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The Democratic Standard Of Care In Tort Law

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The Democratic Standard Of Care In Tort Law

Abstract

Social life is inherently risky. Who should bear the costs of accidental harm? That issue has been traditionally addressed in tort legal doctrine under the concept of breach of the negligence standard of care. Trial courts provide juries with instructions that, put roughly, direct the jury to decide whether the defendant's conduct fell below what a reasonably prudent person would have done if in the defendant's circumstances. Without further judicial direction on that issue, the jury effectively has excessive discretion in rendering a verdict. Such discretion, opens the door for at least two kinds of potential injustice. Juries could treat like cases differently, and juries can easily ignore or fail to give due consideration to a society's diverse, irreconcilable, and competing conceptions of the good as to what constitutes reasonable prudence. To mitigate such, I have created "democratic standard theory." I claim that a theory based on the overarching moral and political commitments of the Kantian tradition can only specify what constitutes negligent breach if it incorporates, as facts, the actual values of the individuals subject to the risk at issue. Since individuals' comprehensive conceptions of the good conflict, majority rule, constrained by constitutional essentials, should determine what constitutes breach of the negligence standard of care. Thus, in each dispute over negligence in tort, democratic standard theory sets the stakes of negligent risk, especially the costs of accidental harm, in accordance with the values of as many as possible of the individuals locally affected by the particular kind of act at issue.

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**THE DEMOCRATIC STANDARD OF CARE
IN TORT LAW**

Gregory Jay Hall

A DISSERTATION

in

PHILOSOPHY

Presented to the Faculties of

THE UNIVERSITY OF PENNSYLVANIA

in

Partial Fulfillment of the Requirements for the

DEGREE OF DOCTOR OF PHILOSOPHY

2017

Stephen R. Perry – *John J. O'Brien Professor of Law*
Supervisor of Dissertation

Samuel Freeman – *Avalon Professor in the Humanities*
Graduate Group Chairperson

Dissertation Committee

Kok-Chor Tan – *Professor of Philosophy*
Samuel Freeman – *Avalon Professor in the Humanities*

writing, a blur
a step, a fuzzy dream not quite forgotten
a scar cannot fade.
a trophy, collecting dust not measuring achievement,
conveys breadth
no beginning yet ending.
my insides came out and wept.
distraction: employment, hellish, pain,
walking then hobbling then unable to move.
CUT CUT CUT. walk WALK.
sleep
still pain; no way out

Acknowledgements and Dedication

With a brief glance at my dissertation, one will quickly see that I have been influenced greatly by Stephen Perry, through his courses, his writing, our numerous conversations, and much else. I have never wanted to make a career off of others' ideas. My difficulty from my start at Penn has been finding something meaningful to contribute to legal and political theory that Stephen had not already published long ago. An uncanny number of times, I thought I had struck academic gold with an idea, a potential dissertation topic, only to find that idea as one part of a skillfully and thoroughly articulated thesis in Stephen's work. Even worse, I either agreed with everything that I encountered in Stephen's work, or, when I found something that at first I thought I could critique, upon further reflection, I ended up endorsing Stephen's view.

While having a such a mentor has been a unique treasure, developing a dissertation topic was no small challenge as I stood in the shadow of one who has already said it all (correctly). This dissertation topic is no exception. In fact, Stephen's phrase "accepted pattern of social interactions" along with my experiences in my 1L tort law class with Anita Allen are what set me upon my dissertation's inquiry. That is largely why, for a number of years, I introduced my thoughts with Stephen's phrase. I didn't separate my views from his, at first, because back then I saw myself as mostly drawing out the implications of one of Stephen's ideas. As it turned out, my thesis in this dissertation might just be the first issue in which I disagree with Stephen. While I have tried to properly give citation and credit to Stephen to the fullest extent in my dissertation, even that, in a sense, is inadequate to reflect his influence. Most assuredly, I would never have entertained these issues in these ways and, most importantly, as *skillfully* without his paving that path extensively on many fronts and challenging me at every step.

I hope that Stephen's name on my dissertation along with what I write here adequately pays homage to the countless, invaluable ways Stephen has guided me on my path. His guidance has been at a skillful distance, not showing me the way but rather challenging each idea that I put forward. I would not have wanted it any other way. In a meaningful sense, I cannot express all of the ways Stephen has contributed to the success of this dissertation. I count Stephen as my intellectual father and my friend.

An academic need not be in the spotlight to excel. Such is one of the many lessons I learned from Samuel Freeman. Only those who know Samuel well have eventually realized his humility in giving John Rawls all of the credit for the development of Justice as Fairness. Samuel has not only been the best expositor of Justice as Fairness, but also significant aspects of its development, after A THEORY OF JUSTICE, are also directly the result of Samuel's vital contributions. Of course, Samuel does not openly

take credit for such, out of homage to Jack. I had the privilege to learn what should be called Rawlsian-Freeman theory directly from Samuel. Although I chose Penn to work with Samuel, I entered graduate school having adopted political views at the fringes of Rawlsian theory. Luck egalitarianism still had its sway over me. Through Samuel clarifying various sticking points and arguing the finer details in ways that only Samuel has perfected, my studies led me to fully endorse the central features of Rawlsian justice. Another notable thing I learned from Samuel resulted from attending colloquia. Oftentimes, audience questions would attempt to chip away at a presenter's thesis. After a while, Samuel, with his southern charm, would drop on the presenter a theoretical bomb that was couched, as always, with illuminating historical context. The whole tenor of the colloquia would then shift to Samuel's point with even the presenter wanting to focus there as if Samuel then became the *de facto* presenter. Ironically, in these colloquia and often at discussions over dinner, Samuel ends up in the spotlight and leads the discussion as one who has already seen each step of the issue from the beginning to the end.

Early on in my graduate training, I had the opportunity of having numerous one-on-one discussions with Kok-Chor Tan. During these conversations, in multiple courses, and with my exams and this dissertation, I learned from KC much about legal, political, and moral theory and about how to be a "professional philosopher." In each of these settings, I learned by doing—by critically engaging ideas through dialogue with increasing preciseness. As KC's teaching assistant and with his recommendation, I was awarded the Penn Prize for Excellence in Teaching for Graduate Students—the timing of which was no accident. KC is truly a scholar, an educator, and a gentleman. His example has been a model to which I have aspired.

As Anita Allen herself once remarked, she and I have had every possible (professional) relationship that a student and professor can have while I was in both graduate school and law school. I would not have chosen otherwise. Anita is the person whom you seek to explore new ideas, to gain counsel for any imaginable issue, to learn how to navigate university politics, to obtain an advocate who has influence in arenas where you have no meaningful access yourself, to find support while venturing in unchartered professional pursuits, and to share the good, the bad, and the ugly in ways that transform everything into an enriching moment. Due to logistics and exigencies beyond my control, I was not able to have Anita on my dissertation committee. Though her signature is not here, her name belongs here and everywhere else on my degrees, honors, and achievements. Throughout my program and especially at the most crucial steps, she was my advisor, my mentor, my advocate, and my friend. As poet James

Kavanaugh wrote, “There are men too gentle to live among wolves.”¹ With Anita on my side of the court, the wolves never stood a chance.

As my first professor in political philosophy and my first mentor, Bruce Landesman has inspired me on multiple levels, some of which I have only recently begun to fully understand. Looking back, I was first amazed and intrigued by Bruce, a person unlike any I had ever met. I sensed that Bruce embodied numerous attributes, both as a scholar and as a person, that I not only admired but I sought to develop in myself. As a first year undergraduate, I first learned Rawlsianism from Bruce in a survey course on political theory. To his credit, even by the end of the course, I had only subtle clues about which political theory Bruce himself endorsed. I sought to take all of his courses. As a philosophy professor at a university where ideology is a ticking time bomb set to blow at any moment, especially during a philosophy class, Bruce demonstrated time and time again his gifts as an ambassador of Reason. Such gifts were particularly important to me as one undergoing substantial ideological shifts. I consciously and unconsciously started to emulate Bruce when I discussed hotbed issues in and out of academic settings. As if that was not enough, Bruce’s life also demonstrated to me that you can practice what you preach. For example, as a student at the University of Michigan, Bruce would ride the bus all of the way to Texas to participate in protests in favor of equal civil rights for African Americans. Not surprisingly, I sought Bruce’s skillful mentoring for my first attempt at writing a substantial piece of philosophy. That experience was what I always returned to when my other attempts at finding a career proved unsatisfying. Ultimately, that experience and Bruce’s mentorship led me to seek the Ph.D. in philosophy for which this dissertation was written.

Almost all of the Penn Philosophy faculty and many of the Penn Law faculty contributed, each in their unique way, to my exceptional experience at Penn. In addition to those already mentioned, Claire Finkelstein, Susan Meyer, Charles Kahn, Michael Weisberg, Larry Fox, Gary Hatfield, Zoltan Domotor, Karen Detlefsen, Jim Ross, Aditi Bagchi, Gideon Parchomovsky, Howard Lesnick, and Stephen Morse have set the bar high in that they demonstrated in their own work this profession’s best, required my best of me, and provided an environment that allowed me both support and space to grow.

While early on I hoped that John Oberdiek would be a mentor, John became so much more when I came to Penn. Having recently completed the same program with lightning speed and skill, John sought to welcome me to Penn and to introduce me to the profession and the faculty that he so clearly loved. He took on the role of my older brother, all the while treating me like an equal. He graciously provided me with guidance, friendship, and encouragement as only a gentleman such as he could.

¹ JAMES KAVANAUGH, *THERE ARE MEN TOO GENTLE TO LIVE AMONG WOLVES* (1970).

Only my parents have seen me develop all of the way from a child, who was unengaged in school, to what I am today. Had my mother not paid me one dollar per day to do my homework when I was in first grade, I would not now recognize what I may have become. I can still hear my father's voice repeatedly reminding me to "think before you act" so as to avoid carelessly causing a mess or hurting myself or others. Time and time again, my parents have lifted me up both literally and metaphorically, especially when I was not able to even hold up myself due to my age, my chronic ill health, and, most recently, my fractured spine. Only a fool would attempt to chronicle in such a short space all of the ways they have taught, supported, helped, encouraged, and loved me. I share this accomplishment with them, as my abilities are also their accomplishments.

To all who are mentioned above, I dedicate what follows.

ABSTRACT

THE DEMOCRATIC STANDARD OF CARE IN TORT LAW

Gregory Jay Hall

Stephen R. Perry

Social life is inherently risky. Who should bear the costs of accidental harm? That issue has been traditionally addressed in tort legal doctrine under the concept of breach of the negligence standard of care. Trial courts provide juries with instructions that, put roughly, direct the jury to decide whether the defendant's conduct fell below what a reasonably prudent person would have done if in the defendant's circumstances. Without further judicial direction on that issue, the jury effectively has excessive discretion in rendering a verdict. Such discretion opens the door for at least two kinds of potential injustice. Juries could treat like cases differently, and juries can easily ignore or fail to give due consideration to a society's diverse, irreconcilable, and competing conceptions of the good as to what constitutes reasonable prudence. To mitigate such, I have created "democratic standard theory." I claim that a theory based on the overarching moral and political commitments of the Kantian tradition can only specify what constitutes negligent breach if it incorporates, as facts, the actual values of the individuals who are subject to the risk at issue. Since individuals' comprehensive conceptions of the good conflict, majority rule, constrained by constitutional essentials, should determine what constitutes breach of the negligence standard of care. Thus, in each dispute over negligence in tort, democratic standard theory sets the stakes of negligent risk, especially the costs of accidental harm, in accordance with the values of as many as possible of the individuals locally affected by the particular kind of act at issue.

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Introduction

Social life is inherently risky. Since individuals' actions regularly intersect with other's actions, even the most careful people regularly subject themselves and others to risk of accidental harm. Some risks are more likely to occur than others. Most of the time, no one intends to harm anyone. Nevertheless, given the enormity and frequency of actions, over time accidental harm is bound to occur causing, at times, substantial costs including property damage, medical costs, lost wages, pain and suffering, disability, or even death.

Action Interests v. Accident Security

Despite the pervasive chance of harm, each individual has an interest to act as each wishes and to pursue her own objectives (broadly construed). More fundamentally, individuals must act in various ways to sustain their lives and, if possible, to secure rewarding lives. Let's refer to these interests as one's "action interests."² At the same time, each individual has an interest in being free from accidental harm to his body and property.³ Let's refer to this interest as "accident security."

Individuals often diminish their own accident security to pursue their action interests. Similarly, another individual's actions can diminish one's own accident security in ways that do not further one's own interests. Even when another's actions could potentially further one's own interests, that potential does not usually make, from an *ex ante* or *ex post* perspective, the risk worthwhile—let alone offset any resulting harm. Thus, as individuals pursue their action interests, those pursuits simultaneously diminish their own and others' accident security. Such are the risks inherent in ongoing social life.

Since risk of accidental harm is ineliminable, how much risk should we tolerate in our society?⁴ What kinds of risks should we allow others to inflict on us? What actions in

² My formulation of the unavoidable trade-off between security and freedom is influenced by, among others, George Fletcher, *Fairness and Utility in the Law of Torts*, 85 HARV. L. REV. 537, 550 (1972). See also Gregory C. Keating, *Irreparable Injury and Extraordinary Precaution: The Safety and Feasibility Norms in American Accident Law*, 4 THEORETICAL INQ. L. 1, 15-16 (2003); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1829-37 (2004).

³ I am not taking a position of whether these are primary or secondary interests or better described by other terms since nothing in the forthcoming argument hinges on those issues. I am using "interests" similarly to how Stephen Perry does in *Torts, Rights, and Risk*, in *Philosophical Foundations of the Law of Torts*, in PHILOSOPHICAL FOUNDATION OF THE LAW OF TORTS 38, 55-58 (John Oberdiek ed., 2014) (defining interests as certain aspects of human wellbeing that are core or fundamental).

⁴ By using the terms "accident" and "risk," I mean to exclude instances where an individual intentionally or knowingly harms another person's body or property. Those instances, I presume, deserve a separate inquiry, well explored in criminal law theory.

what contexts do we want to be able to perform even if those actions risk accidental harm to others? When accidental harm occurs, who should bear the resulting accident costs? These questions extend beyond the legal issues in tort law that concern courts and lawyers. These questions pertain, in a variety of ways, to insurance companies, workers' compensation funds, regulatory agencies of many stripes, businesses, government at all levels, and the daily work-related and non-work-related decisions of individuals.

Negligent Breach and Two Kinds of Injustice

This dissertation examines an important issue at the center of these broad and pervasive questions. Put roughly and simply, the issue is, in lawsuits over accident costs, how should we determine if the defendant's conduct was negligent? More specifically, what criteria should determine whether a defendant's conduct fell below the negligence standard of care such that, *ceteris paribus*, the defendant should be assigned the plaintiff's accident costs? Unfortunately, the answer is *not* simply "according to the law."

This issue has been traditionally addressed in tort legal doctrine under the concept of breach of the negligence standard of care. Several components in addition to breach of the standard of care must be established for a negligence claim to be successful such that the court will assign to the defendant the plaintiff's accident costs. Therefore, following John Goldberg and Benjamin Zipursky,⁵ I use the phrase "vulnerable to a negligence claim" to mean that, assuming all other necessary components of a negligence claim are satisfied, the "vulnerable" party should be assigned the accident costs at issue. Other

⁵ John C.P. Goldberg and Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733 (1998).

remedies might be appropriate as well such as punitive damages. Yet, I am primarily referring to compensatory damages unless otherwise stated. Using “vulnerable” also points to the fact that the harmed individual has the option, legally speaking, of pursuing a negligence claim against another party but is not forced to do so. Neither the government nor another individual (aside from surrogates) can (or should) be able to pursue the claim if the harmed is not disposed to do so. As an aside, wrongful death claims are not exceptions here because the survivor is also harmed and is seeking compensation for that harm.

The applicable legal standard for negligent breach can be expressed in a sentence or two. However, that standard gives the judge or jury excessive discretion in determining breach. That discretion opens up the possibility of two kinds of injustice.

The first kind of injustice is familiar in the context of adjudication. To determine negligent breach, trial courts provide juries with an instruction that, put roughly, directs the jury to decide whether the defendant’s conduct fell below what a “reasonably prudent person” would have done in the defendant’s circumstances. Due to the malleability of that “reasonably prudent person” jury instruction, unbiased, fully informed individuals can and regularly do disagree with particular jury verdicts, even when the jury in question was dutiful, unbiased, and well-intentioned (collectively referred to as “dutiful”). Thus, depending on which individuals happen to end up in the jury box, one dutiful jury could tender a verdict for the defendant in one case while another equally dutiful jury, using the same legal standard, could tender the opposite verdict—even though the acts of both defendants were the same in all morally relevant respects. Treating (morally) like cases

differently is the hallmark of injustice. Let's refer to the first kind of injustice as disparate treatment.”

The second kind is familiar in other issues of liberal political theory due to one of liberalism's major starting premises. Liberalism assumes that diverse, competing, and irreconcilable comprehensive conceptions of the good will (and should) persist in a modern society. To paraphrase John Rawls, there is no one social end—except justice.⁶ Put differently, no single conception of the good should be privileged *ab initio*. I refer to this kind as the “privileged *ab initio* injustice.” Given that assumption, the task of political theory is to devise legal institutions that treat all individuals *with fairness or justice* even though they hold differing conceptions of the good.

Regarding negligent breach, in a diverse society, each conception of the good may entail a different view on what constitutes negligence in particular circumstances or, in the terms of the jury instruction, the conduct of a reasonably prudent person in context. For ease, I often speak of each of these conceptions of the good as a “group's view,” and that phrase should be understood loosely. Putting these ideas together, the second kind of justice pertains to whether a jury verdict in a negligence suit shows due regard to each group's view, that is, due regard to that society's diverse, irreconcilable, and competing conceptions of the good. For example, a jury may tender a verdict for the plaintiff that has all of the following three attributes.

1. The verdict reflects a conception of the good that the defendant herself does not endorse.
2. The verdict and the way it was reached did not give any consideration to the conception of the good held by the defendant's group.

⁶ John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159, 162 (1977).

3. The verdict reflects another group's view, and, thus, that group's view is privileged *ab initio* vis-à-vis the defendant's group's view.

A verdict such as one with these three attributes is illiberal and, thus, unjust. Several aspects of the second kind of injustice need to be spelled out, and I do so in future chapters. For brevity, I may refer the injustices of disparate treatment and privileged *ab initio* as the “two kinds of potential injustice,” “both injustices,” or similar.

Let me illustrate the above ideas with drivers' use of mobile telephone technology. As background, consider first the extent of harm involved from this kind of activity. In 2014, 3,179 people were killed, and 431,000 people were injured in crashes where a driver was distracted by performing other activities, including texting and phoning while driving.⁷ In total in 2012, 33,561 people died from automobile crashes and an estimated 2.36 million people were injured.⁸ Obviously, the resulting monetary costs from automobile accidents alone are astronomically high. “How much risk is tolerable?” and “Who pays for each accident?” are questions with high stakes. In response, legislatures in forty-six states have passed laws forbidding drivers from texting while driving.⁹ The legal status of *phoning* while driving is less clear as illustrated in the following simple yet realistic hypothetical.

Suppose Eman and Woomin accidentally collide while driving automobiles. Eman was phoning while driving while Woomin was not phoning, breaking any traffic

⁷ U.S. Department of Transportation, *Key Facts and Statistics*, <http://www.distraction.gov/stats-research-laws/facts-and-statistics.html>.

⁸ U.S. Department of Transportation's National Highway Traffic Safety Administration, *Highway Deaths Over the Past 5 Years Remain at Historic Lows*, (2013), <http://www.nhtsa.gov/About+NHTSA/Press+Releases/NHTSA+Data+Confirms+Traffic+Fatalities+Increased+In+2012>.

⁹ Governors Highway Safety Association, *Distracted Driving Laws*, (2016), http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html.

laws, or doing anything else that would even minimally increase the dangerousness of her driving when compared to normal driving. The accident 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. Was Eman’s phoning while driving negligent? If put before a jury, the jury will be instructed to decide if Eman’s phoning while driving conformed to the conduct of a reasonably prudent person.

As for disparate treatment, one jury may determine Eman’s conduct was negligent. Meanwhile, another jury in the same courthouse drawn from the same jury pool could determine that Adood’s (identical) phoning while driving, which led to a separate collision, was not negligent. Such may occur due to the malleability of how the jury may interpret the “reasonably prudent person” jury instruction—even if both juries are dutiful. This disparate treatment between Eman and Adood is the first potential kind of injustice.

As for the second kind of injustice, suppose that Eman, Woomin, and Adood’s accidents occurred in their town where reside individuals with three diverse, irreconcilable, and competing conceptions of the good.

- **Group One** thinks that since phoning while driving is reckless in all situations, the reasonably prudent person would never phone while driving.
- **Group Two** thinks the reasonably prudent person, if so inclined, would phone while driving in most situations.
- **Group Three** thinks that the reasonably prudent person would phone while driving only in low-risk situations, such as when few others are on the road.

Suppose, for illustration purposes, that Eman's jury is composed of only individuals that hold Group One's view and Adood's jury is composed of individuals that only hold Group Two's view.

In such a scenario, the reasonably prudent person jury instruction does not necessarily require Eman's and Adood's juries to consider, even minimally, any of the other two group's views as to phoning while driving. On the contrary, if anything, this jury instruction makes it appear as if there is only one legitimate view (or only one social end) on that issue. Not surprisingly each jury renders a verdict that reflects their own group's view and does not consider any of the other two groups' views. Such renders each jury's own view privileged *ab initio* both to Eman's and Adood's detriment. Liberalism prohibits such. So, given that existing jury adjudication has the potential of rendering a verdict where one of many conceptions of the good is privileged *ab initio*, the jury's verdict may be illiberal and, thus, unjust.

Neglecting Breach

In the past several decades, theoretical issues in tort law have increasingly received attention with theorists primarily drawing from two of the major Western philosophical traditions. The interest in tort law resulted as part of, and in reaction to, the development of the broader Law and Economics Approach, which largely draws on the utilitarian philosophical tradition. One of the Law and Economics Approach's most vociferous adherents, Steven Shavell, describes it as a discipline that analyzes "law's

effects on behavior.”¹⁰ Like its parent discipline, economics, the Law and Economics Approach uses models “to predict the manner in which ‘rational’ parties would act in the face of various incentives.” While various versions have been advanced, the Law and Economics Approach’s general model for negligent breach seeks to balance the *possible burdens of precaution* that the defendant could have undertaken against the *possible harm* that the defendant risked by refraining from any foregone, additional precaution. Following common usage, I refer to this approach as the “balancing test.” The law and economics paradigm often states this conception of negligence in terms of a formula.¹¹ A person is negligent when the burden of a possible precaution (B) was less than (<) the probable loss (PL).¹² A person is not negligent if, for all relevant precautions, $B > PL$.¹³ If a defendant in a tort claim was negligent in her act that led to the accident (and the plaintiff was not), then the defendant should bear the costs the plaintiff incurred from the accident. To apply the balancing test to extant law, the Law and Economics Approach uses the balancing test to determine what the reasonably prudent person would have done in the defendant’s circumstances.

¹⁰ STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW*, vii (1987).

¹¹ 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 J. OF LEGAL STUD. 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. Later, Posner extended this his claim to be a normative claim. Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. OF LEGAL STUD. 103, 110 (1979). Weinrib interprets Posner as making this extension. Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307, 307 (1980). I address the utilitarian form of negligence as a normative theory.

¹² Posner 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.

¹³ In an early article, Ernest Weinrib characterizes negligence in terms of “its balancing of the risk to which the defendant exposes the plaintiff against the defendant’s burden of precautions.” Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 428 (1987). Weinrib later departs from this view as explained below.

The Law and Economics Approach and its balancing test for negligent breach have gained much adherence in legal academics and appellate courts, and for good reason. In contrast to the bald and, thus, malleable reasonably prudent person construct, the balancing test, especially when phrased as a mathematical equation, offers a seemingly precise answer to what constitutes negligent conduct. It also provides a seemingly objective solution to the two kinds of injustice sketched above.

In reaction to the Law and Economics Approach, commentators have critiqued the utilitarian-esque balancing test and have advanced alternative theories of tort law. These alternative theories are often referred to as “rights-based” or “non-consequentialist.” Hereafter, I loosely refer to all non-consequentialist theories as “rights-based theories” because the term “rights” indicates a central characteristic of most (but not all) non-consequentialist theories of tort law.¹⁴ Below I more carefully distinguish between non-consequentialist theories that seek to rely on the overarching theoretical commitments of the Kantian tradition versus theories that find their justificatory basis elsewhere.

While rights-based tort theories have extensively and insightfully analyzed many aspects of tort law, surprisingly, they have neglected the issue of what constitutes breach of the negligence standard of care, which includes the concept of the reasonably prudent person. Such is especially strange since most of these theories were responding to the Law and Economics Approach’s analysis of tort law and that approach’s central tenet is its model of the reasonably prudent person, namely, the balancing test.

¹⁴ Note that Stephen Perry uses “rights-based” in a similar way in his *Torts, Rights, and Risk*, in *PHILOSOPHICAL FOUNDATION OF THE LAW OF TORTS* 38, 55-58 (John Oberdiek ed., 2014).

When the issue of negligent breach arises, some rights-based theories merely gesture vaguely to social norms. Almost across the board, these theories primarily rest their justification on their descriptive accuracy of prominent cases in tort law. While descriptive accuracy displays some merit, rights-based theories have devoted relatively little ink to negligent breach, the one issue that the Law and Economics Approach addresses directly, centrally, and with purported mathematical precision.

One reason that rights-based theories have neglected the issue of negligent breach involves how some rights-based theories carve up the theoretical landscape related to negligent breach. One prominent rights-based theorist, Jules Coleman, explicitly contends that the issue of negligent breach falls outside the domain of his rights-based theory.¹⁵ Other theorists seem to agree, at least implicitly, because they scarcely address negligent breach.¹⁶ Similar to judicial jury instructions, existing tort theories rely on the jury to decide, with excessive discretion, if the defendant breached the negligence standard of care.

Perhaps one reason the Law and Economics Approach to tort law has retained dominance in much of legal academia over rights-based theories is that balancing test theories clearly address the issue of negligent breach, the very issue that rights-based theories address so briefly and vaguely. If so, then rights-based theories need to provide a more clear, complete, and determinate answer to what constitutes breach of the negligence standard of care in order to compete against the balancing test.

¹⁵ JULES COLEMAN, *THE PRACTICE OF PRINCIPLE*, 32 (2001). There is some confusion here about the relation of corrective justice and theories of tort law, which I clarify below.

¹⁶ See below where I analyze prominent theories in this camp.

To that end, I have created what I call “democratic standard theory.” This theory, like many rights-based theories, relies on the overarching moral and political commitments of the Kantian tradition rather than the utilitarian tradition of the Law and Economics Approach. I contend that the overarching theoretical commitments of the Kantian tradition do not specify a universally correct answer to what constitutes breach of the negligence standard of care without needed facts. This tradition can only specify what constitutes negligent breach if it incorporates *as facts* the values of the relevant individuals. More specifically in democratic standard theory, I contend that, for each kind of act, the standard of care should reflect the values of as many individuals as possible who are locally affected by the kind of act at issue. Since individuals’ values conflict, majority rule, constrained by constitutional essentials, should determine what constitutes the negligence standard of care. Thus, in so doing, democratic standard theory sets the stakes of negligent risk in accordance with the values of as many of the relevant individuals as possible.

Scope

This dissertation focuses on “accident law” in the United States. So, unless otherwise specified, I am referring only to the law in the United States—even though my positive theory is applicable to most, if not all, secular legal systems. Even though I focus on legal practice by lawyers and the courts, I do *not* mean to imply that I think the extant accident law, either abstracted from or situated within the courts, is theoretically the most important or best place to examine, from a normative perspective, the various political institutions that a society uses to assign the costs of accidents in various contexts or any

of the broad questions presented above. Theories that take seriously the “structure”¹⁷ of accident law sometimes take it *too seriously* to the extent that they give short shrift to the justification of its existing accident law practices.

I focus on accident law as practiced by lawyers in the courts because that is one major arena where these issues are discussed. I hope that, after identifying the hollow parts of accident law in this context, we can address these questions more clearly from a non-institutional perspective as well as within its current institutional structure.

Although I focus on tort law, several aspects of a typical tort claim and some related theoretical issues are not directly part of my inquiry. I am not directly addressing the following issues.

1. What constitutes accidental causation of harm, including the complex concept of outcome responsibility?
2. What is risk and can imposing risk alone constitute a harm?
3. What types of harm (e.g., physical, economic, and emotional harm) should be compensable?
4. How should one quantify adequate compensation for accidental harm? More specifically, does the amount of compensation need to restore, as much as possible, the harmed to his pre-accident state or something else?

My theory, just like any of its near competitors, must necessarily work in concert with theories of these other moral components of a negligence claim. In that light, my theory

¹⁷ I am not asserting that attention to these structural or institutional elements is unimportant. Rather, attention to such has not been accompanied by, and perhaps have stultified, inquiries into justification so much so that for some just pointing out that a theory does not explain or conform to the status quo tort structure supposedly counts substantially against that theory. Jules L. Coleman, *The Economic Structure of Tort Law*, FACULTY SCHOLARSHIP SERIES, Paper 4196, 1241-42 (1988) (book review) (arguing that the economic theory of tort law, to its detriment, provides no explanation about the structure of tort law including its limited, bilateral focus on particular parties who were involved in a past event); Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485-526.409-503 (1989) (emphasizing causation and bilateral parties as essential features of tort law that the economic theory of tort law and others get wrong).

will stand or fall alongside theories of the other components, most especially the duty of care and outcome responsibility. At the same time, my theory does not rely on any particular version of these other theories. Even better, my theory is likely consistent with or supported by multiple plausible theories for each of the other components. For now, I am assuming that the most persuasive theories of these and other issues in accident law are consistent with this dissertation's thesis.

Methodology

My methodology differs from most other existing tort theorists. Other tort theories, many of which I address below, are enmeshed and do not venture much beyond existing legal practice. They largely strive to make sense of the relevant case law according to a preferred ideological packaging. Unlike most theories, my theory puts the normative issues first and treats the institutional arrangements as to be determined afterwards. In some ways, much of my critique of other tort theories and the defense of my own theory is an attempt to put forward my methodology as more illuminating than the methodology of existing theories. Nevertheless, some awkwardness results, as if my theory and its rivals are not always joining issue. In what follows, I strive to identify this awkwardness with the hope that doing so highlights the underlying methodological difference rather than a substantive disconnect.

Due to the two potential kinds of injustice, further normative work on negligent breach can attempt two tasks. First, it can attempt to argue that the existing process of adjudication of negligent breach can and should be modified to mitigate or eliminate potential injustice. Such is *not* my task in this dissertation, even though I briefly address

towards the end some aspects of jury adjudication. In fact, my thesis is explicitly and almost necessarily agnostic about if or how the process of jury adjudication should be modified or whether it should be eliminated altogether. So, this dissertation is not advocating for the modification or the elimination of jury adjudication or that the legislature or some other political institution or process should resolve accident disputes.

