI. Democratic Community Standard Theory**

I offer what I call 'democratic community standard theory' as the best interpretation of Kantian political theory and as the most persuasive answer to the central normative concern. While a complete defense of democratic

community standard theory must await another time, I sketch its main features.<sup>124</sup>

In democratic community standard theory, the community's evaluations of risk establish a threshold of risk for each kind of act. Putting this theory in terms of the central normative concern, the community's evaluation of risk should determine the amount of precaution an individual must employ to avoid being justifiably assigned others' costs from an accident.

The community's evaluation of a risk is determined by how the majority of the members in the community evaluate the kind of risk in question. If one performs an act above the threshold of risk for that kind of act, then one has violated the democratic community standard. Violating the democratic community standard means that one is subject to being assigned any resulting accident costs of others. As long as one's act is at or below the community's threshold of risk, one has met the democratic community standard. Having met the democratic community standard means that one should not be assigned others' accident costs. Democratic community standard theory provides a transparent and complete assignment of accident costs preferable to Weinrib's vague reliance on the concept of reasonable.

The democratic community standard is comprised (in most cases) of the community's actual evaluations of risk. In this way, democratic community standard theory bears a resemblance to one possible interpretation of component B of Fletcher's reciprocal risk theory where background risks are the risks that a community accepts as part of daily life.

Furthermore, recall that I pointed out a conception of component B based on agreement to a regime of risk does not seem open to Fletcher for three reasons. First, such an interpretation is still in tension with component A of reciprocal risk theory because it does not look at the details of the background risks to assign accident costs.

Second, Fletcher does not place any requirements on how the background risks are formed. If background risks were just what individuals do on a consistent basis, then individuals that are more powerful or special interest groups would be able to unfairly impose their preferred risks as part of the background risks. In democratic community standard

---

<sup>124</sup> Democratic community standard theory need not and (in my view) does not apply to all accidents. For example, for individuals living with mental illness or low mental ability, I think the accident costs should be handled according to social tort insurance, as I argue in a separate piece (on file with the author). In my view, democratic community standard theory does not apply to accidents involving commercial and governmental acts. Rather, the theory is part of a comprehensive Kantian approach to accidents that I will articulate in a future piece.

theory, the community's actual evaluations of risk would only be invalidated if they were based on fraud, violated constitutional rights, or like.

Finally, a theory that assigns accident costs based on community acceptance of risk does not fit with Fletcher's justificatory principle. Reciprocity does not seem to be the driving justification for an interpretation of background risks based on community acceptance of risk. Since one person could be harmed extensively by others engaged in background risks without receiving compensation, it is a stretch to say that he reciprocally enjoys the same security as others.

Instead, what seems to be doing the normative work is that the individual's freedom to pursue her life plan is balanced against others' ability to do the same. In this process, no one is guaranteed the same amount of security. Some will get more than others depending on their life plans and their luck. However, individuals are counted equally in determining the democratic community standard. Even if community acceptance of a regime of risk is what Fletcher means by background risks, then democratic community standard theory places this theory on its proper normative justification, namely, democracy.

Having distinguished democratic community standard theory from the concept of background risks, I address where the community's evaluations of risk are found. The community's actual evaluations of risk can be found in the beliefs and practices of that community. Examples of such sources include social norms, regular patterns of behavior, conventions, customs, moral beliefs, community-endorsed laws, beliefs about common sense, and so on. In this way, democratic community standard theory differs from Perry's accepted pattern theory. Perry's theory uses 'accepted patterns of social cooperation' as criteria for assigning accident costs. In contrast, democratic community standard theory uses the community's evaluations of risks as criteria for assigning accident costs. An accepted pattern of social cooperation is a possible piece of evidence for the community's evaluation of a risk, but it is not determinative. The accepted pattern is rebuttable if other sources of the community's evaluation of the risk more strongly support another threshold of risk.