I emphatically do not rely on or idealize the substance or process of jury adjudication especially their deliberations. Instead, I advocate rigorous experimentation to test jury adjudication's effectiveness against alternative viable mechanisms in implementing the recommendations of this dissertation's normative conclusions. This experimentation is necessary especially in light of the work that has shown that jury deliberations can be random, bizarre, and inconsistent. Put differently, I first seek to establish the most defensible criteria for determining what constitutes breach of the negligence standard of care. Only thereafter do I recommend a sustained inquiry and experimentation to discover what mechanisms best instantiate these criteria.

The second normative task to mitigate or eliminate potential injustice is to provide additional or more specific criteria for determining whether a kind of act is negligent. This type of normative task is the endeavor of this dissertation, as should be noticeable from the above sketch of democratic standard theory. Such criteria would augment or replace existing legal doctrinal statements about negligent breach, although not all of it must be explicitly communicated to the jury. Likely, it will have revisionist implications for adjudication or litigation strategies lawyers adopt in light of such revisions.

For these reasons, I contend that the normative criteria should determine the institutional process of resolving disputes over accident costs rather than the other way

around. In fact, any reliance on existing or alternative institutional processes is hollow without an underlying normative theory justifying any of those processes. Thus, it seems that we must ultimately start, in a sense, with normative theory, even if we similarly must evaluate that theory based on our considered convictions, which, of course, may have been significantly influenced by existing institutional mechanisms including jury adjudication.

Road Map

Chapter One examines extant accident law and theories that purport to describe that law. While I have multiple aims in that chapter, the main point is fleshing out my claim that existing accident law and practice provide juries with excessive discretion to determine what constitutes breach of the negligence standard of care. Such leaves the door open for the two kinds of injustice mentioned above. Chapter Two sketches the overarching theoretical commitments of the Kantian tradition pertinent to the issue of negligent breach. I then examine alternative theories of tort law and find that each fails to adequately address the issue of negligent breach. Each theory either neglects the issue or its justification, and, thus, leaves unmitigated the potential injustices, or there are difficulties particular to that theory. I also critique theories that focus on jury adjudication to explain and justify negligent breach.

Chapter Three defends democratic¹⁸ standard theory. To address disparate treatment, democratic standard theory provides determinate and complete criteria for determining breach of the standard of care. To solve the problem of privileged *ab initio*, democratic standard theory argues that a democratic approach treats with fairness individuals with diverse, irreconcilable, and competing conceptions of the good. Importantly, democratic standard theory provides a robust justificatory basis for why such breaches constitute legal negligence.

¹⁸ I am not using “democratic” in the way that much of the literature on assessing public’s beliefs about risk uses it. There “democratic” is contrasted with “technocratic” to distinguish between perceptions of risk by laypeople as opposed to risk analysts with formal training. As a few authors point out, neither kind of perception is necessarily more objective and often these kinds of perceptions differ in what aspects of the risk they deem important. K.S. Shrader-Frechette, *Perceived Risks Versus Actual Risks: Managing Hazards Through Negotiation*, 1 RISK: ISSUES IN HEALTH AND SAFETY 341, 342-54 (1990). Democratic standard theory does not prioritize or elevate the technocrat’s or the layperson’s view. Instead, each view is potentially a source of information to determine the values of the relevant individuals related to the act at issue.

Chapter One

Two Potential Injustices in Accident Law

As mentioned above, the first kind of injustice is familiar in the context of adjudication. Its essence is that the discretion permitted by the negligence jury instruction too easily allows morally relevant cases to be treated differently at law. As exemplified below when I critique the Restatement (Second)'s descriptive theory, several ambiguities that surface even when the Restatement (Second) tries to flesh out the meaning of the reasonable person standard. Those same ambiguities lie too in the reasonably prudent person jury instruction. So, neither of these statements of law is able to unambiguously provide a single, determinate answer to what constitutes negligent breach in all cases. Without such, one jury could assign one plaintiff's accident costs to the defendant in one case

while another jury, using the same legal standard, could tender the opposite verdict—even though the acts of both defendants were the same in all morally relevant respects. Again, treating (morally) like cases differently is the hallmark of injustice.

The second kind of potential injustice is related to and can be the cause of the first kind of injustice. The second kind of injustice is familiar in other issues of political theory. More specifically, liberalism assumes that diverse, competing, and irreconcilable comprehensive conceptions of the good will and should persist in modern societies. With that as one of its major starting premises, the task of political theory is to provide legal institutions that treat individuals with these differing conceptions of the good *with fairness or justice*. For example, Rawls uses the original position (at least in *A THEORY OF JUSTICE*'s version of Rawlsianism) and (later) the idea of overlapping consensus (from Rawls's *POLITICAL LIBERALISM*) to illuminate commonalities among diverse, irreconcilable, and competing conceptions of the good. By capturing those commonalities in Rawls's principles of justice, political institutions that adhere to those principles of justice treat individuals with fairness even though those individuals hold diverse, irreconcilable, and competing conceptions of the good.

On the issue of negligent breach, the potential injustice is that a verdict, in substance or how it was decided, may not respect the society's diverse, irreconcilable, and competing conceptions of the good. In the status quo, to determine negligent breach, the judge or jury is supposed to decide, in the context of an adversarial court proceeding, whether the defendant's conduct fell below what a reasonably prudent person would have done. The problem is that, in a diverse society, there may be more than one view on what constitutes the conduct of a reasonably prudent person. Suppose a political entity (i.e., a

nation or one of its subdivisions) contains three groups each with a different view on what the conduct of the reasonably prudent person would be in a particular context. In such a scenario, the judge or jury may render a verdict in the lawsuit based on only one of the groups' views in a way that does not treat with justice or fairness the other competing conceptions of the good in that society.

Thus stated, in the abstract, the problem about various groups' competing views is abundantly clear. When we address specific conduct in context, it is easy to get tangled up with a sense that there is some absolute truth about the reasonableness of that particular conduct, especially when one examines conduct within one's own culture. In contrast, different views on what constitutes reasonable conduct are salient when we encounter people from other parts of the world. Such is even more striking if one is living abroad or traveling in a way in which one is immersed in another culture.

Based on my firsthand experiences in the Philippines, it is common for a parent to ask her ten-year-old son to climb, *without any safety device*, a tree, usually fifty-feet tall (but often much taller, up to around ninety feet), to cut down coconuts out of mere hospitality for unexpected, uninvited, previously unknown visitors. While experiencing amazement mixed with concern as the boy climbs the tree, many Westerners would also experience shock at the parent's request and the resulting spectacle. As for another real example, Filipino parents would regularly leave only an eight-year-old daughter to care for her four (or more) younger siblings while the parents were working in fields far away. Such acts contravene Western values about exposing children to the risk of danger such that a Westerner who acted similarly would be blameworthy, according to Western values, especially if a child was harmed as a result. In a diverse society, values as diverse

as these may be held by individuals that live among one another. In a diverse society, we must provide due consideration to the various, competing views of what is reasonably prudent conduct when determining negligent breach.

As Rawls puts it, “there is no social end except that established by the principles of justice themselves, or else authorized by them.”¹⁹ The current tort adjudication process and its use of the concept of the reasonably prudent person can easily lead the judge or jury, even when dutiful, to tender a verdict *as if* one single group’s view of what constitutes the reasonably prudent person alone embodied the “one social end” against which Rawls warns. Without further theoretical guidance, the law and adjudication of negligent breach has the potential of being illiberal and, thus, unjust.

Current Law of Negligent Breach

To demonstrate the potential kinds of injustice, we must flesh out the landscape of accident law. Even though courts regularly resolve disputes about who should pay the costs in particular accidents, articulating the doctrine of accident law is challenging for two reasons.

First, as numerous judges ruled on different cases over centuries, judges in the United States and, in earlier times, England developed what is now accident law as found in the United States common law. In doing so, judges developed the legal doctrines of the duty of care, the reasonably prudent person, negligence, strict liability, breach of the standard of care, and correlated doctrines. Since no single judicial decision fully

¹⁹ John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159, 162 (1977).

articulates any of these doctrines, theorists have offered descriptive accounts of each legal doctrine by piecing together judicial decisions. In some cases, as we shall see, their descriptive accounts, perhaps unintentionally, also include prescriptive elements or elements that *interpret* the process of legal adjudication.

The second difficulty pertains to the fact that it is impossible to create a list or code of all of the possible kinds of negligent acts. Contrast the Model Penal Code, which was developed from, and improved on, common-law-based criminal law and previous codification attempts.²⁰ The Model Penal Code attempts to state in sufficient detail the kinds of acts that are criminally punishable. One reason for a code is to put individuals on notice before they act, so that they know in advance what conduct would subject them to criminal punishment.

In the realm of accident law, such a code would be much more difficult, if not impossible. The limitations of human foresight combined with the seemingly infinite ways to perform acts and endless ways diverse acts can intersect make impossible an exhaustive list of the possible forms of negligence. Listing or interlacing the negligent conduct from all court cases to date would not even begin to provide an adequate, let alone exhaustive, list.

For example, it is obvious that even accidentally causing a fire in one's home can lead one to be legally responsible for harm to one's neighbors. However, very few individuals sufficiently appreciate that something as simple as failing to regularly remove lint from one's clothes dryer, including the lint trap, the vent, and inside the dryer can

²⁰ Markus Dirk Dubber and Paul H. Robinson, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323-24 (2007).

cause a lint-based fire or even a major explosion. Over a decade ago, I witnessed in person a vivid demonstration where safety engineers used mere lint-like dust in commonplace conditions to cause a massive explosion. Nevertheless, I cannot attest that my own lint reducing efforts since then have been sufficient. That points to a related issue. Even if an attempt was made at a thorough list of potentially negligent acts, effectively communicating that information to individuals such that it would change their conduct and have a meaningful reduction in negligence would be no easy task.

The Negligence Standard in Jury Instructions

Due to the nature of this area of law, in numerous lawsuits over accident costs, judges developed standards rather than legions of discrete rules to evaluate a party's conduct when its propriety is disputed. The central and most important one is the reasonable person standard. Judges also developed other standards to deal with special categories of acts, such as alleged professional misconduct. Yet, in the current law, these other standards are often based on the reasonable person standard in various ways. So, I focus on the central standard for negligent breach, the reasonable person standard, with the expectation that my remarks can eventually be expanded to explain all other standards of care in accident law. I start that project, at the end of this dissertation, by extending my theory of negligent breach to the domain of strict liability. Interestingly and perhaps surprisingly, my theory has both explanatory power for aspects of the legal doctrine of strict liability as well as revisionist implications.

Due to the often haphazard nature of the common law, forty-eight out of the fifty states have pattern or recommended jury instructions that judges may use to communicate

to juries the meaning of legal negligence or, in other words, the negligence standard of care.²¹ Based on a study of these jury instructions, Patrick Kelley and Laurel Wendt conclude that most define negligence as the failure to exercise ordinary care.²² In most cases, ordinary care is further defined as the conduct of a reasonably careful or prudent person. In court, in the presence of both parties and their respective legal counsel, the judge instructs the jury on the issue of the standard of care with her jurisdiction's recommended instructions or her own to determine whether the defendant's conduct was what a reasonably prudent (or careful) person would have done.²³ If no jury, the judge determines explicitly which party prevails in the lawsuit and implicitly the issue of negligent breach, presumably, according to approximately the same criterion that is reflected in pattern jury instructions. While the jury is optional for the parties, for ease of exposition, I usually refer to the more common practice of trial by jury in negligence cases. Such should not be interpreted as an exclusion of the possibility of a judge rather than a jury determining the issue of negligent breach.

²¹ Patrick J. Kelley and Laurel A. Wendt, *The Actual Practice: What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 595 (2002). The authors note differences among the states' instructions that they think are meaningful. *Id.* at 622. These differences are not relevant for my purposes. Also, note that I searched for and could not find any relevant modifications to pattern jury instructions after Kelley and Wendt's piece. So, I conclude that their findings are still the status quo on the points which I reference.

²² *Id.* at 622.

²³ *Id.* See model jury instructions for the states. Here is an example of jury instructions formulated with the terms "reasonably careful." I adapted it from Vermont's pattern jury instructions 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* (2008), <http://www.vtbar.org/User%20Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/Negligence.htm>. As exemplified here, the jury is asked to determine if the person behaved "reasonably careful," but they are not told *how to determine* what "reasonably careful" behavior is.

Usually, neither recommended instructions nor the judge's own instructions further guide juries on how to determine the conduct of a reasonably prudent person in the typical (as in non-specialized) case.²⁴ Shortly after judicial instructions, the jury ultimately deliberates and returns a verdict for one party or the other. In that process, the jury implicitly or explicitly decides what constitutes negligent breach, albeit only in that one particular lawsuit. Put differently, in rendering a verdict for the plaintiff, the jury implicitly or explicitly decides that the defendant's act, in the circumstances of that particular case, was negligent.

A defendant verdict does not necessarily mean that the jury determined whether or not either party's acts were negligent. Deficits in one or more of several other vital aspects of the plaintiff's suit could have led to a verdict for the defendant. I do not address scenarios where the plaintiff's negligent breach is at issue because different courts handle this possibility in different (doctrinally complicated) ways, an adequate discussion of which would distract from this dissertation's central thesis. Also, if the theory that I defend in this dissertation prevails, extending my theory to the issue of plaintiff's negligent breach and exploring how it interrelates with other aspects of existing accident law doctrine, such as comparative and contributory negligence, is a viable and likely successful follow-up project.

In sum, in the prototypical case, the only official jury instruction as to negligent breach is the (non-specialized) reasonably prudent person instruction addressed above. Different dutiful juries can reach different conclusions on what the reasonably prudent

²⁴ In some jurisdictions, the juries are told to use common sense. Kelley at 602. But, that too does not provide precise content as to what constitutes the conduct of a reasonably careful person.

person would have done. In such deliberations, juries do not necessarily consider with due regard the society's diverse, irreconcilable, and competing conceptions of the good. As a result, existing jury adjudication can lead to the two kinds of injustice detailed above.

Possible Checks on Jury Adjudication

After the jury deliberates, they return a verdict *usually without officially detailing how they resolved particular sub-issues or any part of the rationale behind their verdict*. No official judicial or governmental follow-up specifically ensures that the jury heard, understood, or followed any legally substantive judicial instruction. The lack of any official detail behind the jury verdict has earned the jury deliberation process the description of being a "black box."²⁵ As a protection against extreme jury verdicts, there are three possible checks on the jury's discretion as to negligent breach as well as other issues:

1. The trial judge could reverse the jury's verdict by ruling, upon motion from one of the parties, that no reasonable jury could have reached the verdict that the jury in fact tendered.
2. Upon appellate review, the appeals court could determine that issue of negligent breach in the opposite way from what the jury's verdict may indicate.
3. Intermittently, state legislatures have enacted statutes that alter specific aspects of their jurisdiction's accident law, often in response to an unpopular result in a well-publicized court case. Such does not alter the outcome of any past case, but it attempts to influence future analogous cases. While some statutes have been enacted, keep in mind that legislatures have not broadly

²⁵ Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 432, 457-66 (2008).

codified accident law like they have done with the criminal law, as exemplified by the Model Penal Code.²⁶

While these checks are available, they are not always employed or successful when employed, with the indirect check through legislative override the least likely due to its difficulty. Even though the first two checks are easier to attempt, they do not eliminate or necessarily mitigate the two potential injustices. As for disparate treatment, since prior jury trials by themselves are not precedent, utilizing any possibly inconsistent outcomes in other trials on appeal would be difficult and likely ineffective. Regarding privileged *ab initio* injustice, requesting the trial or the appellate court to reverse a jury verdict does not necessarily mean that either court will duly consider the society's diverse, irreconcilable, and competing conceptions of the good in reviewing the issue of negligent breach. Either court could merely substitute its own preferred view in lieu of any view reflected in the jury verdict. Each court could use some version of the balancing test, and many appellate courts do. Nevertheless, the balancing test does not necessarily treat with fairness the diverse, irreconcilable, and competing conceptions of the good. Instead, it is likely just one of the available conceptions of the good that need due consideration along with others.

My Purely Descriptive Theory of Negligent Breach

Based on the above points, a pure description of the extant law of negligent breach is tricky. In my view, the best pure description is as follows:

²⁶ The Model Penal Code was created by the American Law Institute in 1962. American Law Institute (ALI), MODEL PENAL CODE (1962), <https://www.ali.org/publications/show/model-penal-code/>.

Mixed Descriptive Theory of Negligent Breach – Conduct constitutes negligent breach if the judge or jury determines, in the context of an adversarial adjudication, that the conduct fell below what the reasonably prudent person would have done in the defendant’s circumstances.

I intentionally mix the reasonably prudent person jury instruction with adjudication simply because just stating the reasonable person standard is incomplete, to a substantial extent, as a statement of legal doctrine. Put more strongly, a purely descriptive account of the law of negligent breach that does not explicitly include adjudication, in addition to the reasonable person standard, would be hollow, minimally helpful, and myopic.

At the same time, stating anything more than my Mixed Descriptive Theory is likely a normative interpretation of the way jury adjudication should employ the reasonable person standard rather than a pure (or even a mostly pure) description of the legal doctrine. As we shall see below, other descriptive theories make the error of saying too much when they purport to purely or primarily *describe* the law of negligent breach.

We could continue to specify other aspects of adjudication including:

- how the jury pool is selected;
- how any particular set of jury members is selected from that pool; and
- general instructions to the jury such as not to discuss the issues with the parties, their lawyers, or each other (until the jury deliberates).

I discuss more of these aspects below. All of these parts are meant to be captured when I use the phrase “in the context of an adversarial adjudication.” To say anything more about what conduct is likely to be deemed negligent, we need to know the various views, related to the conduct at issue, held by those individuals likely to be selected as jurors at a given point in time. Nevertheless, we cannot spell out the law of negligent breach with more statements of legal doctrine. Therefore, further specification of the existing legal

doctrine beyond my Mixed Descriptive Theory, apart from providing more details about adjudication, is a misguided project. That is why this dissertation's project is largely normative, not descriptive.

Restatements of Tort Law

Despite the elusive nature of accident law and its adjudication, a non-governmental organization, the American Law Institute, has promulgated descriptive theories of accident law, where each successive version supersedes the previous one. Even though I suggest above that any descriptive attempt in accident law, apart from the one that I specified above, is misguided, analyzing prominent attempts at providing descriptive accounts, especially the Restatement (Second) of Torts, illuminates:

- A. key aspects of the issue of negligent breach;
- B. the flavors of possible, plausible normative theories of breach; and
- C. the pitfalls of a more detailed description of the existing legal doctrine of breach.

More specifically, I analyze below the Restatement (Second) of Torts, perhaps in excruciating detail, because in it are the ambiguous threads that can and have been used to weave plausible normative theories of breach. To clarify, I am not claiming that normative theorists actually received inspiration or borrowed ideas from the Restatement (Second). Likely, theorists were inspired by the same case law from which the Restatement (Second) drew.

Nevertheless, I will parenthetically highlight aspects in the Restatement (Second) that seem like “fore-shadows” of the normative theories that I address later. The Restatement (Second), while much less important in many ways, may be likened, in one

aspect, to works such as Plato's REPUBLIC and Thomas Hobbes's LEVIATHAN.²⁷ In dissecting each of these works, one finds not only the main views for which each is renowned, but one can also find shadows of related or possibly competing "Truths," metaphorically projected on the wall of Plato's cave. More concretely, in the Restatement (Second)'s ambiguous threads we can find ideas that point toward the normative theories that I identify below.

Aside from its historical and any prognosticatory worth, for decades the Restatement (Second) of Torts generally influenced black letter law, appellate review of jury verdicts, and directed verdict practice in trial courts.²⁸ Furthermore, few other overarching code-like statements of accident law were even available during this period, and none were obviously better than the Restatement (Second)'s account. One of these few accounts, PROSSER ON, TORTS was also a renowned account of tort law during that same period (and continues to be influential).²⁹ Nevertheless, Prosser's account of negligent breach and the reasonable person standard is quite similar to that found in the

²⁷ PLATO, REPUBLIC (George Maximillian Anthony Grube & C. D. C. Reeve trans., 1992) (c. 380 B.C.E.); THOMAS HOBBS, LEVIATHAN (John Charles Addison Gaskin ed., Oxford University Press 1998) (1651).

²⁸ Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 814-815 (2001). Below I point out how the Restatement (Third) also fails to adequately guide judges and juries in determining the standard of care.

²⁹ Some appellate decisions have followed the phrasing of Prosser on Torts (2d Ed.) of the reasonable person standard in terms of the "community ideal of reasonable behavior." WILLIAM PROSSER, LAW OF TORTS (2d ed. 1955); *Cermak v. Hertz Corp.*, 28 N.J. 568, 569 (1959); *Sheets v. Pendergrast*, 106 N.W.2d 1, 4 (N.D. 1960); *Bowens v. Knazze*, 237 F. Supp. 826 (N.D. Ill. 1965); *Wolff v. Light*, 169 N.W.2d 93, 102 (N.D. 1969); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Huey v. Barloga*, 277 F. Supp. 864, 872 (N.D. Ill. 1967); *Moon v. Winfield*, 368 F. Supp. 843, 845 (N.D. Ill. 1973); *Daniel v. State, Dept. of Transp.*, 239 N.J. Super. 563, 587 (App. Div. 1990); *Daniel v. State, Dept. of Transp.*, 239 N.J. Super. 563, 587 (App. Div. 1990); *Levin v. County of Salem*, 133 N.J. 35, 60 (1993); *Radtke v. Everett*, 442 Mich. 368, 390 (1993); *Furey v. County of Ocean*, 273 N.J. Super. 300, 312 (App. Div. 1994). However, it is not clear whether Prosser and these courts were merely rehashing the Restatement (Second) of Torts (for which Prosser was a reporter) or whether the court intended to validate one interpretation of the Restatement (Second) while invalidating competing interpretations.

Restatement (Second), with some of the key phrases verbatim. Such is not surprising given that Prosser was one of the reporters (i.e., authors) of the Restatement (Second). As a close sibling, Prosser's account suffers from the same ambiguities that I identify below in the Restatement (Second).

Even though negligent breach is one of the essential elements of a tort claim, the Restatement (Second) has influenced this issue much less, if at all, compared to other aspects of tort law. That is partly due to the fact that courts have been reluctant to adopt any statements of law, aside from the reasonable person standard, as legal doctrine (understood narrowly) for negligent breach. As I argued above, in order to be accurate and helpful as a pure description of the law, any additional theory would need to add to my Mixed Descriptive Theory information about adjudication and the conceptions of the good of the potential jury members *instead of* specifying further rules, standards, or prohibited conduct.

In other areas of law, legal theorists directly piece together cases to articulate what a particular legal doctrine requires. Yet, that approach is not viable in for negligent breach since judicial opinions do not address the problems raised in this chapter. Judicial opinions also do not provide any other information that could definitively resolve the identified ambiguities below. As mentioned above, listing or interlacing the various negligent actions from all court cases would not provide adequate guidance about what constitutes negligence or what the reasonable person would do because of the seemingly infinite ways to perform acts and endless ways acts can intersect.

In reviewing a trial court's application of the reasonable person standard, appellate courts have often quoted or cited the Restatement (Second) for the relevant,

authoritative law. Other judicial opinions seem to be trying to solve or wrestle with the theoretical abyss, pertaining to this issue, that the Restatement (Second) itself does not fill—and actually obscures. Since the Restatement (Second) was officially superseded, I contrast its account of negligent breach with a markedly different version that the American Law Institute has recently promulgated in the Restatement (Third) of Torts.

In the following sections, as I explain how the Restatement (Second) defines negligent breach, I also point out that, despite perhaps superficial appearances to the contrary, its account is incomplete—even as a description of this particular legal doctrine. Simultaneously, the Restatement (Second) says too much and, thus, errs and misleads by describing one possible interpretation of jury adjudication. More important to my normative project, the Restatement (Second)'s account, standing alone, does not contain the theoretical resources to determine what constitutes breach of the negligence standard of care in all cases.³⁰ Thus, these theoretical gaps create the potential for the two potential kinds of injustice, which I aim to mitigate or solve with my theory. In fact, my overarching objective in critiquing this and other existing theories is to show that there is, in fact, such a theoretical gap, a gap that has been largely neglected.

Ambiguities in the Restatement (Second) of Torts

Generally, across most theories of tort law and in actual law practice, to win a negligence tort lawsuit, the plaintiff must show that, among other things, the defendant breached a standard of care when she performed the act that actually and legally caused

³⁰ Jody Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773, 1775 (2007).

the plaintiff's harm.³¹ In the Restatement (Second), a defendant did not breach the standard of care if she did at minimum what a reasonably prudent person would have done in her circumstances.³² The Restatement (Second) defines the reasonable person as follows:

The words "reasonable [person]" 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.³³

From this first definition, it is already dubious that the Restatement (Second) is merely restating the law. While its definition has aspects that resonate with some uses of the term "reasonable," in fact, it is defining the phrase, "reasonable person," in a particular way that is familiar to lawyers but likely unfamiliar, in its particulars, to most jurors. Nothing in Kelley and Wendt's analysis of pattern jury instructions indicates that juries ever hear any of the terms, "attention," "knowledge," "intelligence," "judgment," and "protection," nor is the jury told that these categories should be filled out by what "society requires of its members."

It is certainly possible that an idiosyncratic judge has fashioned jury instructions along the lines of the Restatement (Second)'s verbiage. Oddly and idiosyncratically, in

³¹ In this sub-section, I am setting aside cases that are addressed using the tort doctrine of strict liability.

³² Restatement (Second) of Torts § 283.

³³ *Id.* Note that, as a product of its time, the Restatement (Second) uses the sex-specific term "man" "when it means "person "as stated at the beginning of the text. "The pronouns 'he,' 'his,' 'him," used throughout the book, "are not intended to convey the masculine gender alone"; rather, they are employed "in a generic sense so as to avoid awkward grammatical situations which would likely occur due to the limitations of the English language. PROSSER AND KEETON ON THE LAW OF TORTS, Lawyer's Ed. at vii, Student Ed. at xvii, (W. Page Keeton, Dan Dobbs, Robert Keeton, & David Owen 5th ed. 1984). "The fact that this judgment is personified in a "man" calls attention to the necessity of taking into account the fallibility of human beings." Restatement (Second) of Torts § 283. I do not mean to preclude the feminist critique that the standard has been a predominantly male standard.

Pennsylvania, appellate courts have incorporated the Restatement (Second)'s verbiage to articulate what constitutes "reasonable diligence" in its "discovery rule."³⁴ The discovery rule must be met for a plaintiff to establish that he sought to discover the cause of his injury with reasonable diligence for the purpose of tolling (i.e., adjusting) the statute of limitations on the plaintiff's tort claim.³⁵

To demonstrate reasonable diligence, a plaintiff must establish that he pursued the cause of his injury with 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.³⁶

Those courts arguably used this verbiage in idiosyncratic and perhaps legally questionable ways. Due to the overall paucity of use of the verbiage in the case law, which is itself noteworthy, as well as the verbiage's noticeable absence in any pattern jury instructions, I assume that juries (virtually) never hear these words in jury instructions in regard to the defendant's alleged negligence in the typical tort case in Pennsylvania as well as the rest of the United States.

Instead of purely describing the law of negligent breach, the Restatement (Second)'s reporters (i.e., authors) are interpreting what takes place in the *process* of jury adjudication as to the issue of negligent breach. Importantly, instead of identifying itself as an interpretation of adjudication, the Restatement (Second) presents its interpretation under the guise of being pure legal doctrine. This point is clearer when illustrated in the

³⁴ *Mest v. Cabot Corp.*, 449 F.3d 502, 510-11 (2006); *Vitalo v. Cabot Corp.*, 399 F.3d 536, 543 (2005); *Cochran v. GAF Corp.*, 542 Pa. 210, 220, A.2d 245, 249 (1995); *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 292, 505 A.2d 973, 988 (1985); *Petri v. Smith*, 307 Pa. Super. 261, 271, 453 A.2d 342, 347 (1982).

³⁵ *Mest v. Cabot Corp.*, 449 F.3d 502, 510-11 (2006).

³⁶ *Id.* at 511.

following example. “Reasonable person,” by itself, will not bring up, in all contexts, the concept(s) of “protection” of one’s “own interests and the interests of others.” As a somewhat trivial example, if one asks what is the conduct of a reasonable person when ordering take-out food over the phone, answers would likely pertain to patience rather than anything related to protection of anyone’s bodily integrity or property. Consider an example where safety is at issue. Suppose five people are fishing on a boat. Asking what the reasonably prudent person would have done in that setting could just as easily be about buying enough bait and picking a good location to fish as, say, making sure one is hydrated and the boat has life preservers. So, what the reasonably prudent person would do, in part, depends on context and can likely refer to aspects far removed from what the Restatement (Second) states.

In the context of a jury adjudication in tort, the plaintiff is claiming that the defendant acted in a way that did not adequately protect his interests. Usually, the jury will have also heard evidence and argument about whether the defendant’s act was proper or cautious enough. When the judge instructs the jury regarding the reasonable person *in that context*, perhaps many jurors may, but need not necessarily, associate some aspect of “protection of interests” or similar and the “reasonable person,” assuming nothing else in the process goes awry. For instance, a juror could think that the reasonably prudent person largely protects her own interests rather than her own interests *and* the “interests of others.” By defining that phrase in terms of the protection of interests or the actor and others, the Restatement (Second)’s description of the law inserts into the concept of “reasonable person” the one possible interpretation of the *context in which jurors hear and interpret the phrase “reasonable person.”* So, the Restatement (Second)’s

description of the law is only plausible if we consider the reasonable person standard in the context of jury adjudication. Most importantly, that description, under the guise of legal doctrine, inextricably includes one, but not the only, possible *interpretation* of jury adjudication in a negligence suit.

Obviously, context is always important to a person's understanding of words and phrases. Yet, such is a spectrum where some words have more narrow definitions that are relatively inflexible in a variety of contexts while others rely largely on context. The phrase "reasonable person" or "reasonable" by itself gets much of its content from the context. That is part of the virtue of that term given that this area of law does not lend itself to *ex ante* specification. Contrast here the term "murder" in the model penal code. While "murder" too can have various meanings in different contexts, the penal code goes to great pains to specify the elements of murder and its several gradations. Nothing in tort law or its adjudication is even remotely comparable as an attempt to more precisely articulate to the jury what constitutes the "reasonable person" (or the broad category of negligence *tout court*).

Putting my earlier point differently, the Restatement (Second)'s reporters are stating their interpretation of jury adjudication going well, when jurors fulfill their duties, or when the process does not substantially break down for any one of a number of reasons (many of which may not involve even the slightest nefarious intention from anyone). Yet, this interpretation of negligent breach has normative content. It is more akin to an ideal that, according to the Restatement (Second), jury adjudication may or should aspire to achieve.

In much of what follows in this chapter, I take seriously the Restatement (Second)'s articulation of negligent breach as what it claims to be, a description of tort legal doctrine. I show that this self-proclaimed description cannot completely and determinately resolve even uncomplicated disputes over accident costs without substantially relying on jury adjudication to correct its ambiguities or provide substantial missing content. Moreover, in the arguments that follow my primary aim is not to highlight the vices (or virtues) of the Restatement (Second), but instead, I aim to highlight what philosophical issues must be addressed to create a defensible normative theory of negligent breach. So, the reader need not assume that I take the Restatement (Second) to be of independent interest—apart from the curious hodgepodge of ideas that it contains.