Returning to the phoning while driving example, if phoning while driving is a pattern of behavior that is accepted (in some sense), phoning while driving could still fall below the community's evaluation of risk, according to democratic community standard theory, if a traffic law against phoning while driving was recently passed according to acceptable democratic procedures. Hence, other beliefs and practices in addition to an

‘accepted pattern’ are evidence for the community’s evaluation of risk in democratic community standard theory.

In using these various beliefs and practices as evidence of the community’s evaluations of risk (i.e., the democratic community standard), communities are able to combine and trade-off values according to the relative weight they attach to each value.<sup>125</sup> In this way, the democratic community standard embodies the multiple values of the community weighted by the community rather than a single value such as efficiency or values foreign to the community. By providing a concrete mechanism to trade-off multiple important values, democratic community standard theory provides what is missing from Ripstein’s theory of freedom and equality.

Recall that social welfare theory was incomplete because it lacked a way to weight the values of acts. Democratic community standard theory provides a way to weight and trade-off values that furthers the values of the community. Democratic community standard theory also solves one problem with narrow utilitarianism by allowing a community to prevent individuals from being exposed to liability from others’ trivial acts. Those who engage in trivial acts according to the democratic community standard are subject to being assigned any resulting accident costs.

Within each community, democratic community standard theory does not require that the community have a threshold of risk above zero for each kind of act. The democratic community standard need not always absolve the agent from liability if she meets a threshold level of risk. The community evaluations of risk could be such that no amount of precaution is sufficient to absolve an individual of being assigned any resulting accident costs. The comparison here is with the tort doctrine of strict liability.

The community evaluations of risk could have the same effect as strict liability for particular kinds of acts for a number of reasons. The community could not value a kind of act that much. The community could be adverse to the kinds of harms that can result from a kind of act. The community could think that certain kinds of acts are more prone to accident. The community may think certain kinds of acts are only worthwhile if such kinds of acts pay for the harms they cause. The benefit of a kind of act could largely go to one segment of the community while the risks of harm largely affect a separate segment of the community. For these and other possible reasons, the community could prefer that individuals engaged in

---

<sup>125</sup> See also, Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

certain risky kinds of acts be assigned the costs of any accidents regardless of the precaution employed.

Consequently, democratic community standard theory harmonizes the normative criteria for the two standards of care in tort doctrine, negligence and strict liability. Since the community evaluation of a risk is the sole criterion for assigning accident costs, using the negligence standard or strict liability should involve determining the community's evaluation of the risk of the kind of act in question. So, whether to use the negligence standard or strict liability for a particular accident would not be based on judicial discretion or precedent. By only using one criterion for assigning accident costs democratic community standard theory provides a more theoretically harmonious theory than the reasonable person theory with its unexplained side-kick strict liability.

Earlier I identified an ambiguity in the reasonable person standard theory regarding the scope of the society or community; the theory did not say whether the city, state, country or other group filled out the requirements of the reasonable person. To avoid having that ambiguity, democratic community standard theory uses a concept of community that is delineated by geographical boundaries. By geographical boundaries, I do not mean that certain features of the land separate communities. Instead, I mean that the community is a group of people that share a section of the Earth based on their interactions, especially the kinds of interactions that led to the accident. As a result, democratic community standard theory does not have one particular size of community in mind. In other words, the community could be a neighborhood, town, a state, a nation, or even a larger group. Instead, democratic community standard theory provides the criterion for delineating the boundaries of the relevant community for assigning the costs of a particular accident. The criterion is the nature of the acts that led to the accident and what should have been the expectations of those who were party to the accident.

To operationalize democratic community standard theory, the decision-maker who applies the democratic community standard does not have to be a member of the community. For instance, in the judicial setting the judge and jury would not have to be comprised of members of the relevant community. Instead, the plaintiff and defendant could have people from the relevant community testify as to what the democratic community standard is regarding the defendant's kind of act. If jury members are from the relevant community, then the jury instructions need to explicitly guide them to ascertain what the community standard in their community is rather than some religious or objective moral standard as the reasonable person theory could suggest.