Returning to the Restatement (Second)'s definition of the reasonable person, that definition indicates the purpose of this concept and the *categories* of qualities that are purportedly important to this concept. However, it does not tell us exactly how those qualities should be instantiated in specific situations. For instance, would the reasonable person phone while driving? Would phoning impede too much her attention and perhaps judgment while driving? Again, the jury does not hear these qualities. So, the Restatement (Second) leaves it up to the jury's discretion, without further judicial guidance, to *implicitly or explicitly* identify these qualities and add substantial content to them in order to resolve such questions and tender a verdict.

Related to a previous point, it is understandable why neither judicial decisions nor the Restatement list the specific qualities for each category needed under what conditions. The variety of acts individuals can undertake, the complex ways acts can

intersect, rule of law principles, and the limits of human foresight make it impossible to create even a minimally comprehensive list of the conduct of what the reasonable person would do under various conditions. Nevertheless, some person (e.g., the judge) or group (e.g., the jury) needs to (implicitly or explicitly) provide content to these categories for the Restatement (Second)'s definition to have any relatively specific content.

The Restatement (Second) does state that these *categories* of qualities (attention, knowledge, intelligence, and judgment) are filled out by what “society requires of its members.” At the same time, again, the jury never hears this society-phrase. Instead, the Restatement (Second) seems to be interpreting the process—that, when the jury reaches a verdict, their verdict (ideally) is based on what society requires of its members. The Restatement (Second)'s assumption is that, when the jury determines the conduct of a reasonably prudent person, the jury will base that determination on society's formal or informal requirements. Again, the context and process are written into the Restatement (Second)'s account of negligent breach. In other contexts, a person could base such a determination on a god's will, his own idiosyncratic view, or his emotional response to the scenario presented. Even more problematic, some research suggests jury verdicts can be haphazardly decided and may have little to do with the underlying law or issues presented in the trial.

One may be tempted to take a more direct line, in a sense similar to the Holmesian power-centered view mentioned above, in understanding the Restatement (Second)'s account of jury adjudication of negligent breach. One could focus on the fact that the jury's verdict directly and largely determines who among the litigants is assigned the accident costs. In so doing, the jury is the “society” (or its representative) and the jury

requires certain conduct of society's members by virtue of the jury rendering a verdict for one of the litigants.

While this interpretation contains some insight, it contains a strained reading of the Restatement (Second)'s text. Specifically, there is a disjointed leap, theoretically speaking, from the jury rendering a verdict for one party where primarily money damages are at stake to conceptualizing the jury as the society that requires all members to employ certain levels of attention, knowledge, intelligence, and judgment for the protection of their own interests and the interests of others. Moreover, in any particular instance of jury adjudication, the jury's verdict pertains directly only to the litigants in that case. Any further impact is nil, small, or occurs long after the jury renders a verdict. Nevertheless, this possible yet strained interpretation further shows how the Restatement (Second)'s account suggests a cauldron of diverse, even conflicting ideas, any one of which could be developed into a more precise normative theory of negligent breach.

Which Society?

Since ultimately my theory addresses the following issue by using the term "group," I employ that term in explicating the Restatement (Second) although it uses either "society" or "community" as if such were univocal in every sense. The Restatement (Second)'s society-phrase, quoted above, is ambiguous regarding the relevant "society." Is it the neighborhood, the town, the county, the nation-state, the hemisphere, the world? Rather than political boundaries, the society could be delineated by historical ties or cultural similarities. In a diverse nation, a jury could plausibly respond to such a question, "Which society?" In that hypothetical dialogue, the jury's

question asks which among the many, competing voices or views in a society speaks on behalf of that society. This issue is especially important in a society with diverse, competing, and irreconcilable comprehensive conceptions of the good. Suppose a political entity (i.e., a nation or one of its subdivisions) contains three groups each with a different view on what the conduct of the reasonably prudent person would be in a particular context. In such a scenario, spelling out “reasonably prudent person” in terms of what “society requires” does not add unambiguous content unless such spells out how to determine from among the views of the three groups what “society requires.”

In actual litigation, this ambiguity issue does not explicitly arise. When the judge instructs the jury on negligent breach, the judge does not explicitly ask the jury to determine what society requires of its members or anything comparable. As a result, jury adjudication does not explicitly deal with the issue of which group in the society determines negligent breach. Nevertheless, the problem does not disappear because, by not explicitly broaching the issue, jury adjudication allows the jury to implicitly or explicitly adopt the view of almost any of the competing groups in a society. So, without something like the society-phrase appearing in jury adjudication, the hypothetical dialogue imagined above does not occur. The issue underlying the Restatement (Second)’s ambiguous society-phrase does not get explicitly addressed.

The jury verdict is not likely to be diametrically opposed to the views of many of the competing groups in the society. Otherwise, the judge may reverse the verdict upon motion of the losing party. So, we can safely assume that most verdicts are at least loosely consistent with the view of one or more of the groups in a society. However, such is hardly a satisfying resolution to the underlying question of which group’s view should

determine negligent breach. Even worse, without adequately considering and properly weighting the diverse, irreconcilable, and competing conceptions of the good at play existing jury adjudication creates the potential for the privileged *ab initio* injustice

Moreover, pointing out this ambiguity in the society-phrase is useful because it calls into question the propriety of using jury adjudication to determine negligent breach. Different well-intentioned, capable juries may render different verdicts for the same lawsuit. Each of those juries could simply be expressing different, conflicting views from different groups in the society, as suggested above. For example, one jury could adopt the regional view on an issue while another jury could adopt the national view on the same issue. So, two individuals whose conduct was the same in all morally relevant ways could receive different verdicts. Again, different outcomes for two identically situated individuals is the epitome of injustice. So, the way that jury adjudication obscures the “Which society?” issue makes this kind of injustice possible.

From a different but related angle, the ambiguity in the Restatement (Second)’s society-phrase points to a normative question about the justification of any theory—including existing jury adjudication—that determines negligent breach. My normative theory, democratic standard theory, specifies that the relevant “society” should include those individuals who are locally subject to the risk from the kind of act at issue in a lawsuit. In my words:

NEGLIGENT BREACH occurs when an individual’s conduct falls below the standard of care that is supported by the values of the most individuals who are locally affected by that kind of act.

In explicating democratic standard theory, I try to defend a workable and plausible theoretical tool to identify those relevant individuals. Locally affected individuals can themselves have competing views just like the views of one region of a nation can vary from the views of the nation as a whole. As its name may belie, democratic standard theory employs constrained, majority rule to determine which of the competing values in a diverse society determines negligent breach. As mentioned above, only after these theoretical issues are resolved can we then determine, through experimentation, whether existing jury adjudication, something similar, or an entirely different mechanism best approximates these normative requirements.

What Kind of Requirement?

Returning to the Restatement (Second), it adds to its denotation of the reasonable person the following:

Standard of the “reasonable [person].” Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.³⁷

To briefly revisit the above “Which society?” ambiguity, 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 (Second) contradicts itself.

³⁷ Restatement (Second) of Torts § 283.

Even if we interpret “community” as superseding or coextensive with the Restatement (Second)’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 geographic boundary remain viable candidates for what constitutes the community. Hence, the first ambiguity regarding the scope of the society remains.

Moving on, another ambiguity with the society-phrase involves three possible interpretations of the nature of society’s requirements. First, what “society requires of its members” could be the actual social norms or conventions (hereafter, collectively “norms”) of a particular society.³⁸ These norms could be codified in bodies of laws or regulations. For example, society may codify driving norms that developed organically. Norms could also remain informal without explicit validation by any part of the government. An example of a possible uncoded norm is: On a pedestrian path you own, as soon as possible, clean up debris or liquids that cause dangerous conditions. The norms-based interpretation of the reasonable person standard may seem to follow from the Restatement (Second)’s text because a social group (society) is doing the requiring.

This possible interpretation can be likened to Stephen Perry’s theory (addressed subsequently) where negligent breach is an act that contravenes the “accepted pattern of social interaction.” Additionally, George Fletcher uses a related idea for one part of his theory of negligent breach. Fletcher terms as “background risks” all of the risks that accompany daily social life. Another plausible way to describe background risks is “the

³⁸ Kelley and Wendt endorse a version of this interpretation as a descriptive theory of negligence. Patrick J. Kelley and Laurel A. Wendt. *The Actual Practice: What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 623 (2002).

grouping of the risks from conduct in conformity with the norms and patterns of daily social life” (my wording). Here, again, we see an embryo of normative theory that is contained in one possible way of interpreting an ambiguous aspect of the Restatement (Second)’s account of negligent breach.

The second possible interpretation is that “society requires” whatever actual members of a society would require based on those members’ preferences. This preferences-based interpretation differs from the norms-based interpretation because the current members of society may prefer in some instances to deviate from their extant norms. Under the preferences-based interpretation, the Restatement (Second) still needs a way to aggregate the possibly conflicting preferences of many individuals into what “society requires of its members.” Would majority rule or would technocrats synthesize the competing preferences of society’s members?

As mentioned above, democratic standard theory resolves this ambiguity by arguing that constrained majority rule, limited to only the issue of what constitutes breach of the negligence standard of care, best resolves the conflicting values in the relevant society. Furthermore, what matters in most cases in democratic standard theory is the *actual* values of the individuals locally affected, similar to the preferences-based interpretation of the Restatement (Second)’s requirement.

Finally, since “reasonable” is often a term in moral discourse, the society-phrase could refer to the requirements of morality. The demands of morality are often phrased in terms of what a social group would require of its members.³⁹ In this morality-based

³⁹ Social contract theories do this explicitly. Impartial observer constructs from other theories do this to some extent. JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY *passim* (2008).

interpretation, the requirements of morality would fill in the details of what the reasonable person would do. Since the moral point of view may not depend on the idiosyncrasies of any particular individual, a specific, actual group of individuals may not need to be identified as the relevant society. If so, then the morality-based interpretation may avoid the above ambiguity regarding society's scope.

The separate theories of Ernest Weinrib and Arthur Ripstein have similar morality-based flavors. Weinrib extols the moral concept of liberty as the governing concept for negligent breach while Ripstein adds equality as well. As we shall see, Weinrib's and Ripstein's theories seem detached or only loosely connected to actual preferences of individuals or norms—just as the morality-based interpretation of the Restatement (Second)'s account of negligent breach would likely be.

In the rest of its text, the Restatement (Second) does not definitively identify which of these three interpretations of the society-phrase it endorses. Some parts of the text hint at one interpretation while other parts hint at another interpretation or are ambiguous. For instance, the above-quoted use of “community” in the reasonable person standard suggests something less than the moral point of view, something particularized to a specific group of people. If so, that usage suggests, without favoring one over the other, the norms-based or the preferences-based interpretation of the society-phrase.

On the other hand, “community” could be a term indicating the moral point of view because a community may, by definition, require its citizens to follow the requirements of morality. Moreover, another part of the text may suggest, at first appearance, 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....⁴⁰

The Restatement's further qualification that the "reasonable person" standard be objective⁴¹ favors the morality-based interpretation because the moral point of view is often associated with an objective point of view.⁴² In contrast, society's preferences or norms may not be objective but may rather be the result of the mere wants or religious beliefs 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 society's preferences or norms.

At the same time, the preferences-based and norms-based interpretations are still viable because the rather-than-phrase could mean that the standard is objective and external only relative to any particular individual in the community instead of objective and external to the whole community. At the same time, the morality-based interpretation would also be objective and external relative to any particular individual. So, none of the three interpretations are definitively ruled out.

The idea expressed in the phrase, "[The standard which the community demands] must be the same for all persons, since the law can have no favorites," may push us towards the morality-based interpretation. Requiring the same standard for "all persons"

⁴⁰ Restatement (Second) of Torts §283.

⁴¹ *Id.*

⁴² 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, passim (1971).

suggests the moral point of view because the requirements of morality are usually the same for all (similarly situated) persons without favoritism. In contrast, community norms and preferences vary between communities which may lead to differential treatment between those communities. However, the norms-based and preferences-based interpretations are not ruled out because “all persons” could refer only to all persons in the community. If so, a community’s requirements would apply without favoritism to all individuals in that community. Still, the Restatement (Second) does not conclusively exclude any of the three possible interpretations of the society-phrase.

To reiterate, my objective is not to focus on the Restatement (Second)’s shortcomings as if immensely important in itself, especially given that the Restatement (Second) has been superseded and the particulars of the text analyzed above were likely never included into actual jury instructions. Rather, these three interpretations are of interest also because they each identify important issues that pertain to a defensible normative theory of negligent breach. Each of the normative theories surveyed hereafter wrestles with one or more of these issues, which are smoldering within the Restatement (Second)’s text.

Before moving on, the current dominant view in academic circles regarding negligent breach is also foreshadowed in the Restatement (Second) as follows:

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.⁴³

⁴³ Restatement (Second) of Torts §283.

On its face, this text presents a definition of unreasonable risk as if that definition seamlessly coheres with the prior text quoted above. In fact, this text could be intended as a clarification of the prior term, “unreasonable risk,” which the Restatement (Second) included in its “standard of the reasonable person.” Upon inspection, the weighing-interests test obscures further the legal doctrine of negligent breach, while also spelling out another thread with which one branch of normative theory has woven extensively.

First, let’s examine the weighing-interests test, as above, taking seriously the Restatement (Second)’s purported descriptive project. Weighing interests to gauge whether “the magnitude of the risk outweighs the value which the law attaches to the conduct” may not always lead to the same conduct as doing what society requires of its citizens even under any of the three interpretations of the society-phrase.⁴⁴ For example, society’s norms or preferences may *not* require that citizens avoid phoning while driving even though the magnitude of the risk of an accident may and probably does outweigh the value which the law attaches to phoning while driving. Thus, the weighing-interests test may conflict with the norms-based or preferences-based interpretation of the reasonable person standard.⁴⁵ If so, then the weighing-interests test provides yet another definition of reasonableness rather than clarifying the prior criteria and their ambiguities.

⁴⁴ For reasons why the two criteria may not coincide, see Steven Hetcher, *The Jury’s Out: Social Norms’ Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 650-52 (2003).

⁴⁵ In the Ford Pinto case and other similar cases, not only do juries find companies, who weigh interests as exemplified in the Learned Hand test, negligent and, thus, liable for the costs of the accident, but juries also attach punitive damages on top of the compensatory damages of the accidents. This suggests that Learned Hand test reasoning, at least in some cases, does not equate with the jurors’ understanding of what the reasonable person would do at all. Instead, Learned Hand test reasoning in some instances may equate with recklessness worthy of punishment. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* 52 Stan. L. Rev. 547 (1999-2000).

Second, the Restatement (Second) does not specify how to determine “the value which the law attaches to the conduct” in the weighing-interests test. Setting aside the awkward personification of the law, the law does not function like a stock market where one can look up any particular conduct and discover its value. With a charitable construction, the weighing-interests test bears similarity to the Learned Hand test. Put roughly, the Learned Hand test determines negligence by comparing the weighted magnitude of risks against the costs of further precautions in performing the conduct at issue. Some legal commentators claim that weighing interests according to the Learned Hand test is exactly what a reasonable person would do.⁴⁶ Following that vein, the Law and Economics Approach to negligence endorses a utilitarian-esque morality-based version of the Learned Hand test.⁴⁷ Here too, a thread, which was incorporated into the Restatement (Second), has been refined into a widely lauded, normative theory of negligent breach.

Within the four corners of the Restatement (Second), the weighing-interests test could be a clarification of the morality-based interpretation of what society requires of its members. On the other hand, the Restatement (Second) does not explicitly equate the weighing-interests test with its prior use of what society requires of its members. Instead, the Restatement (Second) baldly offers both as explanations of what is reasonable.

⁴⁶ Posner initially made this claim. Richard A. Posner, *A Theory of Negligence*, 1 J. OF LEGAL STUD. 29, 32-34 (1972).

⁴⁷ 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).

Furthermore, a utilitarian version of the weighing-interests test is not the only moral theory available to flesh out the morality-based interpretation of the society-phrase. Instead, that interpretation could be based on intuitionism, pragmatism, virtue ethics,⁴⁸ or rights-based theories. While all of these moral theories may perhaps agree on what the reasonable person would have done in some cases, in other cases the theories propound conflicting answers.⁴⁹ Since the Restatement (Second) merely formulates the weighing-interests test without clearly identifying it as the definitive interpretation of the reasonable person standard, the inclusion of the weighing-interests test exacerbates rather than resolves the ambiguities noted above

To summarize, I list the ambiguities discussed above and then reiterate my arguments thus far in this chapter.

1. **Which society?** - Since reasonable person theory does not specify how to delineate the relevant society/community, it provides conflicting answers when different societies/communities require conflicting actions from the same individuals.
2. **Society's requirements** - Reasonable person theory is ambiguous whether the society's requirements are based on social norms, preferences of a group, or moral requirements.
3. **Weighing-interests** - The Restatement (Second) mentions the weighing-interests test but does not clarify whether this test is the definitive account of the society-phrase or somehow supplements it.

With these ambiguities, the Restatement (Second)'s theoretical resources are not able to unambiguously provide a single, determinate answer to what the reasonable person would

⁴⁸ Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000).

⁴⁹ Simmons at 1173-80.

do in specific circumstances. Without such, the Restatement (Second)'s account relies heavily on jury adjudication to assign accident costs without making that reliance or its details explicit. These ambiguities demonstrate how malleable and how many different ways a jury could interpret the reasonable person standard making disparate treatment injustice as likely as juries are varied.

Misguided in the other direction, the Restatement (Second) also provides superfluous details found nowhere in jury instructions or trial court practice. Thus, its account deviates from the pure description of legal doctrine by including those details that it purports to pertain to the content of the legal doctrine of negligence. Instead, the Restatement (Second) speculates on what might or should be taking place in jury adjudication of negligent breach and in so doing it mixes together the reasonably prudent person jury instruction and its Reporters' interpretation of adjudication.

In contrast, my mixed descriptive theory of negligent breach is drastically different yet accurate in describing the "law" on that issue. My mixed theory makes the adjudication explicit and acknowledges the excessive discretion given the judge or jury to determine negligent breach. With excessive discretion, the judge or jury fills in the details of what the reasonable person would have done largely based on adjudication itself and their own possibly competing conceptions of the good. Given that adjudication does not necessarily require that a judge or jury give due consideration to the diverse, irreconcilable, and competing conceptions of the good as they related to the issue of negligent breach, existing adjudication leaves open the potential that one conception of the good is unjustly treated in effect as privileged *ab initio*, to the detriment of one of the parties to the lawsuit.

As I have pointed out periodically, the Restatement (Second) contains ambiguities, the resolution of which paves the way toward some plausible normative theories of negligent breach. Perhaps sensing the injustices looming in existing adjudication of negligent breach, the normative theories surveyed in subsequent sections wrestle with ideas like those exemplified in the obscure threads in the Restatement (Second) in an effort to provide the decision-maker more normative guidance, guidance that their advocates assume or hope is also soundly justified.

The Restatement (Third) of Torts

The American Law Institute's Restatement (Third) of Torts has superseded its Restatement (Second). To unify and simplify the Restatement (Second)'s account of negligent breach, the Restatement (Third) replaces it with a single, more focused account of negligent breach. That account harkens back to the weighing-interests test in the Restatement (Second) and is one version of the Law and Economics Approach to negligent breach. In general, the Law and Economics Approach has dominated much of the legal academy and has been well-received by numerous appellate courts. Even so, what, if any, influence the Restatement (Third)'s version or text, in particular, has or will have on courts, the law, and legal academia has so far been unclear.

Relevant to this dissertation, I contend that the Restatement (Third), like its predecessor, is not a purely descriptive account of negligent breach. Rather, its account is primarily normative. Regardless, as its reporters explicitly acknowledge, on its own without adjudication, its account does not provide complete, determinate criteria for what constitutes breach of the negligence standard of care. That fact alone opens the door for

both kinds of potential injustice, namely, both disparate treatment and privileged *ab initio*.

I address the Restatement (Third) for multiple reasons aside from it now being the current version of its kind. First, the elimination of much of the text prominent in the Restatement (Second) is an implicit acknowledgment that that former account said too much resulting in the internal tensions and ambiguities that I mentioned above.

Second, as one version of the Law and Economics Approach, I use the Restatement (Third)'s account as a contrast to the other approaches of negligent breach. My aim in this dissertation is *not* to persuade the reader that Law and Economics Approach is unsatisfactory on its own or compared to rights-based theories. Much ink has already been persuasively spilled to that end. Rather, I am merely offering the Law and Economics Approach as a contrast—especially to highlight how directly and precisely it addresses negligent breach, the very issue that rights-based theories neglect or disavow as within the domain of their theories.

In fact, in a bit of irony, the Law and Economics Approach's theory of negligent breach is its central and motivating idea of its entire account of negligence. Its theory of negligent breach virtually reduces all of the other traditional elements of a tort claim to this one concept. The irony is that the Law and Economics Approach has achieved dominance in legal academia by focusing almost entirely on the very issue that the rights-based theories have neglected or even explicitly excluded from the domain of their inquiry. In my view, the rights-based approach to negligence law only stands a chance at counterbalancing the Law and Economics Approach if the former can provide a compelling theory of the issue that the Law and Economics Approach centrally

addresses, namely, what constitutes breach of the negligence standard of care. So, my aim is to develop the best theory of negligent breach based on the overarching theoretical commitments of the Kantian tradition so that, in a future work, I can showcase it as a compelling alternative to the Law and Economics Approach to negligence and especially to its pride and joy, the balancing test. Even though my project in this dissertation is *not* to refute the Law and Economics Approach to negligent breach, I provide a sketch of some of the arguments against it.

The Restatement (Third) begins the section on negligence with the following:

A person acts negligently if the person does not exercise reasonable care under all the circumstances.⁵⁰

This statement hearkens back to aspects of the Restatement (Second) and most pattern jury instructions. However, unlike those texts, the Restatement (Third) immediately follows that statement with the following:

Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.⁵¹

Again, these factors remind us of the weighing-interests test in the Restatement (Second) and the Learned Hand test from the Law and Economics Approach. Some key differences are noteworthy. Although the factors are not arranged as opposite sides of a mathematical formula, the Reporters' notes explain the foreseeable likelihood of harm and the

⁵⁰ Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3, 29 (2010).

⁵¹ *Id.*

foreseeable severity of harm should be balanced against the burden of precautions to eliminate or reduce the risk of harm.⁵² The Reporters declare that this formulation supports the “balancing approach’ to negligence.”⁵³

While the Reporters claim, “The balancing approach rests on and expresses a simple idea,”⁵⁴ that idea is not as simple as it may first appear. That idea is:

Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages.⁵⁵

This idea is too simple, or better yet too general, because other bad conduct (e.g., criminal conduct, illegal conduct, immoral conduct, bad etiquette) can plausibly be described as conduct where the “disadvantages outweigh its advantages,” and one does not have to be a utilitarian for this idea to hold. What does all of the work is how we spell out the disadvantages and advantages. The Reporters may sense this excessive generality because they go on to add:

The disadvantage in question is the magnitude of risk that the conduct occasions; as noted, the phrase “magnitude of the risk” includes both the foreseeable likelihood of harm and the foreseeable severity of harm that might ensue. The “advantages” of the conduct relate to the burden of risk prevention that is avoided when the actor declines to incorporate some precaution. The actor’s conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention.⁵⁶

Although the Reporters’ notes give their negligence test an appearance of mathematical rigor, it creates additional problems. Each of the following problems shows why the

⁵² Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3, Comment e, 30-31 (2010).

⁵³ *Id.* at 31.

⁵⁴ *Id.*

⁵⁵ *Id.* at 30.

⁵⁶ *Id.*

Restatement (Third) fails to provide complete, determinate criteria for what constitutes breach of the negligence standard of care without substantially relying on adjudication to provide most of the missing substance and, thus, opening up the door for both kinds of injustice.

First, harms, risks, and the burden of risk prevention are difficult to measure for numerous reasons extensively explored in the literature of multiple disciplines.⁵⁷ Second, even if each factor can be accurately measured, it does not mean that each can be measured or translated into a single unit (e.g., happiness), which suggests that instances of these factors may be incommensurable.⁵⁸ Third, sometimes the magnitude of risk is not known, which some, including Sven Ove Hansson, have termed “uncertainty.”⁵⁹ Hansson claims that most situations of accidental harm are instances of uncertainty rather than actors behaving with known risks.⁶⁰ Without known risks (or at least reasonably knowable risks), the Restatement (Third)’s formulation of negligence is unhelpful for a large subset of accidents.

The Reporters think they have a rough solution to the problems of measurement, incommensurability, and uncertainty, at least for common activities. They write:

⁵⁷ The Reporters also admit some problems with measurement especially the severity of harm, when anticipated harm is personal or emotional injury, and the burden of precaution, when it is intangible. *Id.* at 31.

⁵⁸ The Reporters seem to acknowledge this difficulty when they state that the balancing test does not permit the “comparison of common elements.” Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3, Comment h, 35 (2010).

⁵⁹ Sven Ove Hansson, *Ethical Criteria of Risk Acceptance*, 59 ERKENNTNIS 291, 293 (2003) (“Strictly speaking, real-life decisions are almost always made under conditions of uncertainty, but we often choose to simplify our description of them by treating them as cases with known probabilities, hence as decisions under risk.”).

⁶⁰ *Id.*

[W]hen the claim of negligence relates to how a party conducts an activity that most people generally engage in and are familiar with, such as motoring, the jury's knowledge of the circumstances of the activity reduces the need to evaluate the party's conduct in the formal terms of risk magnitude and risk prevention burdens.⁶¹

The jury's familiarity with the factors in the balancing test substitutes for the need to formally quantify the factors in a way that all are commensurable, according to the Reporters.

The Restatement (Third) explicitly includes jury adjudication to fill out the meaning of its terms, a notable acknowledgment compared to the Restatement (Second)'s seeming lack of self-awareness on its inclusion of its preferred interpretation of jury adjudication. However, one problem with this solution is that it merely supposes that such balancing is what the jury is in fact doing. In reality, we have little information about jury deliberation. The "black box" nature of that process seems to be a virtually insurmountable barrier to such information, at least without extensive (and expensive) social scientific experimentation and study.

Second, the Restatement (Third)'s solution effectively abandons the seeming mathematical rigor when it substitutes the specified factors for the jury's *beliefs* about those factors. It is true that, with jury adjudication, we are always working with the jury's beliefs about whatever is at issue. However, again, the balancing approach loses its mathematical rigor unless jury members individually or collectively turn out to be adept at these estimations. Furthermore, it raises doubts about whether or not jury adjudication is the best process for making these determinations. Bureaucrats, armed with computers

⁶¹ Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3, Comment h, 34 (2010).

and actuarial tables, are much more likely to be adept at performing the estimation and balancing that the Restatement (Third) seeks.

Third, the jury does not hear about the Restatement (Third)'s factors from the judge's instructions about negligence. Instead, the judge usually instructs the jury to determine whether the defendant conduct was what a reasonably prudent/careful person would have done in the defendant's circumstances. So, the Restatement (Third) is making a few big inferential leaps in proposing that the jury overcomes (at least some of) the need for the formal rendering of the factors without the jury every hearing the factors that it proposes to determine negligent breach.

Due to some of the reasons above and others that the Reporters themselves mention, the Reporters surprisingly admit that "the approach to negligence described in this Section is not one that . . . generates determinate results."⁶² Instead, the Reporters leave that task to the jury. The Reporters state as follows:

Rather, the approach identifies important variables for the jury to take into account in evaluating whether the actor was unreasonable; the jury's responsibility is to render an informed judgment in light of these variables.⁶³

For my purposes, that admission validates or lends support to my main claims regarding the Restatement (Third)'s theory of negligent breach as well as my claims above about existing legal doctrine of negligent breach. Those claims are as follows:

1. The Restatement (Third)'s account of negligent breach, standing alone (that is, without adjudication), will not provide complete and

⁶² *Id.* at 35.

⁶³ *Id.*

determinate criteria for what constitutes breach of the negligence standard of care.

2. Existing legal doctrine of negligent breach is hollow without adjudication, in which an institutional actor (judge or jury) has wide discretion. (Perhaps, including the balancing test in the jury instructions may limit that discretion a little.)
3. Due to the malleability of that “reasonably prudent person” jury instruction, one dutiful jury could tender a verdict for the defendant in one case while another equally dutiful jury, using the same legal standard, could tender the opposite verdict—even though the acts of both defendants’ were the same in all morally relevant respects. (**disparate treatment injustice**)
4. Existing jury adjudication of the issue of negligent breach does not necessarily show due regard to each of society’s diverse, irreconcilable, and competing conceptions of the good. (**privileged *ab initio* injustice**)

As a purely descriptive theory, the Restatement (Third)’s account is dubious given that the judge never instructs the jury to take the identified factors into consideration. The parties’ lawyers may raise evidence and arguments pertinent to the Restatement (Third)’s factors. Yet, nothing in trial court practice necessarily encourages the jury to employ the Restatement (Third)’s factors in the way that the Reporters hope. The Reporters’ notes are correct in that the jury reaches its verdict based on indeterminate theoretical guidance; it is just not necessarily the guidance that the Reporters describe.

In the remainder of this chapter, I briefly address balancing test tort theories to provide a contrast, especially to highlight how directly they address negligent breach, the very issue that alternative theories neglect or disavow. Alternative approaches to negligence law only stand a chance at counterbalancing the now dominant balancing test approach if the former can provide a compelling theory of what the latter centrally

addresses, namely, what constitutes breach of the negligence standard of care. Even though my project in this dissertation is not to refute the Law and Economics Approach to negligent breach, I provide a sketch of some of the arguments against it.

Social Welfare Theory

Balancing test theories do not always address accident law in terms of the traditional elements of the prima facie tort claim. Nevertheless, for ease of comparison to rights-based theories, I still formulate the relevant part of balancing test theories in terms of breach of the standard of care. These theories apply efficiency or some form of cost-benefit reasoning to determine breach. Some theorists seem to think that it is obvious why their criterion is the proper one to use⁶⁴ while others take seriously the need for justification.⁶⁵ In the end, these theories inadequately justify their criterion for what constitutes breach of the standard of care.

The social welfare approach proffered by Louis Kaplow and Steven Shavell is a sophisticated account of the Law and Economics Approach.⁶⁶ 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.⁶⁷ 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 affected. Kaplow

⁶⁴ WILLIAM M. LANDES AND RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

⁶⁵ LOUIS KAPLOW AND STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

⁶⁶ *Id.* at 52.

⁶⁷ *Id.* at 18.

and Shavell only exclude in their social welfare theory under the title of “fairness” those considerations that do not affect preference satisfaction at all.⁶⁸

In response, social welfare theory is afflicted with the problem of incompleteness. In fact, social welfare theory fails to answer an issue key to its own formulation. Even though the theory tries to justify social welfare as opposed to fairness as the criterion to assign accident costs, the theory does not provide, let alone defend, a particular way to weight each component of social welfare.⁶⁹ Social welfare theory tells us to pursue the option that gives the highest social welfare once the acts are weighted.

In my view, the only meaningful and justifiable way to weight the various aspects of social welfare is based on the actual values of the individuals locally affected by the act at issue. Some version of that may be open to social welfare theory in lieu of preference-satisfaction as the metric of welfare. If so, then social welfare theory becomes more like democratic standard theory differing primarily in how it reconciles the differing and competing values of the relevant individuals.

Strict Liability Separated

The negligence standard of care could be used to assign the costs from *all* accidents. However, as various cases arose, judges separately developed, ahistorically speaking, the standard of strict liability for certain kinds of conduct.⁷⁰ More accurately,

⁶⁸ *Id.* at 39.

⁶⁹ Daniel Farber, *What (If Anything) Can Economics Say About Equity?* 101 MICH. L. REV. 1791, 1793 (2003).

⁷⁰ This description is not meant to be a historical description, nor does it take a position of the issue of whether strict liability was ubiquitously applied with negligence added later.

judges developed several strict liability rules, for specific kinds of acts that the judges singled out usually because they involved a high risk of harm.⁷¹ One broad category of strict liability is laid out in the Restatement (Third) as follows:

Abnormally Dangerous Activities

(a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

(b) An activity is abnormally dangerous if:

(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and

(2) the activity is not one of common usage.⁷²

Examples of abnormally dangerous activities where judges applied strict liability are blasting and crop dusting.⁷³ Judges have also applied strict liability rules to instances where an owner's livestock, wild animal, or abnormally dangerous animal has caused harm to others.

Strict liability is strict because the agent doing the abnormally dangerous act is vulnerable to a tort claim even if the agent met or exceeded the reasonable person standard. So, having caused a foreseeable harm via an abnormally dangerous act is usually enough to establish liability for accident costs whereas with the negligence standard of care causation is necessary, but alone not sufficient, to establish liability.⁷⁴

⁷¹ RESTATEMENT (THIRD) OF TORTS: Liability for Physical and Emotional Harm: Strict Liability, Ch. 4, *Scope Note*, 228 (2010).

⁷² RESTATEMENT (THIRD) OF TORTS: Liability for Physical and Emotional Harm: Abnormally Dangerous Activities § 20, 229 (2010).

⁷³ *Id.* at 233.

⁷⁴ Strict liability is not absolute liability because some qualifications can absolve one of liability. RESTATEMENT (THIRD) OF TORTS: Liability for Physical and Emotional Harm: Abnormally Dangerous Activities § 20, Comment a, 230 (2010); RESTATEMENT (SECOND) OF TORTS § 519, Comment (2)e; *Madsen v. East Jordan Irr. Co.*, 101 Utah 552, 125 P.2d 794 (1942) (holding defendant was not strictly liable

Strict liability could be used to assign the costs of all accidents as long as the person seeking compensation can somehow prove that another person “caused” the accident.⁷⁵ Richard Epstein has espoused such a theory.⁷⁶ Common law judges did not go this route choosing instead to use the negligence standard of care in one domain and to use the strict liability standard in other limited domains. Keeping these domains separate is entrenched in the common law.

However, common law judges have not provided a deep theoretical justification for the division between negligence and strict liability. This lack elucidates a further way that these accident law doctrines are hollow.⁷⁷ In response to this problem and others, commentators have developed other theories about how we should assign accident costs. In the next chapter, I critique these theories.

As a sneak peak, my theory justifies the division between negligence and strict liability by pointing out that, with abnormally dangerous acts, most, if not virtually all, individuals do not want to be subject to those risks of harm *at all*. They want *even less* to be subject to negligently performed abnormally dangerous acts because, presumably, a negligently performed abnormally dangerous act is more dangerous along one or more dimensions compared to an abnormally dangerous act performed with more care than the negligence standard of care requires. The implicit “compromise,” if you will, is that agents may nonetheless perform abnormally dangerous acts if they pay compensatory

because the type of harm that occurred to the neighboring mink farm was not foreseeable, breaking the legal causal link).

⁷⁵ Perry argues that the concept of cause in such a theory must have some normative component to it. Stephen Perry, *Libertarianism, Entitlement, and Responsibility*, 26 PHIL. & PUB. AFF. 351, 381 (1997).

⁷⁶ Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

⁷⁷ See Patrick J. Kelley and Laurel A. Wendt. *The Actual Practice: What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 587-88 (2002).

damages for any resulting harm, and they pay punitive damages also if they perform the abnormally dangerous act negligently (and harm occurs).

This latter point is an interesting departure from existing legal doctrine where punitive damages are only available if the agent is grossly negligent in performing the abnormally dangerous act. This asymmetry seems insightful, intuitive, and justified given the fact that a negligently performed abnormally dangerous act likely involves greater danger. With the possibility of punitive damages addressing that extra risk of danger, my theory has a clear advantage over existing legal doctrine for strict liability.

Summary

The Restatement (Second)'s and (Third)'s accounts of the legal doctrine of negligent breach fail at their purely descriptive projects. Furthermore, both accounts of negligent breach rely on the process of adjudication to fill their large theoretical holes or resolve ambiguities. This reliance is worrisome given that neither these nor jury instructions put a check on the wide discretion that any jury may employ without sensitivity to the diverse, irreconcilable, and competing conceptions of the good held by the individuals locally affected by the act at issue. So, examination of the Restatements elucidates the numerous ways that existing adjudication of negligent breach leaves open the door to the two kinds of potential injustice to the detriment of the parties to a negligence suit.

Chapter Two

Competing Theories of Negligent Breach

The previous chapter shows that two forms of injustice loom for parties to a tort lawsuit. First and most notoriously, jury adjudication, especially on the issue of negligent breach, too easily allows like cases to be treated differently.⁷⁸ Second, given Liberalism's assumption of diverse, competing, and irreconcilable comprehensive conceptions of the good, the lawsuit may be unjustly decided in a manner (or according to a criterion) that does not respect these diverse conceptions of the good.

⁷⁸ 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).

I also point out, in the last chapter, how these possible injustices persist despite efforts to provide more determinate content to negligence law. The Restatement (Second)'s account of negligent breach attempts to flesh out the reasonable person standard. However, reflection on its ambiguities instead demonstrates the wide conceptual space in which juries have excessive discretion to render a verdict.

The Restatement (Third) attempts, with its balancing test, to provide more definite content to the negligence standard of care. However, in doing so, it loses its descriptive accuracy since the jury never hears the balancing test factors and the jury can interpret what they do in fact hear in multiple ways that are at odds with the balancing test. Even taken on its own, due to the measurement, incommensurability, and uncertainty problems mentioned in the last chapter and its own admitted incompleteness, the Restatement (Third)'s balancing test leaves open both of the forms of injustice sketched above. These issues are worrisome given that negligent breach is an essential part of a prima facie tort claim.

Justification

The purposes of the Restatements that I have been analyzing are predominantly to state the law,⁷⁹ not to justify the law. Furthermore, these Restatements do not even restate any reasons or justifications that judges may have proffered over the centuries. So, it is worth highlighting that the above considerations do not even attempt to provide a

⁷⁹ Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 814 (2001) (noting that American Law Institute's traditional position is that "[r]estatements are predominantly positive and only incrementally normative").

justification for the reasonable person standard (in any of its possible forms), the balancing test, or jury or judicial adjudication in this context.

No self-evident justifications seem available for determining negligent breach based on the reasonable person standard, the balancing test, or jury or judicial adjudication. Other plausible ways of assigning accident costs compete with them. New Zealand's social tort insurance is a dramatically different way to assign accident costs.⁸⁰ Those harmed in accidents may apply for compensation from one of several funds paid for by general or specific taxes.⁸¹ So, accident costs are spread among those paying taxes rather than a specific party to a particular accident. With such divergent systems available, this dissertation seeks adequate criteria to determine breach of the standard of care as well as a justification for those criteria. Thus, I create a theory that has the following sensible goals:

- A. Provide more detailed, justifiable criteria to further limit jury discretion; and
- B. Given that individuals hold diverse, irreconcilable, and competing conceptions of the good, resolve tort disputes according to criteria that justly arbitrate between those conceptions of the good.

To achieve these goals, I seek a theory of negligent breach that best interprets the relevant parts of the overarching theoretical commitments of the Kantian tradition.

As part of this project, I also analyze, in the next sections, existing theories of tort law to show that, in their current state, they fail to adequately address the issue of negligent breach. Of course, proponents of these theories could still add an adequate

⁸⁰ Rosemary Tobin and Elsabe Schoeman, *The New Zealand Accident Compensation Scheme: The Statutory Bar and the Conflict of Laws*, 53 AM. J. COMP. L. 493, 495-97 (2005).

⁸¹ *Id.* at 496-97.

theory of negligent breach. So, I explore some possible revisions or additions on behalf of these theories. Ultimately, I conclude that one or both of the following critiques apply to each of these theories:

1. While the theory may still acquire an adequate account of negligent breach, most of the theoretical work will be supplied by that addition rather than the theoretical resources contained so far in that theory.
2. Among the options readily available to flesh out the theory, none is preferable to the theory that I later defend if the ultimate criterion for success is the best interpretation of the overarching theoretical commitments of the Kantian tradition.

From one angle, my analysis of the upcoming theories might be a bit unsatisfying because I am largely pointing out what is missing from these theories. While I entertain some possible ways to rectify or flesh out these theories, it is impossible for us to conclusively prove that no compelling option is available. Instead, we can only demonstrate the lack, entertain some plausible fixes, and point out that much of the theoretical work, on the issue of negligent breach in these theories, has yet to be done. Fortunately, I have done that theoretical work for these theories by creating a theory of negligent breach that is compatible with several general accounts of tort law. For those that cannot simply or seamlessly incorporate my theory, I point out why my theory is preferable in the final chapter.

Overarching Theoretical Commitments in the Kantian Tradition

Kantian political theory, as a branch of normative liberal political theory, includes the writings of Immanuel Kant, Jean Jacques Rousseau, and John Rawls. I take it that one of the overarching theoretical commitments of the Kantian tradition is a commitment to

treating each individual as a person with certain fundamental interests that must be respected. I mean the words in the previous sentence to be understood in their most stripped down, jargon-free senses possible. So, the reader should take each of those words in a general way apart from any of the particular, more technical concepts that can and have been developed.

To apply this general statement to specific issues, the concepts attached to these words need development. Nevertheless, I think that, even at this general level, we can say, among other things, something significant about what the above commitment proscribes. Specifically, it proscribes any individual from depriving another individual of some aspect of that individual's personhood or fundamental interests in an unjustifiable way. I am not trying to sneak in the phrase "in an unjustifiable way." As noted above, due to the pervasiveness and inevitability of severe, accidental harm, some individuals' fundamental interests, such as their bodily integrity and lives, will be accidentally deprived or severely burdened as a result of others' acts. Such is unavoidable due to the fact that these accidents may occur while others are performing acts that are in a meaningful sense necessary to their survival. Thus, the qualification "in an unjustifiable way" signals, among other things, that these proscriptions must be sensitive to some aspects of the role that another individual may have played in causing the proscribed outcomes.

Nevertheless, even at this level of abstraction, the overarching theoretical commitments of the Kantian tradition seem to proscribe certain actions. Put from another direction, it would be impossible, or at least difficult, to justify certain acts as consistent with the overarching theoretical commitments of the Kantian tradition. For example, one

person forcing another to be a chattel slave is impossible to reconcile with a commitment to treating each as a person with certain fundamental interests that must be respected.⁸²

In contrast, the most straightforward (yet perhaps unsophisticated) form of utilitarianism seems to leave open the possibility that chattel slavery is morally justified—even if in only exceptional or bizarre situations where enslaving one or a relatively small number of individuals leads to an overwhelming abundance of utility for others. Thus, even this general sketch of the overarching theoretical commitments of the Kantian tradition contains some significant content.

This general sketch could be developed in numerous ways, yet my methodology is not to derive a theory of negligent breach step by step from first principles. Since my theory aims to be consistent with many different ways that the Kantian tradition can and has been developed, I do not deem it as necessary to reinvent the wheel by formulating, in a unique way, each step of the argument starting from the overarching theoretical commitments of the Kantian tradition until I reach my theory and its implications. Instead, my methodology is to partly piggyback off one prominent way that the Kantian tradition has been developed. Specifically, I employ Rawlsian terminology and concepts to explicate the overarching theoretical commitments of the Kantian tradition—even though these commitments can be explicated in other terms. At least for my purposes, the differences between general theorists that adhere to the Kantian tradition should not

⁸² I have in mind in the background the statement of Abraham Lincoln, “If anything is wrong, slavery is wrong,” which John Rawls often quoted. SAMUEL FREEMAN, *JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY* 326 (2009).

matter as long as in the end my theory is supported by, or at least consistent with, the best interpretation of the overarching theoretical commitments of the Kantian tradition.

A foundational element in the overarching theoretical commitments of the Kantian tradition is the concept of the free and equal person. Reasoning about what kind of society treats persons with equal concern is one method to determine the implications of these overarching commitments.⁸³ Another way to flesh out these commitments is by considering what kind of society free and equal persons would choose given limitations about what may influence (or bias) their choices.⁸⁴ The outcome of the most persuasive reasoning from the basis of free and equal persons provides the fundamental structure of the political society required by morality, based on the overarching theoretical commitments of the Kantian tradition.

In addressing what treating individuals as free and equal entails, Rawls and other philosophers use terms such as “life plan” and “conception of the good.” For ease of exposition, I treat both of these broad notions as roughly synonymous even though they differ, at least, in focus. At times, I refer to them collectively as one’s “life plan” even though in some cases aspects of one’s life plan may not be planned in the sense of consciously or critically adopted. For that reason, “conception of the good” may be better suited to my meaning. Nevertheless, “life plan” emphasizes better that a life plan is not monolithic. Rather, it is composed of numerous parts that address various aspects of

⁸³ This formulation is based on Ronald Dworkin’s writings. RONALD DWORKIN, *SOVEREIGN VIRTUE* 1 (2000).

⁸⁴ This formulation is based on John Rawls’s writings. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 14-15 (Erin Kelly ed., 2001). For my purpose, reasoning in either 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 liberal political theory.

one's life. A life plan, at least my concept of a life plan, includes one's routine of daily acts, inclinations, attitudes, dispositions, counter-factual dispositions, relationships, and settings in which one lives as well as one's values, morals, moral principles, religious beliefs, ideologies, short and long term goals, jobs/careers, life-long projects, and activities or principles that give one satisfaction on any level (herein also referred to as "life plan parts"). The collection and integration of these aspects of one's life are what I mean by a life plan.

With that clarification in mind, note that Rawls also uses a philosophical tool, the "original position," to illustrate how his two principles of justice best capture what it means to treat individuals as free and equal. Rawls's argument is intricate and has extensively been both critiqued and defended. For my purposes, I am sketching only some of its central features.

Deliberators in Rawls's original position are under the veil of ignorance, which hides from them their personal interests and circumstances and most of the features of their society.⁸⁵ The deliberators are rational maximizers of their self-interest and, as such, would choose the kind of society where each could develop their most valued capacities.⁸⁶ One of these capacities is the ability to develop, revise, and pursue her own life plan; this capacity reflects her value of being free.⁸⁷ 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

⁸⁵ *Id.* at 86-87.

⁸⁶ JOHN RAWLS, *POLITICAL LIBERALISM* 18-19 (1993).

⁸⁷ *Id.* at 30-31.

cooperation; this capacity reflects her value of being equal.⁸⁸ 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 nationality, heritage, gender, wealth, ethnicity, sexual orientation, or place in history.⁸⁹ Putting these components 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 social cooperation which do not discriminate against persons based on morally arbitrary characteristics.

Rawls concludes that the deliberators under the veil of ignorance would choose the following principles of justice to govern the basic structure of their society:

First Principle: Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;

Second Principle: Social and economic inequalities are to satisfy two conditions: They are to be attached to offices and positions open to all under conditions of fair equality of opportunity;

They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).⁹⁰

The first principle has lexical priority over the second principle in that greater social and economic goods cannot be sought by sacrificing the satisfaction of the first principle.⁹¹

Rawls's two principles of justice together require a political structure that provides each individual space to pursue her own life plan while making sure other

⁸⁸ *Id.* at 19.

⁸⁹ 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.

⁹⁰ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42-43 (Erin Kelly ed., 2001).

⁹¹ *Id.* at 46-47.

individuals are also able to pursue their life plans based on fair terms of social cooperation.⁹² In this space, individuals may not have to take into consideration, as a matter of political justice, how their actions may affect other individuals or society as a whole.⁹³ For example, an individual may 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 range of permissible life plans must be expansive enough to allow for meaningful expression of one's moral power as a free person.⁹⁴ In so doing, the political structure provides space for the diverse, irreconcilable, and competing conceptions of the good in modern societies.

Despite being free to pursue a life plan, an individual may not pursue just any life plan or conception of the good. An individual may not permissibly pursue being a serial murderer because that conduct substantially interferes with other individuals' pursuits of 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 a political structure where society or the government enforces fair social terms that govern individual actions. This choice

⁹² For one version of these elements, see Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004).

⁹³ I include "as a matter of political justice" because I mean to exclude those actions that may be required by interpersonal morality. I am focusing on the relationship between the individual *qua* a member of a coercive social structure and that coercive social structure.

⁹⁴ Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004).

reflects the person's desire to be equal.⁹⁵ To enforce such terms, the government must do such things as forming laws and institutions, regulating certain transactions between individuals, and providing public goods. In so doing, the government makes possible various life plans that individuals may pursue within that structure. In other words, the individual must comply with the fair terms of social cooperation that govern the conditions in which she and others can pursue their determinate life plans.⁹⁶ This political structure also indicates to individuals what their fair share of resources (including wealth and social power) is at any given time and allows individuals to estimate what their fair share is likely to be over their complete lives. Each individual is responsible for creating her determinate life plan based on that estimate of her fair share.⁹⁷

Putting these ideas together, the free and equal person would choose a political structure where she is free to pursue her own life plan within fair terms of social cooperation that the government creates and enforces for all. In so doing, the political structure allows diverse, irreconcilable, and competing conceptions of the good to coexist without any one of them unduly burdening another. Theorists may disagree on the exact details of these terms, but they acknowledge, as part of the overarching political commitments of the Kantian tradition, that individuals should be able to pursue their own

⁹⁵ 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. The domains of the society and the individual also include what the individual is responsible for and what society is responsible for, as indicated by the "must" in the above formulations.

⁹⁶ JOHN RAWLS, *POLITICAL LIBERALISM* 19 (1993).

⁹⁷ John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 165-169 (Amartya Sen & Bernard 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).

life plans, to some extent, within a legal system that protects the fairness of those pursuits.⁹⁸

Up to this point in this section, I have been explicating a philosophical tool in Rawlsian political theory. The tool is reasoning from what rational individuals would choose under radical uncertainty (i.e., the veil of ignorance) to ascertain the requirements of justice. This philosophical tool is not meant to and cannot be used to answer all political questions. Some political questions can only be adequately answered if the decision makers have more or complete knowledge about themselves, their societies, and their places in history. For example, it is implausible for deliberators to determine how many and what kind of public parks a town should have and where to place them if the deliberators do not know how many people reside in the town, the demographics of the population, the town's geographical characteristics, and so on. Theorists, working within the theoretical commitments of the Kantian tradition, disagree about what decisions should be made, if any, through the philosophical tools like the original position. Rawls, in particular, thinks that the original position tool is primarily useful to determine basic rights or constitutional essentials.

As stated from the outset, I am not relying on or wedded to the Rawlsian framework to justify my theory—even though I find Rawlsianisms useful to explicate the general features of the overarching theoretical commitments of the Kantian tradition. How or at what point tort theory or corrective justice should enter into a more general

⁹⁸ One can see an example of this kind of issue in the disagreement between Rawlsians and G.A. Cohen regarding to what extent individual choices about their salary or their line of work are subject to the demands of social justice. G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* Chpts. 4-5 (2008).

political theory is an issue that has garnered some discussion. In this dissertation, I remain agnostic on this issue for two reasons.

First, one of the main issues at stake is whether interpersonal moral requirements constitute the basis for tort law principles within the overarching theoretical commitments of the Kantian tradition. These interpersonal moral requirements exist quite apart from the political or social requirements of morality. Alternatively, tort law principles may be properly nestled somewhere within political morality.

In reaction, I am not yet convinced that this issue has a substantial substantive implication for the issues in this dissertation. It seems quite possible that these alternative conceptual schemes, by themselves, are two equally correct ways to describe the underlying ideas. Just like certain phenomena can be mathematically represented in terms of the mathematics of either quantum mechanics or Newtonian mechanics, neither conceptual scheme is right or wrong even though each uses different conceptual tools. So, one reason behind my agnosticism is that I am not convinced that anything related to this dissertation turns on whether we place tort theory within political theory or outside of (or prior to) it in some way. One caveat to this issue relates to the next issue, and so I discuss it below.

The second issue involves substantive implications, yet still, I remain agnostic. Some commentators think that tort law principles have to be wholly or partly subservient to distributive justice principles. Others think that these two categories of principles are largely independent or, at least, the substance of tort law principles is not determined by distributive justice principles. Some theorists seem to think that this second issue depends on or can be derived from the first issue where tort law principles correspond to

interpersonal moral requirements and distributive justice principles correspond to the political or social requirements of morality. Nevertheless, I suspect that the interrelation between these two issues is either nil or more complex than has been suggested in the literature.

Regardless, I remain agnostic because I think some kinds of accidental harm are properly handled by substantively-independent tort law principles while other kinds of accidental harm are properly handled by distributive justice principles. While I started work on this dissertation by addressing these two issues squarely, they became too unwieldy in conjunction with the issues that I retained. Thus, these issues must be partitioned off for my future work. So, I am assuming that at least some kinds of accidental harm pertain only to tort law principles, and the substance of those principles are not overridden or largely controlled by the substance of distributive justice principles.

If I were to characterize any sort of ideology in this dissertation, I would say it is anti-dogmatic within the overarching theoretical commitments of the Kantian tradition. Since I think my theory is compatible with many different tort law theories and more general theories in the Kantian tradition, I do not tie my theory to any particular formulation of the overarching theoretical commitments of the Kantian tradition. Similarly, I do not tie my theory to placing tort theory in any one fixed relation to distributive justice or at some specific place in the overarching theoretical commitments of the Kantian tradition. Put simply, I do not think the substance of my theory is altered by depending on what (theoretical) point my theory is attached to the Kantian tradition (for the reasons briefly stated above). If it turns out that the substance of tort law principles must be largely or wholly subservient to principles of distributive justice, such

could render my theory a nullity rather than merely forcing my hand to specify one theoretical point where my theory is properly attached to the Kantian tradition. Since I suspect that at least some kinds of accident harm should be handled by substantively independent tort law principles, I assume that is the case in this dissertation.

As I stated earlier, theories of tort law have neglected the justification for their accounts of breach of the negligence standard of care. To fill that void, I have sketched above some of the overarching political and moral commitments of the Kantian tradition to provide a justificatory framework for a theory of breach. The question is which theory best interprets this justificatory framework. In the next section, I examine existing theories of tort law that explicitly draw on the overarching theoretical commitments of the Kantian tradition.

Accident Law Theories within the Kantian Tradition

The theories of tort law in this section seek to capture the overarching theoretical commitments of the Kantian tradition. The first two theories that I address below are proffered by Ernest Weinrib and Arthur Ripstein. In parts of their theories that I do not address, Weinrib and Ripstein extensively and insightfully analyze many of the components of extant tort law's doctrine and institutional structure. Nevertheless, Weinrib and Ripstein barely address what constitutes breach of the negligence standard of care.⁹⁹ Surprisingly, this shortcoming has not received much attention either in regard

⁹⁹ Some theorists are an exception to this claim because they advocate for some form of social tort insurance. David H. Blankfein Tabachnick and Kevin A. Kordana, *On Belling the Cat: Rawls & Tort as Corrective Justice*, 92 VA. L. REV. 1279 (2006); Ronen Avraham and Issa Kohler Housmann, *Accident*

to their two theories in particular or more generally among theories of a similar stripe.¹⁰⁰

Weinrib and Ripstein skim over what constitutes breach of the negligence standard of care by endorsing the reasonable person standard and then adding a step or two. They merely identify one or two moral principles that each thinks constitute or embody the reasonable person standard and then make brief remarks about the case law.¹⁰¹ Recall that I associated their theories with the morality-based interpretation of the reasonable person standard in the previous chapter.

The next two theories that I address below belong to George Fletcher and Stephen Perry. Fletcher and Perry each base their theories of negligence, to a significant extent, on social practice. Recall that I associated their theories with the norms-based interpretation of the reasonable person standard in the previous chapter. Compared to the bare threads considered above, as we shall see, Fletcher's theory of negligent breach is complex and the most developed of all theories surveyed in this section. While Perry only provides us

Law for Egalitarians, 12 LEGAL THEORY 181 (2006); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David Owen ed., 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 in some manner or another.

¹⁰⁰ LOUIS KAPLOW AND STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 91-93 (2002). They are some of the most vocal critics of how rights-based theories address what constitutes breach of the negligence standard of care.

¹⁰¹ ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 147-52 (1995); 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 rights-based tort theorists are engaged in descriptive theory or normative theory. Kaplow and Shavell at 91-93.

with a glimpse of his theory, we shall see that it has the most potential of all of the theories presented in this chapter. In fact, the theory I advocate in the next chapter originated from my attempt to develop Perry's insightful characterization of negligent breach. While I ended up going a different direction than Perry himself goes, his theory and to a lesser extent Fletcher's theory are the closest competitors to my own theory.¹⁰²

In commenting on these and other tort theories in this genre, John Oberdiek has recently phrased in terms of primary and remedial obligations the issue regarding how tort theories have neglected negligent breach. He states that tort theories have only been concerned with remedial obligations that individuals incur due to the violation of "wholly unspecified antecedent primary obligations."¹⁰³ While that claim is a bit of an exaggeration, these primary obligations are the details of the negligence standard of care. In my terms, conduct that fails to meet or exceed one's primary obligations constitutes negligent breach. In that light, this section establishes that the four theories mentioned above insufficiently address the antecedent primary obligations that Oberdiek mentions, which is another way of saying that these theories neglect negligent breach.

To support his observation, Oberdiek cites Jules Coleman's much earlier statement that "while corrective justice presupposes some account of what the relevant first-order duties are, it does not pretend to provide an account of them."¹⁰⁴ Despite first appearances, Oberdiek and Coleman are addressing related but separate topics. Coleman

¹⁰² 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).

¹⁰³ John Oberdiek, *Structure and Justification in Contractualist Tort Theory*, in PHILOSOPHICAL FOUNDATION OF THE LAW OF TORTS 103, 105 (John Oberdiek ed., 2014).

¹⁰⁴ *Id.* (quoting Jules Coleman, THE PRACTICE OF PRINCIPLE 32 (2001)).

speaks of *corrective justice* in the abstract as a normative domain while Oberdiek points to existing theories of *tort law*. Corrective justice and tort law are not identical though they are related and perhaps have overlapping domains. So, we can imagine, in response to Oberdiek's point, that Coleman may well argue that the tort theories that do not provide an account of the primary social duties are not, for that reason, incomplete *as theories of corrective justice*.

Looking at Coleman's view in another way, perhaps many theories of the primary social duties are harmonious with corrective justice, but those theories do not fall within the domain of corrective justice. If that is what Coleman means, he may be right, for what it is worth. On that view, various principles justify our primary moral obligations in all of their variety. When an individual violates one or more of those obligations, corrective justice identifies one's duties of reparation, if any.

At the same time, most who espouse theories of corrective justice do so because they are interested in explaining tort law including the outcomes of specific cases. So, even if Coleman is right that the domain of corrective justice does not include the antecedent primary obligations, it is surprising that *tort theorists* do not supplement their corrective justice theories with an account of primary obligations that pertain to negligence. Since breach of the standard of care is a primary component of the prima facie tort claim, a tort law theorist without a theory of negligent breach is playing with only three-quarters of the deck.

Weinrib's Theory of Tort Law

Ernest Weinrib provides what he calls a distinctly Kantian account of tort law by arguing that tort law's characteristics reflect the moral dimensions of the Kantian commitment to liberty.¹⁰⁵ 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 harm.¹⁰⁶

Regarding breach of the standard of care, Weinrib endorses what he terms the "English and Commonwealth" approach to "reasonable care."¹⁰⁷ In contrast to the Law and Economics Approach, the English and Commonwealth approach ignores "almost completely" the burden of precaution for reducing risk.¹⁰⁸ 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, according to Weinrib.¹⁰⁹

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."¹¹⁰ 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 this threshold, "it is then for the tribunal of fact to

¹⁰⁵ 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.

¹⁰⁶ *Id.* at 63-66.

¹⁰⁷ *Id.* at 147-48.

¹⁰⁸ *Id.* at 148.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 149.

determine what a reasonable man would do by way of response to the risk.”¹¹¹ In other words, the trial judge determines whether the risky act was reasonable to take under the circumstances.

While Weinrib provides some criteria for analyzing the concept of reasonable care, he does not offer robust criteria. 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 of fact should decide whether a risky act that passed the first-stage threshold was reasonable or not. It would be odd if Weinrib thought that a judge should make such decisions without further justified criteria for guidance. At least this much is clear: his theory does not offer determinate answers to specific cases of what constitutes breach of the negligence standard of care. Instead, it appears that Weinrib, like the Restatements surveyed above, relies primarily on adjudication that culminates in judicial discretion to determine what constitutes specific instances of negligent breach.

Given that Weinrib’s insight on morally salient structural features of tort law is illuminating on numerous other issues in tort law, it is surprising that Weinrib says so little about how reasonableness should be fleshed out. In Weinrib’s theory, tort law’s structure and institutional features seem hollow without a determinate answer to, for example, whether phoning while driving or failing to fully delint one’s clothes dryer at least yearly constitutes negligent breach. Weinrib sees tort law as grounded in liberty but

¹¹¹ *Id.* (quoting *Wyong Shire Council v. Shirt*, HCA 12, 146 CLR 40, 54 ALJR 283, 27 ALR 217, 60 LGRA 106 (1980)).

does not provide much guidance about how to determine the bounds of that liberty. In other words, Weinrib's liberty-based theory cannot tell us whether I am at liberty to phone while driving without the potential of paying for others' accident costs. Back to the lint example, one of my real-life neighbor's clothes dryer exploded due to lint, blasting a sizeable hole through the home's second story floor and ceiling and its roof. The resulting fire substantially damaged the adjoining home with which they shared a wall. Even worse, the homeowners had recently canceled their homeowner's insurance policy to help pay their child's tuition. Weinrib's liberty-based theory cannot tell us whether my neighbors were at liberty to forego delinting their dryer to some extent without being vulnerable to a tort claim for the fire damage to their next-door neighbor's house.

Of course, Weinrib or an adherent could still flesh out a theory of negligent breach. I propose some possible fixes below after sketching Ripstein's theory. However, most of the theoretical work will be supplied by that addition rather than the theoretical resources contained so far in Weinrib's rather thin account of negligent breach. Even more important, the issue of negligent breach is so centrally important that to instantiate the best theory, we may want to alter some of the structural features that Weinrib deems so important. Here is one instance of the methodological differences between myself and Weinrib. In my view, normative theory trumps existing structure while Weinrib seems to hang his hat primarily on case law and tort law's existing institutional and theoretical structure.

I flag this methodological difference without saying much more or attempting to argue extensively for my method. Instead, my method seems helpful because Weinrib's theory only gets us so far. Weinrib's theory contains gaps that adjudication must fill in

order to resolve tort disputes. Since the judge's discretion fills in these gaps, Weinrib's theory leaves open the possibility for both kinds of potential injustice. To mitigate the potential for injustice, we need further normative criteria that cannot simply be found in tort law's existing case law or structure.