Democratic community standard theory uses democracy in a substantive sense rather than a procedural sense. Pure substantive democracy is mostly interested in the content of laws rather than the procedures that produce those laws. Democratic community standard theory's substantive criteria for evaluating the assignment of accident costs are the community evaluations of risk in most cases.

Due to its use of substantive democracy, democratic community standard theory does not require procedures that are often associated with democracy such as voting to elect law-making officials, elected officials voting on proposed laws, universal suffrage voting on proposed laws (i.e. referendum), transparent elections, and so on. Let me call this sense of democracy, where democracy is constituted primarily by some or all of these procedures, 'procedural democracy.' Pure procedural democracy as a theory about the moral justifiability of laws does not evaluate the content of a law by an external criterion. Whatever laws are made by its procedures are morally justifiable.

In contrast, democratic community standard theory does not require any particular democratic procedures to make decisions about assigning accident costs. Thus, democratic community standard theory should not be interpreted as a theory of procedural democracy. For instance, the upshot of democratic community standard theory is *not* that legislatures as opposed to courts should be assigning accident costs. Democratic community standard theory would endorse particular institutional mechanisms based on their instrumental effectiveness in instantiating its substantive criteria, that is, in assigning accident costs according to the community's evaluations of risk.

One may raise the same concern with democratic community standard theory that I raised with Perry's theory: how does one determine the democratic community standard especially when beliefs and practices vary in a community? In such a situation, evidence for what is the majority community evaluation of a risk may conflict. Let's illustrate this possibility with the example of Woomin and Eman. Suppose again that in this community, most people believe that phoning while driving is not a worthwhile risk as evidenced by what they say in community discussions and how they behave when observing someone phoning while driving. However, at the same time, a large majority of the community, including those that believe that phoning while driving is not worthwhile, often phone while driving themselves with little to no cognitive dissonance.

One way to address such a case is to see if we have reason to discount one side of the conflicting evidence for the community's evaluation of a risk. For example, the beliefs of most individuals about how much phoning while driving increases the likelihood of a vehicular accident may be



erroneous. If these individuals knew how much phoning while driving actually increases the risk of accidents, then they may change their spoken statements about the evaluation of the risk of phoning while driving to match their actual behavior.

Assume from now on that nothing suggests we should discount the evidence on either side of the conflict. The community's evaluation of the risky kind of act is based on the most reliable information available. The behavior that contradicts the community's spoken evaluation of the risk is not based on free-riding, self-deceit, or anything else that would make us discount that behavior. If so, then evidence based on community beliefs seems to support that phoning while driving exceeds the community's threshold for risk and at the same time evidence based on community practices seems to support that phoning while driving meets the community's threshold for risk. Due to the conflicting evidence, it would seem that no majority community evaluation of the risk exists.

To resolve this conflict, we should view conflicting evidence within its historical context. If the current evidence points to equal evidence for and against whether a risk is worthwhile, then a tie about what is the community's evaluation of risk should depend on the newness of the risk. If the risk is relatively new, then without more evidence on its side the risk should be considered above the community threshold for risk because the community has not yet endorsed that risk. If the risk has existed for a long time and community views are shifting about whether it is a worthwhile risk, then the evaluation of the risk should remain wherever it was prior to the shifting until a new view gains enough ground to provide clear evidence that it is the majority view.

These conclusions rest on the core idea in democratic community standard theory: the most important criterion to assigning accident costs is whether the community has endorsed the risk. For a new risk, no clear endorsement means that the risk is not evaluated by the community as worthwhile. Without a clear endorsement of changes to the community's evaluation of a risk, the status quo should remain. In so doing, the central normative concern is answered: A person only need to meet the democratic community standard of risk to avoid being justifiably assigned another's accident costs.

## **VII. Conclusion**

While the democratic community standard requires much more exploration, what I have said sufficiently suggests that extant rights-based theories are inadequate to the task of answering the central normative

concern. To develop a compelling rights-based theory of assigning accident costs, democratic community standard theory merits more investigation.