Ripstein's Theory Based on Freedom and Security

Arthur Ripstein advances a theory of responsibility for accident costs within the overarching theoretical commitments of the Kantian tradition.¹¹² He seems to be focusing exclusively on explaining and justifying tort law as found in its extant institutional setting.¹¹³ For my purposes, I focus only on the part of his theory concerning what constitutes breach of the negligence standard of care. 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."¹¹⁴

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"¹¹⁵ 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

¹¹² ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW 12 (1998). Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. OF TORT LAW 1, 7 (2007).

¹¹³ I conclude this from Ripstein's detailed description of tort doctrine without him questioning many of its parts. ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW 48-58 (1998).

¹¹⁴ *Id.* at 56.

¹¹⁵ *Id.* at 57.

of these concepts, seeming to leave such decisions to judges and juries without further guidance.¹¹⁶

While Ripstein's theory addresses the value of being free, it is unclear whether Ripstein's theory even attempts to satisfy the Kantian value of being equal. It cannot merely be that the same rules apply to all people because all plausible theories of breach of the standard of care have that quality. Once Ripstein has added the specificity that his theory lacks, he would have to defend why his theory satisfies the Kantian value of equality.

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."¹¹⁷ However, Ripstein does not provide us that conception. Of course, he could yet supply such as theory, but it is not clear how merely reasoning about the importance of liberty, security, and autonomy, without further guidance, will provide enough detail to make the highly specific decisions about whether acts, which Ripstein himself describes as "activities in contexts," are reasonable.¹¹⁸ Later, Ripstein does point out that customary risks will often coincide with appropriate risks and undue risks.¹¹⁹ However, he does not flesh out the importance of this coincidence or how to determine cases where customary risks do not coincide with appropriate risks.

As a result, Ripstein's theory does not go far enough in addressing what constitutes breach of the negligence standard of care. Ripstein does not provide sufficient

¹¹⁶ *Id.* at 56.

¹¹⁷ *Id.* at 55.

¹¹⁸ *Id.* at 51

¹¹⁹ *Id.* at 71.

criteria to determine how the interests of security and liberty are to be justifiably weighed. Thus, Ripstein's concepts of liberty, security, and autonomy leave so much discretion that parties to a lawsuit could receive disparate treatment and one of the society's diverse, irreconcilable, and competing conceptions of the good could be privileged *ab initio*.

Possible Additions to Weinrib's and Ripstein's Theories

On behalf of Weinrib and Ripstein, we could try to flesh out the fundamental values they point to regarding negligent breach so that the potential injustices may be mitigated. For example, on Ripstein's behalf, we could show how to trade off the interests of security and liberty by appealing to moral intuition. Since Ripstein intends his theory to apply to existing tort adjudication, by "moral intuition" I mean what the dutiful juror or a well-intentioned judge may draw on to determine what the reasonably prudent person would have done in the defendant's circumstances. This kind of appeal to moral intuition seems to be, at least in part, what Weinrib has in mind when a judge doing the two-step analysis of the English and Commonwealth Approach. So, I propose this kind of moral intuition because such is available to, and likely already used by, existing institutional actors in adjudication.

In response, fleshing out Weinrib's and Ripstein's theories with this kind of moral intuition is unsatisfying because it does not solve the problem of when moral intuitions conflict within an individual and between individuals. This aspect alone sets the stage for the potential injustices. Moral intuition is also problematic because it seems to reify the status quo's view of risks under the auspices of objective moral truth. Thus, one of the

diverse, irreconcilable, and competing conceptions of the good could be privileged *ab initio* because it has been “around for a while” or it is the conception of the good held by many of the society’s elites.

If Weinrib’s and Ripstein’s theories were fleshed out by actual deliberative procedures, their theories would gain the specificity needed. However, Weinrib’s and Ripstein’s identification of liberty and/or security does not seem to add much to a theory that uses actual deliberative procedures. Actual deliberators may be motivated by more values or evaluative ideas than liberty and/or security such as the value of efficiency or religious ideas about how one should treat one’s neighbor.

If Weinrib’s and Ripstein’s theories were fleshed out by ideal deliberative procedures, such is difficult to evaluate without a concrete theory before us. Suppose that Weinrib or Ripstein use a contractualist deliberative procedure, akin to Rawls’s original position, where some sort of ideal observer knows the relevant facts and decides what liberty and/or security would require for each instance of alleged negligent breach.¹²⁰

¹²⁰ In a dated discussion of a (now-disfavored) version of the Law and Economics Approach, Ronald Dworkin does just that, employing Rawls’s original position with the full veil of ignorance. Ronald Dworkin, *Why Efficiency? - A Response to Professors Calabresi and Posner*, 8 Hofstra L. Rev. 563, 585-90 (1980). Dworkin’s focus is on whether the deliberators would choose “wealth maximization” theory, a largely abandoned theory where the balancing test factors measure the monetary costs of precaution and the potential harm. Per Dworkin, Rawlsian deliberators would not adopt a wealth maximization theory of negligence because an individual could be devastatingly harmed in an accident where no one was negligent. If that individual is uninsured, he would be financially ruined from the accident costs without any legal entitlement to compensation, making him essentially the worst off. According to Dworkin, that possibility is too severe for deliberators in the original position to endorse a principle that could easily lead to that outcome.

If Dworkin is correct, then it is not clear why Dworkin does not think that deliberators would only endorse a social tort insurance approach to accidents in lieu of the negligence-based two-party civil law system. Any negligence-based system, including Weinrib’s and Ripstein’s theories, allows for the possibility of extreme loss without any right to compensation. So, any ideal procedure first has to overcome the hurdle of justifying a negligence-based two-party civil law system as compared to the radically different social tort insurance system.

One problem with the ideal observer solution presents immediately. It is not clear that an ideal observer, in any defensible procedure, would have enough information to choose among competing negligence-based theories for assigning accident costs. In general, broad values such as liberty, security, and equality do not obviously lead to any particular conclusions about the permissibility of concrete risks. An ideal deliberative procedure seems unable to provide enough detail without a substantial addition of content to the theory. So, even if Weinrib's and Ripstein's theories added an ideal deliberative procedure, most of the theoretical work on the issue of negligent breach will be supplied by that addition rather than the theoretical resources contained so far in their theories.

Fortunately, I think Weinrib and Ripstein could wholly adopt my theory of negligent breach without any major alterations to their theoretical bases or primary conclusions. My theory tries to interpret best the liberty, security, equality as they figure

One thing is clear. Rawlsian deliberators do not have to reject all negligence-based two-party theories for the reason Dworkin offers. Dworkin's line of reasoning considers accident law in a vacuum without other institutions that assist individuals from falling below the position of the worst-off group whether due to accident or other causes such as a failed entrepreneurial endeavor. So, it is not obvious that deliberators need to take extreme loss from accidents into consideration. There are many ways that one could become devastatingly poor apart from the scenario Dworkin describes. A person could be financially ruined from (1) a negligent accident where the devastatingly harmed, uninsured individual is a negligent actor and also one of the harmed; (2) a negligent accident where the devastatingly harmed, uninsured individual is not negligent, and the negligent party was uninsured and otherwise unable to compensate; and (3) an accident where the party required to pay compensation (whether determined through negligence or strict liability) is under-insured and financially ruined from having to compensate the harmed. Furthermore, disease, natural disasters, failed economic enterprises, failed investments, theft or other crime, lightning, and so on might cause an individual to be devastatingly poor. Social tort insurance seems to be the only suitable solution to guarantee that no one would fall below the worst off in society due to accident costs. In fact, in Dworkin's later work he employs a hypothetical insurance argument (comparable to the arguments for social tort insurance in interesting ways) to address situations where individuals would otherwise become devastatingly poor.

For a debate on this aspect of wealth maximization theory, see Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. OF LEGAL STUD. 103 (1979); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. OF LEGAL STUD. 191 (1980); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Guido Calabresi, *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980); Ronald M. Dworkin, *Why Efficiency? - A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980).

into the overarching theoretical commitments of the Kantian tradition. At the same time, my theory can resolve particular disputes as to negligent breach, the account of which is in the final chapter.

Fletcher's Reciprocal Risk Theory

Working within the overarching theoretical commitments of the Kantian tradition, George Fletcher provides, prior to this dissertation, the most developed theory of negligent breach from that tradition. For that reason and because one part of his theory bears some resemblance to my theory, I address it extensively. With Kantian and Rawlsian flavors, Fletcher starts by claiming that each person should receive the maximum amount of accident security compatible with the same amount of accident security for everyone else.¹²¹ In this claim, Fletcher is trying to follow John Rawls's emphasis on reciprocity.¹²² 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 (i.e., mutual risk imposition is asymmetrical), then person X owes compensation to person Y if harm results from that interaction. Monetary compensation makes up for a person's loss of security when he is harmed thereby restoring him to an equal amount of security as everyone else. Fletcher's theory harmonizes the rationales for negligence and strict liability. Both are instances where one party imposes more risk than

¹²¹ George Fletcher, *Fairness and Utility in the Law of Torts*, 85 HARV. L. REV. 537 (1972).

¹²² Fletcher at 550. Fletcher does not phrase his theory using terms such as "Kantian political theory," but that is where his theory is best placed based on his reliance on John Rawls's work.

the other party imposes. Fletcher thinks that according each individual reciprocal security (and risk) in this manner treats individuals as free and equal.

Reciprocal risk theory embodies a tension.¹²³ 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.¹²⁴ I call this "component A."

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 what constitutes breach of the negligence standard of care when two people are engaged in the same kind of act.¹²⁵ 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."¹²⁶ 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."¹²⁷ From Fletcher's text, component A seems to have no limit to the scope of kinds of activities to which it applies. Thus, component A can explain pockets of strict liability if one individual is engaged in a

¹²³ Stephen Perry identifies this tension as well in a piece on his theory of outcome responsibility. Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 117-18 (Gerald Postema ed., 2001).

¹²⁴ *Id.* at 548.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 547-48.

drastically riskier act as well as negligence where individuals are engaged in the same act.¹²⁸

“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.¹²⁹ Background risks are all of the risks that accompany daily social life.¹³⁰ Since everyone creates background risks, Fletcher thinks that “all members of the community contribute in roughly equal shares.”¹³¹ 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.¹³² Background risks are the risks that individuals must bear without compensation “as part of group living.”¹³³

Fletcher provides an example, “If we all drive, we must suffer the costs of ordinary driving.”¹³⁴ Extrapolating from that example, 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. Component B considers them as having the same level

¹²⁸ *Id.* at 549.

¹²⁹ *Id.* at 548-49.

¹³⁰ *Id.* at 547-48.

¹³¹ *Id.* at 547.

¹³² *Id.*

¹³³ *Id.* at 543.

¹³⁴ *Id.*

of risk for the purpose of assigning accident costs even if, in a particular real accident, one background risk was riskier than the other. So, in Fletcher's theory, the actual risk of an act is disregarded when the act is part of the society's background risks.

I contend that component A of reciprocal risk theory is in tension with component B. Component A determines breach of the standard of care based on the actual risk imposed by the acts. In contrast, component B ignores the actual risks of the acts and instead determines breach 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 for breach of the standard of care. As a result, the components of reciprocal risk theory may determine breach differently for the same case.¹³⁵

For example, suppose a person engaged in ordinary driving gets into an accident with a person engaged in ordinary walking. 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 determine what constitutes breach of the negligence standard of care 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

¹³⁵ See Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72, 115 (Gerald Postema ed., 2001), where Perry identifies this problem in Fletcher and proposes a solution.

generating nonreciprocal risks.”¹³⁶ 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.¹³⁷

So, component A is all that Fletcher seems to advocate. Since all nonreciprocal risks impose an uncommon amount of risk, they are in that sense non-background risks. If so, the two components I identify collapse into component A.

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 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. Ordinary driving imposes a greater risk than ordinary walking indicating that component A would determine that the ordinary driver should compensate the ordinary walker if harmed by the driver. 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

¹³⁶ Fletcher at 547.

¹³⁷ *Id.*

component A. So, reciprocal risk theory requires two conflicting determinations of breach 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.”¹³⁸ Fletcher thinks that these cases do not pose a significant problem because they are at the “fringes” of reciprocal risk theory.¹³⁹

In response, 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 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.

¹³⁸ *Id.* at 549.

¹³⁹ *Id.*

Furthermore, there are cases where uncommon acts are not riskier than common acts. Suppose a person who is juggling gets into an accident with an ordinary bicyclist. While juggling is an uncommon act, it does not seem more harmful to other people than bicycling or many other common acts. In such a case, we see again the tension in reciprocal risk theory. Component A would determine no liability based on the similarity of risks to others between juggling and ordinary bicycling. However, since juggling is uncommon, it is not a background risk. Component B requires that the juggler compensate the ordinary bicyclist. The way to explain these diverging determinations of breach is by acknowledging the two components of reciprocal risk theory.

One possible 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, 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. Component A has no intrinsic limit to the scope of activities to which it applies.

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. The lifelong approach is appealing because Rawls is concerned with how

individuals fare over their complete lives.¹⁴⁰ Recall that Fletcher concludes that each person is to be guaranteed equal amounts of accident security from Rawlsian premises.¹⁴¹

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.¹⁴² 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.¹⁴³ 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.

The first problem with this idea is that we do not have any reason to treat an accident as one where we should take the lifelong view versus the immediate view. Thus, the two components would still determine breach differently in some cases. Another 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 the life-long version of component B).¹⁴⁴ If compensation makes up for a loss of accident security, we would expect all individuals, who engaged in one kind of risky act, to compensate a person

¹⁴⁰ JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* §16: 55 (Erin Kelly ed., 2001).

¹⁴¹ Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 118 (Gerald Postema ed., 2001).

¹⁴² Fletcher at 547-48; 572.

¹⁴³ *Id.* at 547.

¹⁴⁴ *Id.*

harmful by that kind of act, or something similar. In contrast, in accident law, only the one individual whose risky act happened to harm the person is vulnerable to a claim of compensation.¹⁴⁵ Fletcher's rationale, which seeks to distribute accident security equally, would be better suited to some kind of social tort insurance where the cost of compensating for harm is distributed among all individuals who diminish others' accident security.¹⁴⁶ 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 compensate another individual for harm.

The final problem stems from the fact that component B does not guarantee that each individual will be exposed to even roughly the same amount of accident 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 accident 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 cutting off that person's chance to impose risks on others to counterbalance the risk to which he was subjected to while alive.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Component B merely gives each person the formal or legal freedom to do the same acts without being assigned others' accident costs. Component B does not guarantee that everyone will be subjected to and be able to subject others to roughly the same amount of accident 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.

At most, component B provides "legal reciprocity" in that everyone is subject to the same legal rules. However, any plausible theory of what constitutes breach of the negligence standard of care will have legal reciprocity as long as breach is based on the acts performed. To that extent, component B of reciprocal risk theory cannot claim to embody any unique form of reciprocity compared to any other theory of breach.

Perhaps Fletcher does not think of the reciprocity in component B as legal reciprocity. Rather, he might think 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 think that these risks are acceptable in that society. While this

interpretation is appealing, I see minimal textual basis in Fletcher's work that hints in this direction.

Furthermore, a plausible conception of reciprocity based on an accepted 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 such a regime of risks not really "accepted," but also reciprocity seems nowhere to be found. Since Fletcher does not place moral constraints on the way that background risks are determined in a society, interpreting his form of reciprocity as accepted risks is not that plausible.

Even if Fletcher goes this direction with component B, the tension still exists between component A and component B. The new interpretation of component B rests on a society's acceptance of a certain regime of risks. Component A does not appeal to any sense of acceptance since it only looks at whether individuals actually impose the same risks on each other. Since a society can think that unequal risk impositions of certain kinds should be free from liability, the tension between the accepted-risk version of component B 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 be advocating primarily for the sense of reciprocity imbued in component A, I conclude that Fletcher would excise component B from his reciprocal risk theory.

Unfortunately, component A by itself is not an appealing theory of what constitutes breach of the negligence standard of care. 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. Determining whether walking while texting is riskier than playing Frisbee is difficult at best and impossible at worst.

A bigger problem is that determining breach of the standard of care based on component A alone introduces uncertainty. Whether one person is acting safely enough to avoid being vulnerable to a compensation claim depends on what the other person who happens to be harmed is doing. Such a moving target as a standard of care would make planning appropriately difficult. Consequently, individuals may excessively restrict their pursuits or over insure against liability. Thus, component A alone does not seem to be a good interpretation of what it means to treat a person as free according to the overarching theoretical commitments of the Kantian tradition.

Component A alone would also favor individuals who prefer acts with low risk. Individuals with low-risk preferences could shift the costs of some of their accidents to persons with high-risk preferences. Such an advantage for individuals with low-risk preferences does not treat persons as equal, according to the overarching theoretical commitments of the Kantian tradition.

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 the overarching theoretical commitments of the Kantian tradition. Reciprocal risk theory does not provide us with an adequate theory of negligent breach.

Perry's Accepted Pattern of Social Interaction Theory

In critiquing Fletcher's theory, Stephen Perry briefly suggests his own theory of what constitutes breach of the negligence standard of care. He writes that "the materialization of a risk that is normally incident to an accepted pattern of social interaction will not give rise to liability."¹⁴⁷ Unfortunately, Perry does not flesh out what he means by an "accepted pattern of social interaction." Since Perry words on this specific topic are few, much of what follows is my attempt to flesh out his theory. Nevertheless, since my theory was inspired by thinking about Perry's thoughts and their relation to Fletcher's theory, I devote much ink toward teasing out the possible forms that Perry's theory could take. In that light, the reader should not take my account as authoritative, but rather as just one charitable reading of the few sentences that Perry devotes to the topic. In fact, my critique of my interpretation of Perry's brief remarks contains some of the reasons why my theory took its ultimate shape. Hopefully, Perry will advance a full account of his thoughts on this topic, and only then will a more precise comparison with my theory be possible.

By the key statement quoted in the last paragraph, I take Perry to mean that if an individual's act accidentally harms another individual, the former has not breached the standard of care as long as the former's act is part of an accepted pattern of social interaction. Depending on how Perry fleshes out his theory, this theory may in fact

¹⁴⁷ Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 119 (Gerald Postema ed., 2001).

accurately describe much of accident law's doctrine.¹⁴⁸ Regardless, Perry seems to suggest that he is also advancing a normative theory.¹⁴⁹ Even so, he does not offer a justification for his theory. Perry is not relying on Fletcher's principle of equal accident security because Perry criticizes that use of a principle of social distributive justice to establish a right between only two parties to an accident.¹⁵⁰ Given that Perry suggests his theory as a possible amendment to Fletcher's theory, it is safe to assume that Perry would justify his theory based on the overarching theoretical commitments of the Kantian tradition. I will consider two possible justifications below.

Before then, I identify some possible problems internal to my understanding of Perry's theory. Perry's theory has one of the problems that I identified above while addressing Fletcher's theory: an accepted pattern of social interaction may not be justifiable to determine breach of the standard of care because of the way the pattern became accepted. For example, if a society accepted an aspect of a pattern of interaction due to fraud, then the pattern was not legitimately accepted and is not a justifiable basis for determining breach. Reading Perry charitably, we can assume that he too would invalidate aspects of a social pattern that were the result of fraud.

Another problem with Perry's theory 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

¹⁴⁸ 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.

¹⁴⁹ Perry speaks of "moral warrant" and the "proper context" for assigning accident costs. *Id.* at 115.

¹⁵⁰ *Id.* at 118.

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.¹⁵¹ 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. Similarly, Perry may also accept, as a friendly amendment, that the accepted pattern must not violate constitutional rights.

Aside from these amendments, potential problems lurk for Perry's theory depending on how he fleshes the theory out. Perry requires the social interaction to be both accepted in some sense and a pattern in some sense. Both of these attributes pose difficulties. First, Perry must not 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 do not consciously and deliberately consider whether to

¹⁵¹ *The Help*, DreamWorks (2011).

accept risky acts. At least, Perry must require that many 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 also lurk depending on what Perry means by "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 on whether such constitutes breach of the standard of care.

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. Since no one deviated 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 in this hypothetical scenario 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 then. Many of the concerns I have raised against Perry's theory need to be answered by the theory that I will defend in the next chapter. Wrestling with such concerns has shaped the contours of my theory. Even if Perry can persuasively satisfy these concerns, Perry still lacks a detailed justification for his theory. Why should the accepted pattern of social interaction determine what constitutes breach of the negligence standard of care?

As mentioned earlier, Perry may be committed to a rights-based justification, based on the overarching theoretical commitments of the Kantian tradition, 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.¹⁵² 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,

¹⁵² Perry suggested, in conversation, this point as a possible justification for his view without endorsing the justification.

someone (a deviator) who deviates from that pattern wrongs another individual who is harmed by the deviating act. This assumes that the harmed individual was conforming in relevant ways 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.¹⁵³ 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 determining breach of the standard of care, 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 her reliance on the accepted pattern delegitimizes deviation. Without a more robust theory, the reliance theorist does not seem to have a persuasive response.

¹⁵³ One version of this idea is equitable estoppel, which is “a rule that if one person has induced another to take a certain course of action in reliance upon the representations or promises of the former, the former person will not be permitted to subsequently deny the truth of the representations, or revoke such promises, upon which such action has been taken.” The Law Dictionary, *Equitable Estoppel* (2016), <https://advance.lexis.com/document/?pdmfid=1000516&crd=a8a569c0-901c-403b-ab8c-9e506c09aa23&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A497P-N6B0-01PT-32NM-00000-00&pddocid=urn%3AcontentItem%3A497P-N6B0-01PT-32NM-0000000&pdcontentcomponentid=264010&pdteaserkey=sr3&ecomp=7nLhk&earg=sr3&prid=57139a69-65fd-421d-9992-c3e2d8083086>.

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 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 justification, from within the overarching theoretical commitments of the Kantian tradition, 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 plausibly treats individuals as free and equal. However, I do not think that it is the best interpretation of the overarching theoretical commitments of the Kantian tradition. The accepted pattern of social interaction could encompass a wide swath 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 more.

Another shortcoming for Perry's theory is that it does not explain how those who do not accept the "accepted pattern" are treated as equals. Let's call them "dissenters." 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 interests of those that accept the accepted pattern of social interaction ("accepters"). 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 adequately treat persons as equal as required by the overarching theoretical commitments of the Kantian tradition. It is true that Perry's theory treats everyone as equals in that the same standard of care is applied to everyone in the same way. However, as I pointed out earlier, every plausible theory of what constitutes breach of the standard of care has this virtue.

Summary

As evident from above, the above theories of accident law insufficiently address what constitutes breach of the standard of care especially when it comes to justification. They do not provide the theoretical tools to justify determine decisions for all instances of accidental harm. Like the theories in the Restatement (Second) and Restatement (Third), rights-based theories seem content to let the jury determine breach with excessive discretion that leaves open the possibility of the two kinds of potential injustice. In the next section, I examine theories that address directly what constitutes breach of the standard of care and look closely at jury adjudication as a mechanism to make determinate decisions regarding breach in all possible cases.

Jury Adjudication Theories of Negligence

As demonstrated in the previous section, many rights-based theories inadequately address what constitutes breach of the standard of care. In contrast, the sole purpose of my democratic standard theory is to provide a moral justification for the issue that most other theories barely address, namely, what properly constitutes breach of the negligence standard of care in accident law. Put roughly:

Democratic standard theory claims that breach of the negligence standard of care should be determined based on the values of the individuals locally affected by the kind of act in question.

While I explicate my theory in the next chapter, in this chapter I address theories that center directly on the standard of care and its relation to social norms or something

similar. Although I discovered the following theories after creating democratic standard theory, critiquing these theories has helped me make more precise the contribution that democratic standard theory offers.

Another interesting aspect of the upcoming theories is that they analyze jury adjudication as an institutional mechanism for addressing what constitutes breach of the standard of care. Recall most of the theories that I address earlier seem content to let the jury make determinate decisions about breach with little theoretical guidance about what the reasonable person would do. Employing the jury to address breach might be justifiable. At the same time, in England and elsewhere, only judges make specific applications of the reasonable person standard in tort cases. The theories considered above provide virtually no justification for why one or either of these institutional mechanisms (with or without theoretical guidance) should determine breach of the standard of care. The upcoming theories address that issue head on.

Wells's Process Theory of Jury Adjudication in Tort Law

Catharine Wells states that her pragmatic theory of torts is based on the idea that tort law “enforces community standards of financial responsibility and just compensation.”¹⁵⁴ Wells contends that “[c]orrective justice only justifies the tort system if the results that the system produces can themselves be defended as just outcomes.”¹⁵⁵ She criticizes “rule-based” approaches, which include the tort theories addressed in this

¹⁵⁴ Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2360-62 (1990).

¹⁵⁵ *Id.* at 2364.

chapter, because they are unable to determine or justify a uniquely correct outcome.¹⁵⁶ Wells's critique captures the shortcoming that I refer to above when I state a theory is incomplete. Wells extrapolates that no rule-based theory can achieve that level of completeness because such theories rely on "increasingly abstract statements of law and correspondingly abstract accounts of justification" within moral and political theory.¹⁵⁷ Given that futility, Wells develops what she calls a "pragmatic" justification for tort law. Specific outcomes are justified, she believes, if the outcomes result from a justified process. Wells argues that the jury system, as generally practiced in the United States, has multiple features that support its ability to ascertain the community standards relevant to the tort dispute despite the inescapable subjectivity of each juror.¹⁵⁸ She concludes that "jury adjudication is an essential element of reaching a fair resolution of corrective justice disputes."¹⁵⁹ For Wells, the process of jury adjudication justifies the specific outcome of a negligence tort dispute.¹⁶⁰

Unlike Wells, I am not wedded to the jury system as the best vehicle to ascertain group values even though I am open to that possibility for the jury system or a modified version of it. What is interesting is that Wells assumes what I take to be primarily in need of justification, namely, that community standards should provide the content to the standard of care. Without explanation, Wells speaks of the "requirement that tort law

¹⁵⁶ *Id.* at 2374-76.

¹⁵⁷ *Id.* at 2376.

¹⁵⁸ *Id.* at 2411.

¹⁵⁹ *Id.* at 2411.

¹⁶⁰ *Id.* passim.

reflect community norms.”¹⁶¹ It is not clear whether for Wells that requirement is moral, legal, or factual in some sense.

Importantly, that “tort law reflect community norms” is not explicitly a legal doctrine. No legal doctrine states that a jury must use community norms to reach its verdict. Nothing forbids a jury from having a religious or an idiosyncratic concept of what the reasonably prudent person would have done in the defendant’s circumstances. Instead of being a requirement, it is plausible that, as a descriptive matter, many juries rely on community norms in reaching a verdict, especially given the reasonable person jury instructions and the institutional set up of jury adjudication. It is so plausible that, on my view, the writers of the Restatement (Second) imputed that interpretation into its account of negligence legal doctrine, as I suggested in the previous chapter. While it is plausible that juries often apply community standards given the nature of the reasonable person standard and the lack of more specific guidance, such is not guaranteed especially given the reportedly haphazard aspects of jury deliberation. Furthermore, the jury’s use of community norms is dubitable enough that the writers of the Restatement (Third) substantially downplay that aspect in their rendition of negligence legal doctrine.

Due largely to Wells’s methodology, her theory may not be able to evaluate whether social norms properly constitute the standard of care. Her methodology holds that “existing practices are the beginning of a normative inquiry.”¹⁶² I take it that this emphasis on existing practices, rather than theory or first principles, is why Wells refers

¹⁶¹ *Id.* at 2361.

¹⁶² *Id.* at 2361-62.

to her theory as “pragmatic.” She claims that her pragmatic theory contains a normative component with which one may criticize existing practices.¹⁶³ I am not rejecting that possibility. At the same time, evaluating whether the standard of care should be based on community standards or something entirely different seems too far beyond Wells’s pragmatic normative reach. It is too far because Wells takes enforcing community standards to be a fundamental requirement of existing tort law practices. Given the justificatory floor that Wells celebrates,¹⁶⁴ her theory does not help much when deciding between the current United States tort system and alternatives such as social tort insurance ala New Zealand or the law and economics approach to negligence, especially in its more revisionary versions.

Put in terms of Wells’s analogy, Wells states that the pragmatic study of bridge building allows the pragmatic theorist to critically evaluate the various ways of bridge building as better or worse.¹⁶⁵ However, such a theory does not tell us where a bridge should be built. Similarly, Wells’s theory does not examine in alternative social systems of assigning accident costs. Thus, the scope of her theory does not allow her to criticize or justify central components of the negligence system such as the proper source of the content of the negligence standard of care.

While Wells states that social norms are the currency of the standard of care, upon further investigation, that claim appears qualified. Wells explicitly disavows normative foundationalism. However, Wells situates her theory in Humean moral sentiment.¹⁶⁶ Felt

¹⁶³ *Id.* at 2362.

¹⁶⁴ *Id.* at 2363.

¹⁶⁵ *Id.* at 2362-63.

¹⁶⁶ *Id.* at 2396-99.

moral sentiment comprises moral intuitions, according to Wells, and these sentiments are allegedly synchronous across individuals. The variations among individuals' moral reactions are superficial and can be controlled for via dispassion, reason, and reflection.¹⁶⁷ Wells thinks that several of the structural features of jury adjudication filter out the variations among the moral intuitions of the jurors allowing them to obtain local objectivity on the issue of whether the defendant breached the standard of care.¹⁶⁸

Put differently, Well's theory, at first, seems to take community standards and jury adjudication as its fundamental justificatory basis. Later, we learn that community standards and jury adjudication have a lineage based in human sentiment, which seems like a normative foundation, a form of naturalism perhaps. In this light, a jury might produce a wrong verdict if it fails to filter out bias and other distortions of synchronous moral sentiment. Even if the jury's verdict accurately reflects synchronous moral sentiment, its justifiability stems from that basis rather than the process of jury adjudication. If so, then the process of jury adjudication is an epistemic tool rather than the justificatory basis that Wells envisages in her theory.

In comparison, democratic standard theory makes no similar claim regarding the values of a group. The values of the group do not provide the basis because these values tap into some widely felt underlying moral sentiment. The values of the group provide the basis of the standard of care in democratic standard theory because those are the values of the people locally affected by the relevant actions.

¹⁶⁷ *Id.* at 2397-2400.

¹⁶⁸ *Id.* at 2402-10.

Polemically speaking, Wells's endorsement of community standards and the jury's ability to ascertain them point us toward democratic standard theory. Wells says, "The requirement that tort law reflect community norms has a certain amount of appeal in a democratic system."¹⁶⁹ However, she does not extend that thought to a claim that principles of democracy justify individual tort outcomes. The fact that Wells does not even explore that possibility is odd especially since she seeks a process-based justification of tort decisions and democracy is often characterized as a process that justifies its result. Even though democratic standard theory does not focus on a process-based justification, it leverages the appeal of democracy as a basis for what constitutes the negligence standard of care.

Feldman's Virtue Theory of Tort Law

Heidi Li Feldman presents a theory of tort liability that bases the standard of care on certain virtues, namely, reasonableness, prudence, and due care (a sub-virtue of benevolence).¹⁷⁰ Feldman takes these virtues directly from common pattern jury instructions. She claims that instead of a Kantian or utilitarian reductionist account of reasonableness, the virtue ethics tradition shows how reasonableness, prudence, and due care as applied by a lay jury justify jury verdicts in negligence cases. According to Feldman, virtue ethics seeks "to identify both what counts as a life of high quality or worth and the character traits it takes to achieve one."¹⁷¹ Feldman believes that virtue

¹⁶⁹ *Id.* at 2361.

¹⁷⁰ Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1432, 1439-40 (2000).

¹⁷¹ *Id.* at 1436.

ethics differs in kind from Kantian ethics where moral rightness is based on autonomy and freedom. For Feldman, Kantian ethics excludes from the domain of morality the role that “the satisfaction of human needs, wants, and desires” plays in human flourishing, which is the “ideal central to virtue ethics.”¹⁷²

To promote human flourishing in general and virtues such as prudence and due care in particular, we need to identify specific acts that do so. Feldman claims that humans “naturally have the capacity to see what these traits ask of us.”¹⁷³ Feldman explains:

We can take up the perspective of a virtuous person to see how she would conduct herself in a particular situation. The more naturally certain virtues come to us, the more easily we can inhabit the perspective they define.¹⁷⁴

Feldman describes the jury’s deliberation as jurors performing this process to determine if the defendant had acted in accordance with reasonableness, prudence, and due care.¹⁷⁵ In this way, the jury operationalizes how the abstract virtues apply to the acts in question in a tort dispute.

While Feldman’s interesting application of virtue ethics is fairly straightforward, her explanation of how virtue ethics justifies tort law is harder to pin down. At first, her theory bears a resemblance to Wells’s theory in their mutual reliance on jury adjudication to produce determinate, morally justified verdicts. While Wells’s finds justification in the process itself, Feldman seems to rely on the process to discover what the virtues independently demarcate as ethical behavior. Presumably, even if the jury sincerely goes

¹⁷² *Id.* at 1436-38.

¹⁷³ *Id.* at 1436.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1446-50.

through the process Feldman envisions, the jury can still incorrectly identify what constitutes ethical behavior according to the relevant virtues. In contrast, for Wells, proper jury adjudication makes the jury's verdict a just outcome (even though I try to cast doubt on this aspect).

The jury's central role for Wells is that the jury properly situated has access to the community norms that should govern the resolution of the tort dispute. For Feldman, the jury's prominence is more complicated and yet has an interesting similarity. It seems possible, under Feldman's theory, that a judge (or any other person) can operationalize the pertinent virtues to resolve a tort dispute. Given that possibility, why not employ, in lieu of a jury, a person that substantially embodies reasonableness, prudence, and due care to resolve all tort disputes? More fundamentally, why should the virtues of reasonableness, prudence, and due care govern the assignment of accident costs? Economic efficiency is at least a contender as an alternative criterion and has quite a large academic and appellate court following.

Feldman has thoughts on the latter issue scattered throughout her article. One answer she advances is that reasonableness, prudence, and due care are the terms used in pattern jury instructions for negligence, and she believes that fact is unlikely to change. In the decade and a half since her article, pattern jury instructions have not deviated from the use of the terms of reasonableness, prudence, and due care (or similar). Nevertheless, with the Restatement (Third) and a growing number of appellate case law favoring a balancing test understanding of negligence,¹⁷⁶ pattern jury instructions are not as

¹⁷⁶ Restatement (Third) of Torts: Liability for Physical and Emotional Harm §3, Comment e, 31 (2010).

insulated from change as they previously were. Regardless, Feldman motivates her application of virtue ethics to the standard of care by repeatedly pointing out how it descriptively fits with extant trial court practices, specifically, negligence pattern jury instructions and jury adjudication.¹⁷⁷ That emphasis gives the reader the impression at times that Feldman's theory is largely descriptive or that its normative base rests merely on tort law's existing practices.

In other places, Feldman indicates that her theory has normative implications. She explicates virtue ethics and goes to considerable lengths to differentiate virtue ethics from Kantian ethics and utilitarian ethics.¹⁷⁸ In that account, Feldman paints virtue ethics to be the superior form of ethics. Yet, she does not mount anything close to a thorough, systematic defense of virtue ethics. I am not insisting that Feldman drill down to first principles merely because she appeals to virtue ethics. Instead, her lack of citing or gesturing toward such a defense is noticeably absent because she critiques the first principles of the utilitarian and Kantian traditions. So, it comes across as if she is asking the reader to reject those traditions due to flawed first principles and endorse virtue ethics on faith.

When Feldman tries to ground the normativity of virtue ethics as applied to negligence, she seems to go in a different direction. Such is evident after Feldman introduces her characterization of jury deliberations as jurors performing thought experiments. Jurors supposedly imagine what a person with reasonableness, prudence,

¹⁷⁷ Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1431-35 (2000).

¹⁷⁸ *Id.* at 1435-39.

and due care would have done in the defendant's circumstances. Feldman writes, "The results of the thought experiments juries perform in civil negligence actions are guideposts to the balance [between security and liberty that] the citizenry endorses."¹⁷⁹ With the introduction of this new facet, one wonders whether having the jury apply reasonableness, prudence, and due care is actually a mechanism that gets the jury to ascertain how the citizenry balances the values of security and freedom.

Immediately following the previous quote, Feldman states, "In a political system that assigns sovereignty to the citizenry, it is the citizens who should decide how carefully each must act in an effort to avoid personal injury to others."¹⁸⁰ Feldman may be suggesting here that the normativity resides in the sovereignty of the citizenry. Or, she may be saying that, even though normativity resides in the virtues properly understood, the citizenry should play a central role in applying the virtues given the contingent fact that the legal system she is analyzing places sovereignty in the citizenry. On the former reading, normativity derives from democracy; on the latter reading, normativity derives from the virtues. This ambiguity pervades Feldman's theory with multiple statements supporting both views.

Feldman most clearly endorses the democratic elements in her theory when she writes:

Eliminating the negligence standard and the jury's role in applying it would sacrifice something of political and social importance: the opportunity for popular, collective judgments about how each citizen should conduct herself or himself when the pursuit of her or his own objectives creates the risk of injuring somebody else.¹⁸¹

¹⁷⁹ *Id.* at 1434.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1435.

The potential loss of something of political and social importance is not the same claiming that principles of populist democracy her justify her theory. However, in the absence of a robust justification of virtue ethics or anything else justificatory in nature, Feldman's reliance on democracy seems significant.

In the following statement, Feldman compares jury adjudication to referendum, an especially democratic process:

We cannot hold a referendum each time somebody is about to act and incidentally risk injuring others. We need, therefore, another way of forming and expressing collective judgments about how carefully people should proceed in particular circumstances. Civil negligence actions, in which juries apply a virtue-based standard of care, perform this function.¹⁸²

Feldman implies that the referendum would be better at determining the standard of care, but due to its impracticality, juries fill that function. Note that Feldman characterizes the would-be goal of the referendum as a "way of forming and expressing collective judgments about how carefully people should proceed in particular circumstances." That statement is ambiguous. At first, it appears that such a process has nothing to do with the virtues but, instead, focuses on collective decision-making based on the preferences of individuals. Alternatively, the collective judgment might be about the true nature of the virtues as applied in particular circumstances. So, the ambiguity remains.

Perhaps, Feldman envisages her theory as cohesively combining virtue ethics and some aspect of democracy. At one point, she writes, "Because a virtue-based approach conceives of the application of the negligence standard as a thought experiment best

¹⁸² *Id.* at 1434.

performed by lay people, the virtue-based approach is radically democratic and populist.”¹⁸³ Feldman does not unpack this claim or entertain possible conflicts between virtue ethics and democracy.

To me, any attempt at combining these normative elements threatens Feldman’s whole project of grounding negligence in virtue ethics. If the jury’s explication of the virtues of reasonableness, prudence, and due care is normatively binding because it identifies the way the citizenry balances security and liberty, then what ultimately does the normative work is the way that the citizenry values and trades-off security and liberty. In this vein, deliberation about the virtues is only a means to discover the citizenry’s values. Instead of reasonableness, prudence, and due care having a transcendent meaning that any human can ascertain if done properly, reasonableness, prudence, and due care are fully defined by the values of the citizenry. Feldman seems to be aware of this point when she states, “Jury verdicts in negligence actions give social content to the virtues of prudence and due care, repeatedly providing concrete conclusions about the sort of conduct that is consistent or inconsistent with these dispositions.”¹⁸⁴ It is odd that Feldman does not conclude that the “social content” is what is normatively important, not the shell concept in which the content is expressed. Taken even further, we would have reason to dispense entirely with the use of the terms reasonableness, prudence, and due care if some other terms or processes more accurately or more efficiently ascertained the values of the citizenry regarding the assignment of accident costs in tort disputes. If so, Feldman’s virtue ethics theory collapses into democratic standard theory.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1435.

Despite the ambiguities in several places, I ultimately think that Feldman sides with the virtue ethics reading of her theory. While she would be happy if at times her theory also corresponds with a democratic outcome, she seems unlikely to endorse a democratic decision that contravenes her virtue-based theory for the following reasons. First, the article title and the predominant way Feldman characterizes her theory emphasizes virtue ethics as the theory's core. Second, she explicitly rejects certain ways of determining the risk-benefit trade-off. Specifically, she rejects justice and efficiency separately as sole determiners of negligence. It is plausible that the citizenry could consistently balance security and benefit according to efficiency rather than reasonableness, prudence, and due care in specific domains of action or generally. Such a democratic outcome is anathema to the spirit and much of the text of Feldman's theory. Finally, since Feldman is committed to these virtues seemingly for independent reasons, then she needs to explain how her theory would operate if the general citizenry had warped senses of these virtues. In that situation, I imagine Feldman would opt for a mechanism other than the citizenry to operationalize the virtues.

Without using democracy to ground Feldman's virtue theory, her theory's lack of adequate justification resurfaces. Feldman does not provide a defense of virtue ethics in general or why reasonableness, prudence, and due care should be used to resolve negligence disputes. She provides no argument why the citizenry should not fill out the meaning of efficiency (or perhaps justice) to resolve tort disputes. Why not have the inquiry go through the efficiency as well as reasonableness, prudence, and due care? The only obvious answer that Feldman provides is that reasonableness, prudence, and due care are the concepts identified in extant tort law. If so, then Feldman's justification rests

entirely on the status quo law of negligence (primarily the pattern jury instructions) and some of its institutional practices (e.g., jury adjudication). While her theory provides an interesting way of understanding these features of accident law, her theory does not justify the legal doctrine and practices that it explains.

Dagan's Hierarchy of Values

Before focusing on democratic standard theory, I point out one insight which supports what I am about to defend. The insight is Hanoch Dagan's attempt to charitably read an aspect of Gregory Keating's theory of risk regulation. Put roughly, Keating claims, "No amount of inconvenience, for example, can justify inflicting a devastating injury on someone."¹⁸⁵ From this and other examples, Keating establishes the "existence of discontinuities of value - the fact that not everything is comparable in value to undevastated human life."¹⁸⁶ For that reason, unrestricted cost-benefit analysis is an unjustified way to establish the level of precaution.¹⁸⁷ Keating concludes that a society engaging in an ongoing activity that risks, and thus at some point will with virtual certainty result in, death and devastating injury on some person is only justified if doing so realizes some comparable value to some person or class of persons.¹⁸⁸

Surprisingly, endeavors that realize "comparable value," according to Keating, do not have to be endeavors that prevent or save individuals from devastating injury or

¹⁸⁵ Gregory C. Keating, *Irreparable Injury and Extraordinary Precaution: The Safety and Feasibility Norms in American Accident Law*, 4 THEORETICAL INQ. L. 1, 40 (2003).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 39-40.

death. Keating thinks that endeavors such as motoring and producing toy cigarette lighters are examples of activities of comparable value.¹⁸⁹ These and similar endeavors inflict a “low level of risk of devastating injury” that is an “inescapable price of activity.”¹⁹⁰ Like Fletcher, Keating refers to these endeavors as “background risks,” the “price of activity in *toto*” for individuals to have the liberty to pursue their aims, ends, and aspirations.¹⁹¹ My aim is not to critique Keating’s theory as it pertains to risk regulation.¹⁹² I find the gist of his argument appealing as identifying something misguided about cost-benefit reasoning whether in risk regulation or accident law.

Setting that aside, Dagan explores whether Keating’s premises commit him to the claim that tradeoffs between health and productivity are impermissible because life and health are incommensurably greater values than marginal productivity.¹⁹³ Dagan rejects this reading based on Keating’s text. Dagan proposes the Keating’s premises commit him to endorsing “a social deliberation that identifies and validates the interests and activities that are, for the given community, intrinsic objects of value and that brings about a resolution of conflicts between divergent interests and activities according to the community’s hierarchy of values.”¹⁹⁴ Unfortunately, Dagan does not further explicate the details of what this social deliberation involves, especially in regard to the “community’s hierarchy of values.” Instead, Dagan proceeds to argue that such a social deliberation

¹⁸⁹ *Id.* at 38-50.

¹⁹⁰ *Id.* at 42.

¹⁹¹ *Id.* at 41-42.

¹⁹² While Keating is addressing risk regulation explicitly, he and a commentator, Hanoch Dagan, believe the arguments are applicable to negligence law. Hanoch Dagan, *Qualitative Judgments and Social Meanings in Private Law: A Comment on Professor Keating*, 4 THEORETICAL INQ. L. 89, 90 n.7 (2003)

¹⁹³ *Id.* at 94-96.

¹⁹⁴ *Id.* at 96.

needs to be limited based on the requirements of political morality. In contrast, I think Dagan's description of this social deliberation has more appeal than even Dagan does, at least as applied to accident law.

I do not think this social deliberation, as I understand it, cleanly follows from Keating's text or theory. Rather, Dagan description captures more than Keating's theory offers. Dagan's claim insightfully suggests what is the central appeal of democratic standard theory. Specifically, what matters in assessing the moral permissibility of imposing risks is not an extrinsic or universal ordering of risks and benefits. Instead, evaluating risks should center on a particular society's internal interests and activities where differences among individuals are resolved according to that society's hierarchy of values. Democratic standard theory expresses this idea, as applied to accident law, in a streamlined fashion by stating that negligent acts should be determined based on the values of the individuals locally affected by the kind of act in question. Defending this theory occupies the next chapter.

Chapter Three

Democratic Standard Theory

In prior chapters, several competing theories of negligence, despite their other virtues, have proven inadequate in providing a determinate, complete, and compelling theory of breach of the negligence standard of care based on the overarching theoretical commitments of the Kantian tradition. Each theory provides the judge or jury with excessive discretion leaving open the potential for disparate treatment and privileged *ab initio* injustice. To mitigate this potential, I create democratic standard theory. This theory's governing objective is to best interpret what it means to treat individuals as free and equal when determining breach in the context of a negligence tort dispute at law.

Remember that I am using “Kantian” to refer to the overarching theoretical commitments of the Kantian political tradition (broadly construed) within which many versions of that tradition thrive. So, in creating the most persuasive theory of breach, based on the Kantian tradition, I am not defending a theory which aims to adhere most closely with Kant’s own writings or the implications of his writings in particular. Also, I employ Rawlsian terminology and comparisons due to its prominence among theories that draw on the overarching theoretical commitments of the Kantian tradition, not because I think democratic standard theory relies on the validity of Rawlsianism or its particulars, as opposed to alternative competing versions of the Kantian tradition.

Rather, democratic standard theory could likely be explicated in the *terminology* of any plausible theory based on the overarching Kantian commitments. That does not mean that democratic standard theory is consistent with all such theories. Instead, some more general theories and democratic standard theory may conflict even though they both seek to best interpret the overarching theoretical commitments of the Kantian tradition. Nevertheless, I suspect that democratic standard theory will prove to be supported by, or at minimum consistent with, the most compelling version of political and moral theory within the Kantian tradition. At the end of this dissertation, I discuss three core aspects of democratic standard theory that land it squarely within that tradition.

As a sneak preview, those reasons are summarized as follows:

1. Democratic standard theory provides a standard of care in negligence under which the most individuals possible may pursue their life plans more than under any competing theory of negligence. This reflects the Kantian value of freedom.
2. Democratic standard theory suggests that constitutional essentials set an upward boundary between reckless acts and negligent acts.

Such amounts to a right against having reckless acts imposed on oneself. Based on the overarching theoretical commitments of the Kantian tradition, certain acts are prohibited or allowed due to reasons that do not center on the consequences of the acts. This reflects both Kantian values of freedom and equality.

3. Democratic standard theory treats each individual with a robust form of equality by weighing each individual's values equally while at the same time not letting improper or morally irrelevant factors substantially influence the standard of care. This reflects the Kantian value of equal treatment.

An Illustration

Democratic standard theory claims that breach of the negligence standard of care should be determined based on the values of the individuals locally affected by the kind of act in question. I parse each aspect of the previous sentence in the pages that follow. As a teaser, by "values" I have a broad concept in mind that covers virtually all ways that individuals explicitly or implicitly impute worth or the lack thereof to all aspects of their lives.

By "individuals locally affected" I mean to refer to those individuals who have any appreciable degree of chance of being harmed by the kind of act at issue. So, if some individuals create a risk but are not themselves likely, to any appreciable degree, to be harmed by that particular risk, those individuals are *not* part of the relevant group. For example, if, by disposing of the waste from her leather tanning trade, a person accidentally poisons a well from which she never drinks, that person is not in the relevant group for determining negligence in democratic standard theory.

To identify which individuals are in the relevant group for any particular kind of act, we need look neither far nor wide. The relevant group comprises the same

individuals to which an actor, in a particular context, owes a duty of care—to put the point in terms of tort law doctrine. Put in terms of moral concepts, in any situation, the relevant group is determined by the scope of an actor’s particular, context-based primary moral obligation to act with sensitivity to others’ interests at that time and place. Put differently and simply, the “others” whose interests are at play are the relevant group.

Although not ideal, I refer for ease to the individuals locally affected as a “group” even though my use of that term is technical (explained below). For now, keep in mind that my use of “group” does not implicitly or necessarily involve any commonality normally associated with groups, such as nationality, ethnicity, sex, sexual orientation, religion, religious beliefs, political affiliation, etc.

To illustrate democratic standard theory, suppose that, when a parent hosts others’ kids for play time, the relevant group’s values support the following standard:

Group One: After warning children and preventing dangerous situations from arising, a hosting parent must continually monitor children during play time with friends and must respond promptly and appropriately to any injuries.

This standard reflects a group’s values concerning the protection of children, play time, pain, injury, medical care, and the worth of adult time and skills. If a parent fails to continually monitor the children and another’s child breaks her arm while climbing a tree, the hosting parent has breached the negligence standard of care and is vulnerable to a negligence claim for the child’s accident costs.

As one may have guessed, another group’s values regarding adult supervision of play time may differ and instead dictate a different standard, such as:

Group Two: After warning children and preventing dangerous situations from arising, a parent must be within “shouting” distance of children during play time and must respond promptly and appropriately to any injuries.

Group Two’s standard requires less direct monitoring than Group One’s standard.

Suppose that in Group Two another parent’s child falls while climbing a tree. Prior to the fall, the hosting parent forbade such conduct, and after the fall, the hosting parent heard the commotion and responded appropriately. The Group Two parent did not breach the negligence standard of care and is *not* vulnerable to a negligence claim for the other child’s accident costs—even though the parent would have breached the standard of care for the same acts if he were in Group One.

This illustration is inspired by the case, *Lubitz v. Wells*, 113 A.2d 147, 19 Conn. Supp. 322, (1955), where a child injures another child by swinging the father’s golf club, which the father left in his own backyard. I characterize my example in terms of parental monitoring of children instead of the reasonableness of where a parent leaves one’s golf clubs or similar items as the *Lubitz* court primarily framed the issue.¹⁹⁵ In my mind, the more fundamental issue in *Lubitz* is parental monitoring. The parent arguably failed to adequately monitor at the beginning of the play time in the sense of either failing to forbid use of the golf club or failing to inspect the play area for possible dangers. Regardless, democratic standard theory could frame the issue in terms of parental storage (or lack thereof) of such items, if all things considered, that is the best way to handle the kind of act at issue. Below, I address further the delicate yet familiar task of framing such issues in negligence cases.

¹⁹⁵ *Lubitz v. Wells*, 113 A.2d 147, 19 Conn. Supp. 322, 323 (1955) (reasoning that “[i]t would hardly be good sense to hold that this golf club is so obviously and intrinsically dangerous that it is negligence to leave it lying on the ground in the yard”). At the same time, note that it seems like the plaintiff argued that the father could have met the standard of care if he had cautioned his son against the use of the golf club. *Id.* at 322-23.

As evident from the parental monitoring example, democratic standard theory is democratic in a unique yet powerful sense. The people's values determine legal outcomes. More specifically, the people's values determine what constitutes breach of the negligence standard of care in accident law.

The members of a group need not share the same values or weight any of the values in the same ways. That supposition would almost wish away the philosophical problem at issue. Instead, the point of democratic standard theory is to determine breach of the standard of care given the diverse, irreconcilable, and competing conceptions of the good in modern societies. In this way, the theory follows and extends the project of political liberalism.¹⁹⁶ By attending to the larger framework, in particular, democratic standard theory strives to mitigate the potential for privileged *ab initio* injustice.

To that end, when members of a pluralistic group have different values, as is often the case, each person's values are treated with equal weight vis-à-vis each other, like a one-person-one-vote system. Majority rule, according to democratic standard theory, should resolve the problem that diverse, often conflicting values pose. Even though the majority's values support a single standard of care for a particular kind of act, such does not mean that the values of each member of that majority are identical. Different values may provide overlapping support for a single standard of care for a particular kind of act.¹⁹⁷ Except in situations where a person's constitutional essentials would be violated,

¹⁹⁶ JOHN RAWLS, POLITICAL LIBERALISM 3-4 (1993) (stating that the primary inquiry of political liberalism is "how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?").

¹⁹⁷ Compare to Rawls's idea of overlapping consensus. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 32-38 (Erin Kelly ed., 2001).

the standard of care is whatever standard is supported by the values of the most individuals of the relevant group as long as it has at least a simple majority (that is, over 50%). Later, I address (rare) situations where constitutional essentials trump, for democratic reasons, the standard of care that the actual majority's values support.

Values (Broadly Construed) a.k.a. "Life Plan Parts"

To reiterate, democratic standard theory claims that breach of the negligence standard of care should be determined based on the *values* of the individuals locally affected by the kind of act in question. By "values," I mean a vast expanse of ideas that pertain to individuals' lives, including how much importance or worth individuals attach to specific kinds of acts, longer term endeavors, things, relationships, work, risks and virtually all aspects of their daily lives as well as moral concepts (courage, prudence, benevolence, etc.), duties, rules, principles, and beliefs. Not all values are relevant, but most values potentially are. Relevant values pertain to the acts alone or in context with other acts that potentially lead to accidental harm.

"Values," in my broad sense, are an enormous part of a "life plan" or "comprehensive conception of the good." I treat both of these concepts as roughly synonymous and refer to them collectively as one's "life plan" even though some aspects of one's life plan may not be that, well, planned, that is, consciously or critically adopted.

A life plan is not monolithic but is composed of numerous parts ("life plan parts") that address various aspects of one's life. A life plan includes the following or subparts of the following: one's routine of daily acts, inclinations, attitudes, dispositions, counter-factual dispositions, relationships, and settings in which one lives as well as one's values

(as narrowly construed), morals, moral principles, religious beliefs, ideologies, short and long term goals, jobs/careers, life-long projects, and activities or principles that give one satisfaction on any level. The collection and integration of these things or aspects of them in one's life are what I mean by a life plan. As should be evident, numerous aspects of one's life plan fit within my concept of values.

Some life plan parts are unconsciously or uncritically included in one's life plan through socialization, genetic endowments, genetic predispositions, chance, trauma, accidents, etc. Let me refer to these aspects as "proto-life plan parts" to indicate that such play a part in one's life plan, but proto-life plan parts may not be that consciously or critically endorsed. Their existence does not undermine democratic standard theory as long as, for most individuals, a sufficient number of one's life plan parts are full-fledged life plan parts. Consequently, I do not further address them. Relatedly, even values that one has consciously or critically adopted have usually been shaped by strong exogenous influences from one's society. Nevertheless, what matters is that the values are now his or hers (i.e., a particular individual's values a.k.a. life plan parts).

One's life plan parts may adjust in light of exogenous events, development of one's personality or knowledge, and so on. For example, as part of an individual's life plan, she will have attitudes about labor and leisure. How much she actually labors at any given time likely depends on how much she likes that labor, how much remuneration is involved, and how much income she wants or needs at that time. If remuneration increases, she may labor more. So, the way labor figures in this person's life plan depends on her values as they interact with other factors, including exogenous factors such as changes in wages.

Part of forming and pursuing one's life plan involves assessing what risks one has exposed oneself to either by one's own acts or by proximity to others' acts or the products of their acts. Each available type of job involves a certain bundle of benefits and risks as a package deal. Also, living in one kind of home rather than another and in one town/city rather than another involves benefits and risks as a package. The same is true of other aspects of one's life plan such as one's leisure activities and one's modes of transportation. Thus, forming and pursuing one's life plan in a social context involves pursuit of benefits even though such pursuits involve certain inherent risks and risks due to one's proximity to others' pursuits of their life plans.

The Object of Values

To implement the democratic standard theory, we need to know how to identify which values within each person's life plan are relevant to determining the negligence standard of care for any particular kind of act. Let's begin by clarifying what exactly is the object of the values to which democratic standard theory points. Metaphorically, setting breach according to individual's values can be likened roughly to a voting system where each individual's values count as one "vote" for each kind of act in the standard of care. Using this rough analogy, in this section, I am identifying what type of propositions or "laws," if you will, individuals are "voting" on. For ease of use, I refer to the objects of values that individuals are voting on as "propositions," although I stress I am not implying that these "propositions" either have or do not have the standard features of law such as "being legally authoritative over multiple transactions or occurrences." Statutes, ballot initiatives, referenda, and case law precedent generally can have that sort of

authority. For my purposes, consider my term “proposition” with regard to the negligence standard of care as only a single-use proposition. The single-use, specifically, is to adjudicate the issue of breach in a single, specific accident that already occurred.

There are two types of propositions that, though loosely formulated, should convey the issue at stake in this subsection. They are interrelated (and, in many instances, are merely two sides of the same coin), and cannot, perhaps, be cleanly or completely separated. With the first type, the propositions focus on the acts themselves and the manners/contexts in which these acts may be performed. These are (usually) productive acts that individuals do or want to do. For example:

Type One: One may take one’s dog outside of one’s own securely enclosed property only if the dog has a proper restraint (e.g., a leash or muzzle), regardless of how well supervised or trained the dog is.

With the second type, the propositions pertain to what risks individuals may impose on others’ person or property. For example,

Type Two: One may impose a risk of dog attack or property damage by taking one’s dog outside of one’s own securely enclosed property *without any physical restraint* as long as the dog is well supervised and trained.

These two propositions provide different levels of safety against dog attack. However, set that detail aside in order to focus on each *type* of proposition. A Type One proposition focuses on the (productive) tasks that individuals may perform. A Type Two proposition focuses on what risks individuals may impose on others.

In democratic standard theory, Type One propositions are the focus. Put differently, the type of propositions to be decided democratically pertain to what tasks individuals are permitted to perform, not what risks individuals are permitted to impose on others, without being vulnerable to a negligence claim. Each of these types can be

reformulated in the terms of the other. In many instances, values that a person has may support the same substance of either type of proposition. Nevertheless, the point here is not merely semantic or one of emphasis.

The implication of this distinction is that democratic standard theory is not primarily or directly trying to capture each person's values as they relate to imposing risk on others (that is, Type Two propositions). Democratic standard theory's calculus disregards any individual's stand-alone values that support gratuitously imposing risk on others. Remember my sense of values is broad such that one's values could include a preference, desire, or inclination to impose a *risk* of harm on others. Such values, standing alone, have no positive moral worth, and, thus, society should not facilitate or protect them. Stand-alone values to impose risk on others resemble more closely, in a moral sense, values to commit core criminal offenses. Both sorts of values include implicitly or explicitly a substantial disregard for another's bodily integrity or property.

To clarify, I use the phrase "values to [DO AN ACTION]" in the previous paragraph for shorthand as follows: A person's values, in my sense, have as their object the action in question. Or, the values tend, other things being equal, to bring about the action in question at least partly for its own sake, not merely as a side-effect.

In contrast, Type One propositions do not aim at causing risk even though, as it turns out, Type One propositions usually involve risks to others' bodily integrity or property due to brute facts about the nature of the universe and society. The values that support Type One propositions are the bread and butter of any person's life plan. As essential life plan parts, Type One propositions and the supporting values are morally worthy of social consideration and, in numerous cases, protection. Thus, in democratic

standard theory, only Type One propositions are what individuals are “voting” on with their values.

Nature of the Values in Democratic Standard Theory

Democratic standard theory uses values in place of directly appealing to extant legal doctrine’s concept of the reasonably prudent person. The rationale behind this step is that the concept of the reasonably prudent person and its cognates are almost entirely dependent, if the theoretical commitments of the Kantian tradition are properly understood, on the actual values of the individuals involved. To explicate this point, let’s examine statements that have, or can be reworded to have, the same form as the following:

Current Legal Concept of Reasonableness: Act A in manner X and context Z is unreasonable if that act is not what a reasonably prudent person would have done.

Many think that the concept of the “reasonably prudent person” (hereafter referred to simply as “reasonableness”) is a piece (or combination of more basic pieces) of the moral fabric of the universe. For example, recall that “reasonableness” was a core piece of Feldman’s virtue-based theory.

I suspect that this way of slicing and dicing the moral fabric is false—at least in the sense of reasonableness related to breach of the negligence standard of care. The overarching theoretical commitments of the Kantian tradition do not designate a specific, correct amount of (negligent) risk that is morally permissible to impose on others in any particular context—unless (and here is my most significant insight) the premises necessarily incorporate the values of the individuals affected. Since individuals’ values

can change, reasonableness is not a moral concept with universal content over time even with respect to the same persons. Furthermore, since acts in different locations affect different individuals who likely have a different mix of pertinent values, reasonableness is not a moral concept with universal content across all persons. A kind of act, such as phoning while driving or the other examples I have provided, may be unreasonable in one city while reasonable in a different city, and each of these moral claims are equally justified due to the different underlying values regarding transportation, time, etc. held by the individuals in each city.

Democratic standard theory treats individuals' use of reasonableness, its cognates, and related concepts as mere expressions or repositories of facts about a person's values including their likes, dispositions, experiences, preferences, beliefs, and other idiosyncrasies. Rewording the above Current Legal Concept of Reasonableness to clarify how democratic standard theory understands the concept of reasonableness would be as follows:

A Person's Use of Reasonableness: Act A in manner X and context Z is unreasonable, to a particular person, if that person's values do not favor its characteristics, purposes, or likely results.

"What a reasonably prudent person would have done" according to one person is reformulated to a proposition about "what a particular person values." I include "characteristics" and "purposes" in addition to "likely results" because in many instances individuals care not merely about an act's results but also with how those results are brought about or the purposes of the acts.

For example, individuals may tolerate the risks of the transport, storage, and use of radioactive material to develop medical treatments for cancer. At the same time, the

same individuals may not tolerate the same risks of the same quantity and kind of materials to develop alternative energy technology. The former is “worth it” to hopefully extend lives whereas the latter only reduces oil consumption, an individual may explain. So, the characteristics or purposes of an act matter in addition to the possible results. Perhaps, we could collapse these concepts into an umbrella concept of “results.” Yet, keeping them separate emphasizes important features of an act that are often left out in other kinds of risk assessments such as in policy analysis by technocrats.

At the group level, I contend that the concept of reasonableness should read as follows:

Group Concept of Reasonableness: Act A in manner X and context Z is unreasonable if the values of the majority of locally affected individuals do not favor its characteristics or likely results.

Not surprisingly, I phrase the Group Concept of Reasonableness as a version of democratic standard theory. In doing so, I am trying to make it clear that, based on the overarching theoretical commitments of the Kantian tradition, there is no other relevant concept of reasonableness that pertains to breach of the negligence standard of care aside from that elucidated in democratic standard theory.

Democratic standard theory is only interested in the usage of the concept of reasonableness (including the “reasonably prudent person”) to the extent that it contains information concerning individuals’ values—regardless of any other meaning or significance for it in other domains. So, democratic standard theory understands a person’s statement about, or even a jury’s verdict that hinges on, an act’s reasonableness according to the format in the above Personal Concept of Reasonableness. The hope is that a person in the relevant group, a jury’s deliberation after an adversarial trial, or some

other epistemic process can also provide evidence as to the values of the relevant group thereby elucidating what is unreasonable (i.e., what constitutes breach) in a particular context.

Note that democratic standard theory does not judge whether or not the values (including moral beliefs) of any individual are correct in a universal or even a culturally relativistic sense. The theory instead determines breach of the standard of care based on facts. While a person's values (in my sense) contain, among other things, moral concepts and principles, the fact that the person has those particular values and moral beliefs is a fact about the world or, more specifically, a fact about that person in the world. Thus, in setting breach of the standard of care according to individuals' values, democratic standard theory relies on facts rather than on the truth or correctness of any individual's values (including moral beliefs).

In defending democratic standard theory, it is unnecessary to specify what is the precise nature of these underlying values, that is, whether they are mere facts or, in some sense, moral facts in virtue of their pertaining to acts that involve other individuals. All that matters is that the overarching theoretical commitments of the Kantian tradition require that we do *not* rely on, utilize, or even give any weight to any possible truth or correctness of individuals' underlying values for the purpose of justifying the negligence standard of care. This conclusion is unique and important because, traditionally, the reasonable person standard, and rights-based theories of tort in general, have been primarily portrayed as relying on a moral basis that is largely independent of the actual values of those individuals locally affected by the kind of act at issue.

In summary, for the concept(s) of “reasonably prudent person,” “reasonable,” “reasonableness,” or their cognates in the context of accident law,¹⁹⁸ I contend that the overarching theoretical commitments within the Kantian tradition do not specify, in any universal sense, which acts are reasonable and which are unreasonable as these concepts pertain to breach of the negligence standard of care. Instead, based on the overarching theoretical commitments of the Kantian tradition, any concept or theory that sets the standard of care must necessarily include information about the life plans of the individuals affected. As a result, no standard of care is universally morally correct or superior for all groups. The morally superior standard for any given kind of act (like the parental monitoring of child play time in the above example) is whatever standard is supported by the values of the most members of the group of locally affected individuals.

Why Groups?

Recall that democratic standard theory points to the values of those individuals locally affected by a kind of act to determine if a particular act in time and place breached the negligence standard of care. First, note that implicit in that formulation is that the negligence standard of care for the same kind of act can be different if the values of individuals change or when the affected individuals are in separate groups. For this reason, democratic standard theory pertains to “modular groups” rather than fixed groups. “Modular” simply indicates that the relevant group may not be static at each application of democratic standard theory.

¹⁹⁸ I save for my future work my thoughts on what “reasonable” properly means in criminal law or in other issues I have not explicitly identified.

I avoid using the phrase “the group’s values” because I do not mean to anthropomorphize the group. I also do not want to introduce or even imply any wacky sense of collective identity or an amalgamation of individuals’ values into one set of values that the group holds. Ideally, I would rather not use the term “group” at all because it too easily suggests a collection of individuals with more commonalities than I mean to suggest. Yet, continually using phrases such as “locally affected individuals” or more precisely a “collection of individuals who are affected by a kind of act (or series of related kinds of acts) in a single, relatively specific context” are cumbersome. (I specify more precisely below what I mean by a “kind of act.”) So, when I use the term “group” for ease, the one and only characteristic I am referring to is the collection of individuals (at a specific time and place) locally affected by the kind of act in question. Individuals in the group (or for short, but also not ideal, “group members”) need not reside or work in the same area or be a member of the same town, city, nation, etc. Moreover, the group does not necessarily or implicitly have any other commonality normally associated with groups such as nationality, ethnicity, sex, sexual orientation, religion, religious beliefs, political affiliation, etc. Due to the atypical use of a group, any tyranny of the majority concern based on the claim that democratic standard theory could unfairly disadvantage a suspect class or something similar is misplaced. I mean the term “suspect class” to refer to the extensive jurisprudence regarding the equal protection clause of the United States Constitution. In that jurisprudence, the courts have labored to define particular “groups,” often termed “suspect classes,” for which this constitutional protection is provided. I am simply pointing out that these suspect classes and the accompanying jurisprudence are

orthogonal to most of the issues in this dissertation, especially my use of majoritarianism. Later, I respond to concerns that involve other possible senses of tyranny of the majority.

Despite my hesitancy in using the term “group,” I do not mean to suggest that such a collection of locally affected individuals have next to nothing in common. To be locally affected by an act, there is a good chance that most or all of the group members will have been in the same area where the act occurred and many may, as it turns out, reside, shop, and/or work in the same area. Yet, to be clear, I am not building or implying any such requirement in my technical definition of the term “group.”

With all of those points in mind, let me illustrate how group members have characteristics in common that are not what we normally think of as group-defining characteristics. Suppose only one road connects two commercial areas, and an automobile collision occurs on this road. The relevant group may be those drivers that on occasion or regularly travel between those two commercial areas even though these “group members” live and work in a variety of places that are far apart and share no other single morally relevant characteristic.

The reader may think that the success of democratic standard theory *primarily* hinges on its ability to identify the relevant group for any accident at issue. I do not think so—for three reasons. First, the relevant group for any particular matter will likely turn out (and justifiably so) to be one of the existing political divisions in which the harm occurred. Practical matters would weigh heavily, even in a moral sense, at least for democratic standard theory to guide actual tort disputes given existing political institutions. In other words, using existing political divisions may be practically

necessary and “good enough for government work” to operationalize the thrust of democratic standard theory.

Second, if I may lay my cards on the table and explicate my hand later, the relevant group is going to be largely or entirely dependent on the *scope* of the actor’s specific primary moral obligation(s) to act in a particular context with sensitivity to others’ relevant interests. That scope involves moral concepts of the duty of care, outcome-responsibility, and various other senses of foreseeability. Put more simply, the relevant group depends on those individuals to whom the actor owes a duty of care when performing the act at issue. Therefore, democratic standard theory does not need an independent argument for its concept of group apart from it being compatible with one or more compelling theories of the duty of care in tort.

The inextricable importance of the duty of care to a negligence tort claim has received much attention lately especially in the work of John Goldberg and Benjamin Zipursky.¹⁹⁹ As I note in the Introduction, democratic standard theory’s concept of breach works in concert with theories of other moral components of a negligence claim including duty of care, causation, outcome-responsibility (and the concepts included therein), compensable damages, harm, risk, and so on. Any theory of breach must necessarily do so. In that light, democratic standard theory’s use of “group” (or better a “collection of locally affected individuals”) may stand or fall alongside others’ theories of

¹⁹⁹ John C.P. Goldberg and Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. Pa. L. Rev. 1733 (1998); see also Stephen Perry, *The Role of Duty of Care in a Rights-Based Theory of Tort Law*, in *THE GOALS OF PRIVATE LAW* 79 (Andrew Robertson & Tang Hang Wu eds., 2009).

the other components of negligence, most especially the duty of care and outcome responsibility.

Finally, I see my most important and novel claim in this dissertation as being that negligence properly turns almost entirely on the values of individuals. If we lived in a world where individuals had identical relevant values, that unanimity would render moot the issue of identifying a relevant group. Once the reader is nearly convinced that negligence properly turns almost entirely on individuals' values, the remaining step, in order to entirely convince the reader, is largely transformed into a task of avoiding or minimizing the tyranny of the majority concern. That concern is how can we justify holding an individual to a standard of care, which that individual's own values do not support, just because a majority of individuals' values happen to support that standard. Identifying the relevant group is not a moot issue, by any means. Rather, once I overcome the tyranny of the majority concern, identifying the relevant group looks more like a task of minimizing the number of individuals held to a standard that their own values do not support. In such a task, we aspire to minimize such occurrences and, at the same time, are content with almost any level of success we achieve. So, shortly I turn my attention to motivating the democracy thread and to minimize worries about majoritarian tyranny.

Corrective Justice or Distributive Justice?

One concern that may arise both from my argument above and my forthcoming argument regarding democracy is that democratic standard theory uses something akin to a distributive justice mechanism to address an issue within corrective justice. As I noted in Chapter Two, Stephen Perry levels a similar criticism against George Fletcher's use of

equal distribution of security in the reciprocal risk theory. In contrast, the concern has no purchase in democratic standard theory because of its focus on the issue of negligent breach of the standard of care. Put in the terms of Jules Coleman and John Oberdiek discussed in Chapter Two, democratic standard theory provides the basis for a domain of primary moral obligations. Corrective justice involves a potential secondary obligation when certain primary obligations are violated. So, corrective justice operates on a wide swath of primary obligations regardless of the nature of those obligations or the kind of justification underlying them.

For example, in a simple case of theft of one's money, let's assume that the correct theory of distributive justice establishes that the victim is entitled to that money at the time of the theft. The victim's claim for compensation from the thief is the epitome of a bilateral claim appropriate for corrective justice—hearkening even back to Aristotle's thought. Yet, the victim's primary claim to the money is justified through distributive justice.

Similarly, even if the justification I provide in democratic standard theory amounts to a distributive-like theory, such does not count against it as a theory of what constitutes breach of the negligence standard of care. Since democratic standard theory is an account of primary obligations that often give rise to bilateral claims in corrective justice, the underlying justification does not have to be wholly or even partly bilateral in nature. As an advantage illuminated by this point, since democratic standard theory operates at the level of primary obligations, the theory is likely compatible with most plausible rights-based theories of corrective justice.

The Two Potential Injustices

As addressed in Chapter Two, one prominent problem with Ripstein's and Weinrib's theories (and Fletcher's theory to a far lesser extent) is that each theory, like existing accident law, provides the judge or jury excessive discretion in determining negligent breach. These theories do not address or defend whether a judge or jury is capable or justified in determining breach. They merely rely on, without explanation, status quo adjudication to apply their broad moral concepts, likely by means of the reasonable person standard, to the detail-rich factual scenarios relevant to determining breach. The resulting discretion leaves open the potential for disparate treatment and privileged *ab initio* injustice.

To mitigate these kinds of injustice, democratic standard theory provides specific criteria that to determine what constitutes breach of the negligence standard of care for any accident. Specifically, the first step requires us to identify the relevant group for the accident at issue. I address that issue later because, as it turns out (as telegraphed above), identifying the relevant group is easily resolved by appeal to any cogent theory of the duty of care in tort. Since such a theory is external to democratic standard theory, we need not search for any new justification from within democratic standard theory.

The second step is to identify what the relevant group's values are regarding the acts that led to the accident. As I suggest below, the values need not be individually identified and weighted as if we need to specify an equation. Cumulative ways to measure the values of one or more individuals are likely informative enough for resolving

disputes over accident costs. To determine the group's values regarding an act, all reliable sources are potentially useful. As candidates for such sources, one can imagine surveys, rigorous observation of actual behavior, focus groups, expert opinions, opinions expressed in media, (proposed, defeated, or passed) legislation, prior jury adjudication (or mechanisms like it), and many other reservoirs of relevant data.

An objector may be concerned that the locally affected individuals' values contain holes or may be indeterminate regarding specific kinds of acts. I use "holes" to collectively refer to all possible types of ways in which the values of the relevant individuals may not provide a conclusive answer to that group's standard of care for particular kinds of acts. Those ways include:

- Existing values do not cover the kind(s) of relevant act(s) at issue in the accident;
- Existing values equally support two or more competing standards of care for one kind of act; and
- Existing values equally support two competing standards of care for one kind of act so closely that it is difficult to discern if one has a slight majority (e.g., 51%).

The third point is epistemic, yet I include it here because it may be practically indistinguishable from the second point and may land us in the same situation, at least practically speaking, as the other points.

As evidence for the objection, one might point to the numerous tough cases that have been litigated and continue to be fodder for tort law courses. By "tough cases," I do not mean the same thing as Ronald Dworkin famously refers to as "hard cases."²⁰⁰ At the same time, the allusion and the resulting homage are intended. One way to compare these

²⁰⁰ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* Ch. 4 (1977); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY passim* (2000).

concepts is that hard cases involve life plan *insensitive* issues and tough cases involve life plan sensitive issues. Despite the intended analogy, the disanalogy is that toughness of tough cases is only superficial as I argue in the next paragraph. To clarify further, by “tough cases” I mean those lawsuits in tort (or analogous non-litigated scenarios) where it seems that unbiased, fully informed individuals may disagree (and do in fact disagree) based on plausible reasons about whether or not the underlying act(s) (in context) constituted negligence.

As a result, anyone who has experienced such a discussion in or out of a tort law class may end up exasperated at these specific, seemingly irresolvable tough cases. Such experiences demonstrate the reality of the jury’s excessive discretion and the resulting genesis of the two kinds of potential injustice. In reaction, one may wonder whether the legal concept of a reasonably prudent person is merely a convenient farce as adherents to critical legal theory contend. Or, perhaps, one may suppose that the concept was created due to some other more benign sociological explanation that points to coincidental historical forces or practical necessities.

Getting to the rub, if tough cases exist, democratic standard theory would not provide a complete and determinate standard of care. Thus, under that possibility, it would be unable to resolve all possible accidents. If so, then democratic standard theory, like other Kantian theories would be implicitly relying on a political mechanism (such as (but not necessarily) jury adjudication) to fill these holes. The two kinds of potential injustice would remain to the extent that holes remain.

In response, observe that, even if a group’s values contained holes, as the objector suggests, democratic standard theory has a distinct advantage over alternative Kantian

theories if the political mechanism, utilized to fill the holes, approximates how the relevant locally affected individuals would do so. By means of example only, if jury adjudication contained a representative sample of the relevant individuals, perhaps it would resolve any holes or indeterminacies in their existing values. At least, using something like judge or jury adjudication is a relatively straightforward mechanism to apply democratic standard theory. It is more straightforward than Weinrib's and Ripstein's vague appeals to broad values. Fletcher's reciprocal risk theory must assume that jury members are good risk estimators to bridge the connection from his theory to jury adjudication. Perry's accepted patterns theory is the only other theory, among those surveyed herein, that has a direct connection between its criteria and jury adjudication. Presumably, if jury members are drawn from the areas where the accident occurred, they would be familiar with the relevant accepted patterns of social interaction or can readily become so through the evidence presented in the lawsuit.

I do not see any way to prove conclusively that no such holes or indeterminacies exist in a particular group's values (let alone for all groups). Let me motivate why I do not think that holes occur in the real world. Values in my sense are not only a broad category, but each of the numerous parts of my concepts of "values" are themselves broad in that they apply to an extensive range of acts. Adages such as "look before you leap" and "safety is no accident" apply in some sense to all acts. I hazard to guess that every or virtually every act that has been contemplated or performed either has been evaluated within the group in question. For any others, extending existing group values through modest inferences could provide determinate guidance to an individual. If an individual is in doubt, I imagine that many groups' values would demand that the

individual not perform the act at issue without further inquiry. Alternatively, the individual might be able to proceed if she acts with an abundance of caution.

If a new act or piece of technology is invented such that it is not clear how existing values would treat it, democratic standard theory has a clear answer. The new act is a breach of the standard of care until the group's values clearly ratify it. In the meantime, an individual who imposes that risk on another does so at the peril of being vulnerable to a negligence claim.

My sense is that tough cases are intractable only if one is searching for a universally correct answer to whether an act is negligent. I am not denying that unbiased, fully informed individuals plausibly disagree about such issues. Yet, what are intractable are the life plans or comprehensive conceptions of the good of those who disagree about such issues. That intractability is not an objection to democratic standard theory. As stated previously, that intractability is one of the major starting premises of liberalism in general. It is *because* such individuals fundamentally disagree about various important issues that a society needs mechanisms, like majoritarian rule, to reconcile their intractable conflicting values. Similarly, Rawlsianism uses the original position and (later) the idea of overlapping consensus to illuminate commonalities among intractable conflicting comprehensive conceptions of the good. Thus, the existence of tough cases in tort case law is explainable due to intractable conflicting comprehensive conceptions of the good, not necessarily due to holes in a group's values.

Those seemingly tough cases are only intractable insofar as they analyzed out of the context of the time and place in which the underlying acts took place. Specifically, the context that is left out is the group of locally affected individuals and their *actual*

values. Within that context, majority rule identifies negligence in spite of the intractable values.

Based on the above, I am putting significant weight on the role of majority rule in resolving conflicting life plans or comprehensive conceptions of the good pertaining to breach of the negligence standard of care. So, defending democracy in that context and resolving any tyranny of the majority concerns are the tasks to which I now must turn.

Why Democracy?

1. Public Goods

Since individuals in a society are subject to each other's risky acts, determining which kinds of acts constitute breach of the standard of care is a political issue. This issue is one of a cluster of political issues that arguably should be made democratically.

Thomas Christiano terms this cluster, the "collective properties of the society."²⁰¹ I use the more common term, "public good," instead of his term given that the underlying concepts seem to be, at least approximately, the same. I draw the parallel between legally redressable negligence and public goods because the concept of a public good illustrates significant features of the issues involved in breach. Yet, importantly, I am not relying on Christiano's positive argument for democracy.

Christiano states that a public good is where "in order to change one person's welfare with regard to this [public good] one must change all or almost all of the other members' welfare with regard to it." As an example of a public good, consider the public

²⁰¹ Thomas Christiano, *An Argument for Democratic Equality*, PHILOSOPHY AND DEMOCRACY 48 (Thomas Christiano ed., 2003).

road system along with the laws pertaining to automobile driving. To allow one private citizen to legally exceed the speed limit on the highways, all others involved would be worse off because they would bear a greater risk of this person causing an auto collision.

Christiano identifies four characteristics of public goods:

1. Nonexclusivity – “It is not possible to affect one person’s life without affecting the lives of the others.”²⁰²
2. Publicity – The public good must be a public object that affects others’ wellbeing, not just something that others have nosy preferences about.
3. Inevitability – The public good must be inevitably shared; we cannot choose otherwise.
4. Alterability – Individuals or groups must be able to alter the [public good].²⁰³

To illustrate a public good, clean air is nonexclusive in that one cannot decrease or increase the amount of air pollution in a city without affecting the lives of others. As for publicity, a particular individual’s preferences on the amount of air pollution include how it affects that person. Humans, as well as the rest of the Earth, inevitably must share any air pollution by virtue of their sharing the air.

Observe that not all public goods are tangible like clean air and, say, public parks. One of the prototypical public goods, national security, is not tangible or not primarily tangible. National security is often based in part on tangible items such as military personnel and weapons. At the same time, treaties, trade relations, international law, political maneuvering, monetary support to other nations, humanitarian relief, historical political ties, shared values, immigration laws, international goodwill, and so on are

²⁰² *Id.*

²⁰³ *Id.* at 48-49.

intangible yet often vital components of a nation's national security. Among these intangible components, some are legal or have law-like aspects.

Another public good, referred to as "authorship," is essentially the regime of copyright law that allows any person to protect her creation. So, here we find a public good that is intangible in its entirety.

Analogously, public safety, both generally and in the limited scope of the availability of redressing in tort one's harm from negligent acts, is also an intangible public good. Public safety, in the form of legally redressable negligence, has the same four Christiano characteristics as other public goods. Regarding nonexclusivity, if one kind of act is legally redressable negligence, anyone who might perform that kind of act is affected. As for publicity, everyone has interests, not mere nosy preferences, whether the kinds of acts they perform make them vulnerable to negligence claims.

As for inevitability, given our other commitments to rule of law, a legal power to redress negligence for a kind of act is a power that all or no individuals have. In other words, we *qua* individuals inevitably share the powers and liabilities made available at law.²⁰⁴

Regarding alterability, legally redressable negligence can change which kinds of risks it covers. While accidental risk itself is ineliminable from social life, we do not have to adopt any new activity or technology that involves unappealing risks. No person, group, or entity has forced humans to utilize machine-powered transportation. We do not have to continue to act in ways that produce risks that we do not want to bear. One

²⁰⁴ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

individual may not be able to convince the rest of society to give up cars or mobile phones due to the risks. Nevertheless, individuals can alter the details of the lives to change many of risks that they are exposed to or they impose on others. Collectively, individuals in a society can alter which risks constitute legally redressable negligence.

The attributes of public goods demonstrate why a political or social decision is appropriate. At the same time, freedom of the press, for example, is a public good in the sense I have been developing. Yet, that fact alone does not mean that the contours of that public good (or freedom/right) should be based on the values of the majority of individuals affected. So, some public issues are the proper domain of the values of individuals involved while other issues should be determined based on other classes of reasons. I develop this distinction in the next section.

First, note that a government does not have to be democratic itself to utilize the democratic standard of care. An authoritarian government, or a non-democratic part of a democratic government, can also determine breach of the negligence standard of care based on the values of those affected. In fact, any legal mechanism that utilizes juries or bases negligence on reasonableness or similar concepts will likely, if not necessarily, incorporate individuals' values. To the extent they are successful, these are partly democratic processes in my broad sense of instantiating the "will of the people" into legal outcomes.

Even utilitarian theories have a democratic element to them in that the benefits and burdens that are balanced reflect, to some extent, the values of the individuals in the society even though each person is not given an equal "vote" even in theory. Market mechanisms that determine costs of harms reflect various individuals' values since the

individuals' values determine in part the market prices. Social welfare comes close to my concept of values even though the weighing mechanisms of social welfare-based approaches to negligence may improperly skew the values that they use as inputs. Perhaps, all plausible theories of breach of the negligence standard of care will be democratic to some extent. However, democratic standard theory still deserves its name because it is the most democratic among the alternatives. I now return to refining the distinction between political issues where the values of the individuals involved should determine the outcome and those where such values should not do so.

2. *Life Plan Sensitivity*

Ronald Dworkin identifies two kinds of political questions, one of which is better answered by majoritarian rule within a constitutional democracy. Dworkin states that “preference-sensitive” political decisions are decisions where the “character and distribution of people’s preferences in part determine which decision is the right one.”²⁰⁵

²⁰⁵ Ronald Dworkin, *Equality, Democracy, and Constitution*, 28 ALBERTA L. REV. 324, 331 (1990). Dworkinian scholars may be concerned that democratic standard theory employs a statistical conception of democracy that is inconsistent with what Dworkin describes in this text as a “communal conception” of democracy upon which the above distinction relies. *Id.* at 329. My brief comments in this footnote are for the sole purpose of aligning democratic standard theory to Dworkin’s discussion *in this text* and not to raise any other issues or make grandiose claims about democratic standard theory or its relationship to collective action theory. Dworkin defines statistical collective action as:

when what the group does is only a matter of some function, rough or specific, of what the individual members of the group do on their own, that is, with no sense of doing something as a group. *Id.*

In contrast, collective action is communal:

when it cannot be reduced just to some statistical function of individual action, because it is collective in the deeper sense that does require individuals to assume the existence of the group as a separate entity or phenomenon. *Id.*

The democratic standard of care, which is based on the aggregation of the values of each individual in the relevant group, may appear to embody the statistical form of collective action. However, that characteristic is common among any aggregative system where inputs (such as votes) from many people are tallied.

Dworkin's example is a question about whether a town should use designated funds to build a baseball stadium or an ice hockey rink, given that the town can only build one facility.²⁰⁶ Assuming that decision ought to depend on which facility would be used more, he argues that "a majoritarian political process seems the best way to discover the answer."²⁰⁷ Based on that example, Dworkin is thinking of democracy as an epistemic tool.²⁰⁸ Dworkin suggests, without elaboration, that majority decision-making is more likely to be "right" about preference-sensitive issues than any other decision-making process.²⁰⁹ In contrast, "preference-insensitive" political decisions are where "facts about the mix of preferences or opinions are substantively irrelevant."²¹⁰ Dworkin does not think we have any good reason to believe that the majority decision-making, as an epistemic tool, is going to be right about preference-insensitive issues.²¹¹ Dworkin reasons, by example, that the fact that the majority of citizens approve of the death penalty is not, by itself, a justification for capital punishment.²¹² Since Dworkin focuses

Dworkin is not claiming that a communal form of democracy cannot use voting. Rather, the actions aggregated cannot be merely individual actions with no sense of doing something as a group.

In the average person's day, many acts involve often unspoken coordination where many individuals are aware to some extent that each is part of a communal arrangement to limit harm while allowing everyone to accomplish each individual's aims. Furthermore, when an individual expresses the idea that a risk is unreasonable or too dangerous, she is often expressing both her values and what she thinks is proper in her society. In so doing, she is adopting a communal view of collective action. Even if not every individual understands their own dispositions regarding trade-offs between risk and benefits in a communal sense, any governmental procedure designed to assign accident costs would likely involve this communal sense. Thus, democratic standard theory maintains Dworkin's communal sense of democracy even when it bases the negligence standard of care on the aggregation of each individual's values.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

on preference-*ins*sensitive issues, he does not develop further his concept of preference-sensitive issues in this text.

One interesting aspect of Dworkin's discussion of preference-sensitive issues is that he assumes the sports facility question should be based, in part, on which facility would be the "most used."²¹³ That is just another way of saying the decision properly depends on the preferences of the majority of potential users of both facilities. So, Dworkin seems to think that the "right" decision depends on, at least in part (and Dworkin does not reveal any other part), the aggregated preferences where the majority (of the pertinent group) rules. Put differently, there is no universal, morally required answer to this political issue. While Dworkin explicitly praises majoritarian decision-making as an epistemic tool for preference-sensitive issues, he also seems to endorse that majoritarian decision-making because what morally matters for the issue *is* what the majority prefers, all other things being equal. In other words, this issue has no morally required decision apart from the decision derived from some meaningful input from the individuals affected by the decision.

For preference-sensitive issues, capturing the "majority's will" does not merely provide epistemic access to the proper decision, but also the "majority's will" is the only proper decision. So, even if none of the standard democratic procedures were feasible to make the sports facility decision, it seems that Dworkin would still be committed to the claim that there is no "right" answer to which facility should be built apart from the majority's preferences (however discovered).

²¹³ *Id.*

In using “preferences” without elaboration, Dworkin is riding roughshod over several philosophical issues regarding what preferences are, how they relate to an individual’s second-order preferences or more objective interests, and so forth. He does so perhaps because he focuses on preference-insensitive issues. Even though I am interested in exploring the category of preference-sensitive issues, I am not going to speculate on what Dworkin himself means by “preferences.” Instead, I think his distinction can be reformulated in broader terms that tie the distinction directly to the overarching theoretical commitments of the Kantian tradition.

Dworkin seems to think certain issues should be preference-sensitive because doing so advances the life plans of as many relevant individuals as possible. Suppose the hockey rink would be used more than the baseball stadium, and no other facility would be used more than those two. Since the town can only build one facility, it should build the hockey rink because doing so will further the life plans of as many of the potential users of either facility as possible. None of the potential users have a moral right to the town building any one of the facilities over the other. So, building only the hockey rink does not violate any right of those individuals whose life plans would be furthered more by the baseball stadium. Instead, the differences between the life plans of the potential users are properly resolved by the town building the facility that furthers the life plans of as many individuals as possible. The same reasoning would lead to building the baseball stadium in another similarly situated town where the baseball stadium would further the life plans of the most individuals as possible. No single answer regarding the sports facility issue is morally required for both towns, based on the overarching theoretical commitments of the Kantian tradition. Instead, the morally required answer is the one that would further the life plans

of as many of the relevant individuals as possible. Speaking of these issues in terms of life plans instead of preferences does not detract from the appeal of Dworkin's distinction. If anything, its appeal shines brighter because the revision is formulated in broader, more apt terms and does not depend on any particular understanding of what constitutes a "preference." So, after I address some objections to the sports facility example, I will refer to these issues as "life plan sensitive issues."

An objector may ask for further explanation: Is there something unfair about not relying on the *majority's* will?²¹⁴ I take it that this question is *not* aimed at Dworkin's epistemic point because nothing appears problematic if one has a superior, alternative epistemic mechanism to discover the majority's will. Rather, the objection is to my reading of Dworkin where I claim that the majority's will is the right answer, that is, the answer that justice requires. So, the objection is: If the town deviates from the majority's will, are the individuals in the majority treated unfairly?

My short response is yes, if we are understanding fairness as justice, so to speak. To explain, given that fairness (i.e., justice) involves treating individuals as both free and equal, then deviating from the majority's will fails to treat the majority as free in the sense that it does not advance their life plans despite the ready opportunity to do so. Put differently, it fails to do something akin to a Pareto optimal improvement, given the strictures of Dworkin's example (explained below). It is this aspect of fairness/justice that I am analogizing from the sports facility issue to the issue of breach of the negligence standard of care.

²¹⁴ This question and the immediately following objection was posed to me by Samuel Freeman in response to an earlier draft.

Even so, the objector is likely more concerned about whether so deviating fails to treat the majority as equals, given that instantiating the majority's will advantages them and does not equally advantage the minority. To clarify, I do not intend the sports facility example to illustrate or argue primarily for the equality aspect of democratic standard theory which it, like fairness as justice (a.k.a. justice as fairness), draws from the overarching theoretical commitments of the Kantian tradition. Assessing any possible unequal treatment of the majority, beyond whether their constitutional essentials are violated, depends on how the stadium issue is decided if it were not decided based on majority rule. So, such an assessment would involve comparing majoritarianism's sense of equality with alternative senses of equality such as the toss of a fair coin, a lottery, or utilitarianism's method of according equal weight to each unit of each person's utility. In that comparison, we would seek after which sense of equal treatment is the best interpretation given the immediate context (e.g., political issues like the sports facility issue) and how it accords with all other relevant aspects of the town's political institutions. Such a comparative task would involve comparison of democratic standard theory with consequentialist theories of negligent breach against the backdrop of the extensive, relevant literature that spans multiple disciplines. My plan is to address those issues in future papers, with which I will pave my path to tenure.

To gesture in that direction, my sense is that majoritarianism, as applied strictly only to issues like the sports facility example and negligent breach gives life to a sense of equality that plays a major role in the overarching theoretical commitments of the Kantian tradition. That sense of equality is that each person's actual life plan, given equal weight and force (in particular senses of those terms), should directly shape the fine

details of political equality. I realize that the previous sentence is vague. Yet, its explication must wait (briefly) for Dr. Gregory Jay Hall, Esquire, to vigorously pursue that research agenda.

I settle for now with establishing in this dissertation, among other points, the following three claims related to this objection:

1. Majoritarianism, in the strict confines of the political issues explored herein, treats as equals, in a meaningful sense, individuals both in the majority and minority by according equal weight to each person's values.
2. Strictly in only these kind of issues, majoritarianism does *not* treat, as *unequals*, individuals either in the majority or the minority in the sense of that it does *not* violate their constitutional essentials.
3. Majoritarianism accords the best sense of treating individuals as free in that it provides a legal mechanism under which as many individuals as possible may pursue their life plan parts.

Ultimately, in this dissertation, I aim to establish, as well, that democratic standard theory provides the best interpretation of what it means to treat individuals as free and equal, as to the issue of negligent breach, based on the overarching theoretical commitments of the Kantian tradition. If fruitful, then my post-dissertation comparison of democratic standard theory to consequentialist theories of negligent breach is justified.

Having largely postponed the equal treatment sense of the above objection, let's continue the first strand of the above objection. The objector may press me by supposing that a town has an entrenched majority that favors using public money only for sports facilities. Each time the issue is on the table, the 51% majority who favor sports always prevails over the 49% who favor putting the money into museums or towards public education. It does not seem that over time more individuals' life plans are furthered when the sports fans always win each majoritarian vote and the 49% get nothing each time and

overall. In contrast, fairness, perhaps in both the sense of freedom and equality, would demand some kind of compromise, the objector would proffer, to ensure that the large minority gets at least something they prefer.

I am sympathetic, if not in agreement, with the thrust of this objection. Due to particular details in Dworkin's example, this form of the objection is misplaced, despite any initial appearance otherwise. I have not yet emphasized these details. Recall that the town has enough funds for only one sports stadium. This condition does not make the example unrealistic as some small towns cannot afford *any* sports facilities while other small towns can only afford one stadium, at least during a rather lengthy timeframe. So, we are not dealing here with multiple decisions about multiple possible stadiums for a population with conflicting values regarding sports and other "goods." In other words, Dworkin's stipulation shapes the scenario so that it is not exactly like issues addressed by distributive justice, at least the Rawlsian stripe.

Similarly, Dworkin also stipulates that the town has already designated funds for building a sports stadium. So, we can, in fact, we must, for the example to have any significance, presume that any considerations of distributive justice have already been met with regard to funding museums, education, and so on. While the objector may rejoin that the earlier distributive questions are where the beef is, I do not deny those distributive questions' importance.

Interestingly, note that the above stipulations, along with Dworkin's other stipulation that the townspeople only (or primarily) want either a hockey or baseball facility, make this particular example much more like a bilateral issue rather than a distributive issue. In fact, it is this stipulated bilateral nature of Dworkin's example that

opens up the possibility for any insight from it to be applicable to the arena of negligence law in tort—where I am also stipulating, for the purposes of this dissertation, that at least some accidents are matters of bilateral justice rather than distributive justice. As for my terminology, I am calling the moral arena “bilateral justice” instead of the usual term “corrective justice” merely to highlight that, even though nothing about the sports facility issue involves correcting a wrong, both it and the issue of breach have interesting bilateral features that make the moral considerations at play analogous.

By no means, do I think that the sports facility issue and the issue of breach of the negligence standard of care are identical. As an autobiographical aside, my reflections on these concepts in Dworkin’s work stimulated my already burgeoning interest in any possible role that majoritarianism may properly play in political institutions based on the overarching theoretical commitments of the Kantian tradition. Back then, I was ruminating on accident costs more broadly in that I was wrestling with both *ex ante* and *ex post* political decisions regarding the assignment of accident costs.

My earlier broad inquiry highlights a disanalogy between the sports facility issue and assigning accident costs via accident law. Specifically, the sports facility issue is decided prior to the town incurring the expense of the stadium. While it is plausible that a town can only afford one sports facility, it is implausible to assume that the town *must* build one of these expensive sports facilities. Even though the town designated funds for one facility, the town could always reallocate the funds or refund those monies in light of the lack of unanimity on which facility to build. To put it bluntly, at the time of the decision, the town is not yet stuck with the sports facility’s expense.

In contrast, at the time of an accident, at least someone will inevitably be stuck with the accident costs, even if later a court renders a verdict that assigns those costs differently among the two parties. The question is whether that disanalogy makes the sports facility example inapplicable to negligence law in tort. I don't think so. At the same time, it is not useful to conjure up bizarre modifications to the example to tighten up the analogy. Bizarre modifications would, by themselves, call into question whether the example so rendered is helpful. Furthermore, to the extent that our reasoning depends in part or in whole on the process of reflective equilibrium to harness our considered convictions, bizarre modifications risk putting our reasoning outside of the context where our considered convictions were established and have significance, if any. So, I will avoid the bizarre to avoid the gambit that commentators in law, philosophy, and their intersection unknowingly trip on.

Consider the following realistic modification. Suppose a town has an existing baseball facility. While state of the art when built, the baseball facility, like that sport in general, has deteriorated drastically over recent years. Virtually no one in the town wants to watch or play baseball anymore. At the same time, the town does not want to lose its enormous investment in the facility, and, for a relatively modest amount, it can convert the baseball stadium into a hockey rink or a football stadium (but not both). This modification still is not perfect for the town could still let the baseball stadium lie fallow. Nevertheless, supposing a modicum of surplus funds and a modest cost for the renovation, I think we can bridge the gap between the sports facility example and negligent breach in tort.

Let's assume that 51% of the townspeople want the renovation to produce a hockey rink, 49% want a football stadium, and 90% do not want the baseball stadium to lie fallow. The reasoning from above still holds with the modified, more analogous example. Deviating from the majority's will fails to treat the majority as free in the sense that it does not advance their life plans despite the ready opportunity to do so. Given that the hockey rink advances more individuals life plans vis-à-vis the football stadium, of the two, building the rink better advances the social goal to treat individuals as free.

Analogously, regarding a trip and fall accident, suppose a 50% majority of individuals in the relevant group prefer homeowners to inspect and remove litter from the walkways of their property every other day while a 40% minority prefer inspection and removal twice daily. As for the remaining 10%, they want it to occur less than every other day with most preferring once per week. When a pedestrian trips on litter on one of these walkways, suppose all evidence supports the claim that the pertinent house owner only inspected and removed litter once per week. Enforcing the negligence standard of care at the majority's every-other-day schedule still furthers the preferences of the individuals in the minority to some extent. We can liken the 90% supermajority that does not want the dilapidated baseball stadium to lie fallow to the 90% supermajority (that is, the majority and the minority together) who do not want house walkways inspected and litter removed any less frequently than every other day. Plus, in the sports facility example, assuming many in the minority also enjoy hockey, they will have their life plans furthered to some lesser extent by the hockey rink. While not perfect, the bridge between the sports facility issues and negligence in tort should hold enough weight to justify further exploring parallels such as these as we examine the proper role of

majoritarianism, if any, in political institutions that aspire to enact the overarching theoretical commitments of the Kantian tradition.

Another objector may contend that, even if some issues are life plan sensitive, those may be limited to issues where the stakes are relatively low such as:

- which sports stadium to build;
- where to build a city park;
- how much, if any, tax revenue should support the arts (and which arts); and
- to what extent public school curriculum should include the arts.

Additionally, the objector may reason that issues involving devastating injury, death, and substantial property damage are life plan *insensitive* due to those drastic consequences.

Thus, due to the severe harm at stake, the issues of accident law may be more similar to Dworkin's death penalty example rather than the sports facility example.

As a preliminary response, note that substantial injury can and does result from sports, especially hockey. In 1968, before professional hockey players universally used helmets, Bill Masterton died directly from a hockey injury to the head when an opponent knocked him flat on his back causing Masterton's head to hit the ice. Surprisingly (or perhaps not), Masterton is the only player that has died directly from an injury suffered while playing professional hockey in the National Hockey League. Yet, hockey players are not the only ones risking their lives. In 2002, at a professional hockey match, a thirteen-year-old hockey spectator died after she was struck in the head by a hockey puck even though the puck had already ricocheted off another fan (who suffered only minor injuries). Numerous other injuries regularly result from hockey, and more severe injuries

result from hockey compared to baseball.²¹⁵ So, the political issue about whether or not to encourage hockey (by building a hockey rink) involves a substantial political choice to risk bodily injury. Furthermore, the political choice to build a baseball stadium versus a hockey rink is a choice for one level of risk instead of a higher level of risk. Thus, if political issues regarding sports are morally different from political issues regarding other kinds of acts which yearly result in deaths and devastating injury, as the objector in the previous paragraph suggests, the difference is not that one involves risk of death and devastating injury and the other does not.

I freely admit that the preceding argument only gets us so far, for the objector could retort that the scale of harm at issue in sports is dramatically smaller than in other areas of social life. The number and extent of bodily injuries resulting from sports (even hockey) seem like a mere footnote compared to the legions of deaths and devastating injuries that occur each year due to other accidents. The bodily injury and death resulting from driving automobiles, walking in a city, and performing various household acts that lead to slip and falls, fire-related injuries, and poisonings far outnumber and are far more pervasive and ever-present than sports injuries. Due to the differences in scale along multiple dimensions, the objector may continue, political issues pertaining to accidents as a whole may not be life plan sensitive like the sports facility issue.

In reaction, when such devastating injury and death is at issue, nothing is a more proper basis to determine how much risk and what kind of risk individuals should be exposed to other than the values of the individuals *who are themselves exposed to those*

²¹⁵ I rely here on the amount of blood on the ice at hockey games as evidence that these claims are clearly true.

very risks. If anything, it seems rather odd to have any other factor determine risk exposure. Would we not be disturbed by a social reality where we are exposed to severe accidental harm and death, and we, as a group, do not have any or very little input into the determination of what acts make us vulnerable to negligence claims? I cannot see how this minimal point is anything other than almost a truism. In that light, breach of the negligence standard of care is a life plan sensitive issue *regardless* of whether the reader agrees that majoritarianism is the best way to resolve conflicting values among the individuals affected.

Consider a non-judicial but related legal practice that suggests that negligent breach is a life plan sensitive issue. When courts get high-profile negligence cases “wrong,” legislatures sometimes step in to alter that particular precedent. At times, courts even invite the legislature to change a negligence rule if so wanted.²¹⁶ Consequentialist theories may be able to justify these practices as legislatures engaging in efficiency-driven policy analysis or cost-benefit reasoning, given that legislatures are supposedly better at such analysis when compared to courts. However, when it comes theories motivated by the concept of the reasonably prudent person, there is a disconnect between courts and juries determining this moral concept and the practice of legislature override. Presumably, legislatures are motivated by many other forces than mere consideration of what the reasonably prudent person would do. So, there is little basis for reasonableness-motivated theories to conclude that the legislature override of the courts and juries’ decisions is more likely, on average, to accurately decide the issue. Reasonableness-

²¹⁶ *Id.*

motivated theories should at least express concern over this type of legislature override or, even better, provide the theoretical resources to justify or reject that involvement. Instead, reasonableness-motivated theories do not adequately address the issue.

Perhaps, the above considerations suggest why any plausible theory of breach of the negligence standard of care will have a democratic component. Recall that my sense of democracy in this dissertation is, put roughly, a political mechanism where the people's values determine legal outcomes. Consequentialist theories such as the balancing approach of the Restatement (Third) or the social welfare approach implicitly have a democratic component in this sense. The social welfare approach straightforwardly uses individuals' values as components of social welfare. In the balancing approach, risks of possible injuries and the burdens of precautions are ultimately based on individuals' values. A risk of an injury has significance in part due to how individuals value the pain and limitations involved. The burden of a precaution is measured based on how individuals weigh its characteristics and the effort and expense involved. Any aspect of these concepts that involves the market ultimately relies on individuals' values because, in large part, market prices depend on how individuals value what it takes to *supply* goods and services and on how individuals value or *demand* those same goods and services. Given these consequentialist theories substantially utilize individuals' values, a.k.a. life plan parts, they implicitly recognize that negligent breach is properly a life plan sensitive issue.

From that perspective, one of the most significant differences between consequentialist theories and democratic standard theory is not whether or not negligence should be based on the values of the individuals involved but rather how competing

values should be reconciled. To reiterate, one mechanism to reconcile competing values is restricted majority rule (democratic standard theory). Another is maximizing weighted social welfare where the values of the individuals involved are inputs into a consequentialist weighing of each component of social welfare. Another is to balance risks of possible injuries against the burdens of precaution where the inputs for each of these concepts *necessarily* include the individuals' values. While consequentialist theories are not usually phrased exactly in these terms, this sensitivity to individuals' life plan parts is an important commonality between democratic standard theory and these competing consequentialist theories of negligent breach.

The differences between democratic standard theory, social welfare theory, and a balancing test theory akin to the Restatement (Third) can be separated into two parts. First, theories differ on the extent to which individuals' life plan parts play a role, with some theories allowing a greater role for other factors. Second, theories differ in how each individual's own life plan parts are weighted vis-à-vis others' life plan parts. So, in addition to how to weight values, one of the fundamental questions is not whether breach of the negligence standard of care is a life plan-sensitive issue. Rather, the question is how sensitive should breach be to individuals' life plans, with democratic standard theory taking a stand at the "almost entirely sensitive" end of the spectrum.

I keep these observations brief because, as mentioned earlier, defending democratic standard theory against competing consequentialist theories is a future project. In this dissertation, I am defending the claim that breach is a life plan sensitive issue and that democratic standard theory best captures that aspect when compared to

other non-consequentialist theories, based on the overarching theoretical commitments of the Kantian tradition.

Negligence Breach as a Life Plan Sensitive Issue

Drawing on Dworkin's distinction, I contend that what constitutes breach of the negligence standard of care is a life plan sensitive issue. By making the negligence standard of care almost entirely based on what best allows individuals to advance their life plans, democratic standard theory reveals its basis in the overarching theoretical commitments of the Kantian tradition.

Within those overarching Kantian commitments, political institutions should be committed to establishing a political framework in which individuals may further their life plans. To do so, they should create mechanisms that are sensitive to individuals' life plan parts, that is, the political mechanisms allow space for individuals to act in accordance with their life plan parts (i.e., their values) under terms that aspire to also treat individuals as equals. The intersection of allowing individuals to pursue their life plans, within constraints of equal treatment, create the fine details of a particular society that pursues the overarching theoretical commitments of the Kantian tradition.

To make this more concrete, let's highlight how Rawlsianism, another theory based on the overarching theoretical commitments of the Kantian tradition, calls for political institutions that are sensitive to individuals' life plan parts, specifically individuals' values regarding labor and leisure, within the constraints of equal treatment. During the following discussion, keep in mind that democratic standard theory treats negligence as a life plan sensitive issue for similar reasons. Specifically, within the

requirements of equal treatment, political institutions aspire to allow individuals to pursue their life plan parts as much as possible.

In Rawlsianism, political institutions must be substantially sensitive to individuals' values regarding labor and leisure based on Rawls's requirement for protection of the basic liberties and fair equality of opportunity.²¹⁷ On this topic, Rawls remarks, "There is no reason at all for the forced or central direction of labor."²¹⁸ This means that political institutions may not properly require that individuals work a certain amount or in certain ways. Political institutions may perhaps use education or incentives to shape individuals' values regarding labor and leisure, but such may not reach the level of coercion.

At the same time, Rawls's principles of justice do not require that political institutions advance, without limit, individuals' values regarding labor and leisure. The difference principle allows economic markets in labor and goods and services, among other institutions, to give moderated yet fair effect to individuals' values regarding labor, leisure, and their other life plan parts. The moderation results from the difference principle's requirement that the overall distribution of wealth must benefit the least well off as much as possible.

Simultaneously, given the lexical priority of the basic liberties and fair equality of opportunity, justice does not allow political institutions to make the worst off better off by coercing anyone to labor more than the individual chooses or to labor in a particular job that the individual does not want to do. This arrangement is fair in that individuals

²¹⁷ JOHN RAWLS, A THEORY OF JUSTICE 272-73 (1971).

²¹⁸ *Id.* at 272.

may live according to their individual values regarding labor and leisure as long as the institutions as a whole benefit the least well off as much as possible. And, of course, all individuals have their basic liberties protected and fair equality of opportunity. In these ways, Rawlsian institutions are sensitive to and protect space for individuals' values regarding labor and leisure.

Similarly, to advance individuals' life plans, what constitutes breach of the negligence standard of care should be sensitive to and protect space for individuals' values. One sub-conclusion to my thesis is that a theory based on the overarching theoretical commitments of the Kantian tradition cannot provide determinate and complete answers to what constitutes breach of the negligence standard of care without incorporating individuals' actual values. This sub-conclusion is noteworthy and a unique contribution to tort theory. Recall that Weinrib's and Ripstein's theories failed to even remotely provide close to the level of specification needed for determinate and complete answers to what constitutes negligent breach. What is missing from these theories is sufficient inclusion of individuals' values. Their appeals to freedom and equality ring hollow without including what is actually important to the actual individuals involved.

Tyranny of the Majority?

Rule by the majority often evokes, as if by reflex, the criticism that the minority is victimized by a tyranny. Majority rule is infamous due to historical instances where majorities burdened and abused those that were less numerous or less powerful. Majority rule is not always a necessary evil that must be tolerated for lack of a better alternative. I

argue that majority rule is not merely instrumentally useful but is the morally required mechanism to determine breach of the negligence standard of care.

Recall that, under democratic standard theory, breach of the standard of care is determined by the values of the individuals locally affected by the kind of act in question. The values of each member of the relevant group count equally. When the values of group members conflict, majority rules. Let's define a person with a "minority view" as a person whose values regarding a specific kind of act do not reflect the standard of care supported by the majority's values. If an individual's act leads to accidental harm, that individual, even if holding a minority view, may be vulnerable to a negligence claim based on the standard of care supported by the values of the majority in that group. If the relevant group were different, whether or not that individual is vulnerable to a negligence claim for the same act may be different. Even so, that disparate result does not treat the individual with the minority view unfairly. I develop this point in the next sections.

1. Not a Suspect Class

It is important to note that the individual with a minority view is not a member of a suspect class or group. I am resisting the urge to use terms "minority member" or just plain "minority" because those terms too easily connote historically disadvantaged ethnic and religious groups, which are extensively covered in jurisprudence related to the equal protection clause. In the realm of negligent risk, the individual with a minority view is not necessarily in that "minority" due to an immutable characteristic. The individual with a minority view merely has values that favor certain kind of act and its risk that most others do not value. While some ethnicities or other subgroups that share immutable

characteristics may also share many of the same values, members of an ethnic group, for example, might change their values and individuals without the ethnic characteristics can also have or can adopt the same values as the ethnic group.

Moreover, in democratic standard theory, an individual may have a minority view for one kind of act while at the same time have the majority view for many or most other kinds of acts. For example, one may think that the benefits from most engine-based forms of transportation are not worth the death, injury, and property damage that they statistically cause. At the same time, the same person may endorse the existing technologies that increase factory production and make constructing buildings easier. So, the same person can have a minority view on some issues (e.g., transportation) while also having the majority view on other issues (e.g., production).

For most kinds of acts, the disadvantages of not sharing the majority view are not likely falling on the same individuals. Rather, the disadvantages are likely spread, to some extent, among the group members. As a result, the lack of a persistent, disadvantaged minority subgroup due to immutable characteristics already lessens any tyranny of the majority concern regarding democratic standard theory.

While some individuals or subgroups may be extremely risk averse, these individuals are the rare exception. Perhaps, the ideal solution for these individuals or subgroups is for them to voluntarily separate themselves like the recluse Howard Hughes from those that engage in the risks of modern life similar to how the Amish separate themselves to maintain the lifestyle they wish. Democratic standard theory would support group separations in such situations but would maintain that a person with a minority view, who remains (at least through proximity) part of a group whose individuals have

drastically different values, is not treated unfairly if held to the majority's standard of care in a negligence tort dispute.

2. *Basic Liberties Protected*

Kantian theorists often endorse majoritarian rule as instrumentally good for various reasons. Yet, they emphasize that majority rule should be constrained or vetoed if or when it leads to objectively unjust decisions. Democratic standard theory incorporates constitutional democracy in that basic liberties limit the domain of majority rule regarding what constitutes breach of the negligence standard of care.

Let's take a step back for a moment to distinguish democracy from pure majoritarianism. Some theorists think that democracy is unrestrained majoritarianism and construe inalienable rights as at odds with democracy.²¹⁹ Along with other theorists, I find this pure majoritarian view of democracy as wrongheaded because it does not capture the underlying ideas that make democracy appealing, namely, treating each individual with equal respect and concern.²²⁰ I am not adding to this debate which is extensively discussed in the literature. Rather, I am sketching these positions in broad strokes to clarify another aspect of how I am using the concept of democracy.

Under the view of democracy as restrained majoritarianism, basic rights such as freedom of thought, speech, movement, and assembly and equal voting rights are necessary preconditions of a democracy based on majority rule.²²¹ Other basic rights such as those protecting a person's bodily integrity, private property, private sexual decisions

²¹⁹ Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFFAIRS 22, 26 (1997).

²²⁰ Ronald Dworkin, *The Majoritarian Premise and Constitutionalism*, in PHILOSOPHY & DEMOCRACY: AN ANTHOLOGY 241, 242-43 (Thomas Christiano ed., 2003).

²²¹ Ronald Dworkin, *Equality, Democracy, and Constitution*, 28 ALBERTA L. REV. 324, 326 (1990).

and marriage choices and criminal rights such as the right to legal counsel and the right against self-incrimination are justified aspects of a democracy because these rights provide each individual a part and a stake in the collective, to use Dworkin's terms, as well as a degree of independence from it.²²²

In the arena of risk imposition, when a basic liberty trumps the majority's standard of care for a particular accident, democracy has not been thwarted. Since democratic standard theory's fundamental goal is to treat each individual with equal respect and concern, limiting a particular standard of care to protect basic rights further realizes the theory's justification rather than undermining it.

When basic liberties trump the majoritarian standard of care, properly adjusting the standard of care depends on the details. If the trump results from one party's immutable characteristic, the proper adjustment may simply involve applying the majoritarian standard that applies to those without that immutable characteristic. In my example from above, the homeowner would not be able to use the black domestic servant's violation of a social norm by entering the front door to claim contributory negligence or negate an otherwise valid negligence claim. With these adjustments, the standard of care reflects the majority's values regarding risk *sans* any element that violates an individual's constitutional essentials.

²²² *Id.* at 337-42. See also Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUR. J. PHIL. 2, 9-10 (1995).

The Recklessness Boundary Protects Constitutional Essentials

Basic liberties are also protected by negative legal consequences that attach to acts of recklessness with or without the requirement that harm resulted. Basic liberties, in fact, set the boundary between recklessness and negligence. So far, I have discussed risk primarily as if resulting accidental harm is only vulnerable to a legal claim for compensation if such is supported by values of individuals locally affected by the underlying acts. Some readers may be concerned about how democratic standard theory handles the numerous acts that involve excessively high risk due to the nature of the acts or the manner/context in which they are performed. There is likely an upward boundary where the probability of harm is so high or the severity of the harm is so dire that moral theory may universally prohibit the act. Commentators and legal doctrine often refer to this category of risk as “recklessness.”

Reckless acts involve less risk than acts where one intends harm or knows that harm is virtually likely to occur. At the same time, recklessness involves more risk than mere carelessness or negligence that most people encounter daily as illustrated in the examples in this dissertation. While my formulation of recklessness is intentionally rough, it suffices for my present purposes. Here, I am excluding ultra-hazardous acts that are both excessively risky and also have substantial social value. The common law deals with those acts under the legal doctrine of strict liability in tort. I address democratic standard theory’s implication for strict liability elsewhere. Instead, in this subsection, I am addressing excessively risky acts that have little or no social value—especially when compared to the excessive risk. Usually, reckless acts bring, at most, value to only the actor.

While this dissertation's primary purpose is to draw the line between non-negligence and negligence, democratic standard theory also contains the theoretical resources to draw and justify the boundary between negligence and recklessness. The boundary between recklessness and negligence need not be set by the actual values of those individuals locally affected by the kind of act in question. Instead, but still consistent with democratic standard theory, reckless acts could be those acts that have the following characteristics:

1. Excessive riskiness either in its probability of occurring or the dire extent of the probable harm; and
2. Virtually no or very few fully informed individuals would have a life plan that included one's own ongoing exposure to the risk in that act.

If an act meets those characteristics, we need not further consider whether the act meets the democratic standard of care. Alternatively, if for some bizarre reason the values of an actual group support a proposition for a reckless act, these individuals' values may be permissibly overridden because those individuals must not be fully informed or must have some other gross misunderstanding about the issues involved.

Another way to identify the boundary between recklessness and negligence is an extension of the argument for Rawlsian constitutional essentials. I suspect that this justification and the previous one are identical in substance though phrased differently. My previous answer is a version of the reasoning underlying why Rawlsian deliberators behind the veil of ignorance adopt and give lexical priority to the constitutional essentials. This second justification appeals directly to and fleshes out the rationale for constitutional essentials. I keep these two justifications separate because explicating their connection would take us too far afield.

Getting back on the track of the second justification, individuals not only have interests in the government or other persons never intentionally depriving them of constitutional essentials, but they also have interests, generally speaking, in others never acting in ways that recklessly threaten their constitutional essentials. For example, a person who tosses construction debris from a tall building without regard to potential passers-by creates a danger so severe that it improperly restricts their basic liberty of free movement. Free movement may also be improperly restricted by driving at a highly excessive speed or in an excessively dangerous manner.

Intentional and knowing infringements on individuals' constitutional essentials are often criminalized or remediable in law in various ways. Similarly, reckless acts are usually criminalized or remediable in law through compensatory or punitive damages when harm results. Doing so provides various kinds or levels of legal protection to a person's right to bodily integrity and other constitutional essentials. Explicit criminal prohibition of many reckless acts is appropriate because reckless acts are not a necessary part of social life. [Even ultra-hazardous acts that contribute to a substantial social good could be eliminated without major disruption to social life even if eliminating ultra-hazardous acts required some dramatic changes.] Furthermore, recklessness does not have the same mitigating feature that negligence does. Specifically, imposing that level or kind of excessive risk is not generally due to small or momentary lapses in judgment or awareness like many of the acts that we generally think fall within the domain of negligence.

I do not think these conclusions are controversial. Yet, a full defense of basing recklessness in constitutional essentials requires further attention in my future work. Let

it suffice that I am assuming that articulating a moral theory of recklessness and its boundary with negligence is a moral inquiry related to, but distinct from, articulating a theory of how to justify the distinction between negligent acts and non-negligent acts. This latter inquiry is this dissertation's focus.

3. *The Risk in Social Cooperation*

Based on the above analysis, constitutional essentials trump majoritarian values when they support recklessness or when they support an outcome that would directly violate one of the constitutional essentials. In what follows, I explore why constitutional essentials or other significant rights do not continue to shape the contours of the negligence standard of care. Some reckless acts have possible cataclysmic consequences far beyond the realm of negligence. I am thinking of acts that involve enormous harm such as a truck driver driving intoxicated while transporting radioactive waste or a motorist "playing chicken" with an unsuspecting train engineer by driving on train tracks straight at a speeding commuter train full of passengers (to see who will brake first). Usually, when I speak of recklessness, I am not referring to these cataclysmic kinds.

Aside from these extreme examples, harms of similar magnitude could result either from acts of recklessness or acts of negligence. For example, death by house fire may result from one negligently leaving the stove on as well as from one recklessly smoking in bed when exhausted. So, treating negligence and recklessness differently cannot be due to the severity of the harms risked, even if *on average* reckless acts risk more severe harms compared to negligent acts. So, the rationale, if any, must be derived elsewhere.

Well, there are several morally relevant differences. One difference puts the overall issue starkly. As mentioned above but put more simply here, recklessness is not a necessary part of social life. In contrast, the category of acts to which negligence pertains is a necessary part of social life. That is not the same as the claim, “negligence is a necessary part of social life” although that too may be true given human frailties. The point is that, for social life to be possible, individuals need to be able to act in ways that simultaneously impose risks of harm to themselves and others, risks of harm on a scale from (above) 0 up to 100, where 100 is a number I stipulate to represent the boundary where recklessness begins.

All aspects essential to social life and many that are non-essential can be accomplished with acts where the risk magnitudes are from 0 to 100 (termed hereafter a “0-to-100 risk”). Where along that scale non-negligence ends and negligence begins cannot be specified by appeals to constitutional essentials. A right to be free from a “0-to-100 risk” would entail a Hohfeldian disability preventing others from performing an act that is essential for social life or has risk comparable to those acts that are essential for social life. In this trade-off, each expansion of the space to pursue one’s life plan necessarily involves a corollary restriction, in the form of increased risk, in the space for others to pursue their life plans. In this sense, acts with 0-to-100 risk magnitudes are essential to social life whereas reckless acts (with risk magnitudes greater than 100) are not.

The theoretical commitments of the Kantian tradition do not point toward a specific level of risk (anywhere from 0 to 100) for any kind of act that is universally morally acceptable. I am not the only one to have found the theoretical commitments of

the Kantian tradition to have this attribute.²²³ My critiques of the theories in Chapter Two also support this point. Thus, we cannot use the theoretical commitments of the Kantian tradition to establish a specific level of risk at which point an actor is vulnerable to a negligence claim and, below that level, one is not vulnerable to such. Furthermore, even the idea that something other than individuals' own values should determine the risks that individuals must bear seems inconsistent with a variety of arguments against paternalism.

We can reasonably conclude that there is no objectively morally correct amount of risk that would function like a right to constrain the majoritarian outcome of what constitutes breach of the negligence standard of care—aside from the exceptions canvassed above. In that sense, the majoritarian standard of care cannot be objectively wrong or unjust in most cases. Instead, the overarching theoretical commitments of the Kantian tradition support the majoritarian standard of care because it furthers the life plans of the most individuals possible.

To test the appeal of democratic standard theory, let's illustrate a tragic choice that democratic standard theory is willing to swallow. In 1995, the United States Congress repealed the statute requiring a nationwide speed limit of 55 miles per hour (mph) on interstate roads.²²⁴ Afterwards, some states raised the speed limits on several rural and non-rural interstate roads with some speed limits reaching 75 mph.²²⁵ One study concludes that, between 1995 and 2005, 12,545 (about 1,255 per year) more fatalities

²²³ Madeleine Hayenhjelm & Jonathan Wolff, *The Moral Problem of Risk Impositions: A Survey of the Literature*, 20 EUR. J. PHIL. E1, E26-E51 (2012).

²²⁴ Lee S. Friedman, Donald Hedeker, and Elihu D. Richter, *Long-Term Effects of Repealing the National Maximum Speed Limit in the United States*, 99 AM J PUBLIC HEALTH 1626, 1626 (2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2724439/>.

²²⁵ *Id.*

resulted from the increased speed limits than would have occurred had the speed limits remained 55 mph.²²⁶ The same study estimates that 36,583 (about 3,658 per year) more injuries in fatal crashes resulted from the same speed limit increase.²²⁷ Putting those statistics together, the increase in speed limits led to 49,128 more deaths or injuries. I assume these statistics are accurate for this illustration.

Here I add an element of fiction to apply these facts to democratic standard theory. Suppose that the values of 51% of the potentially affected drivers and passengers supported the increased speeds that resulted after the 1995 speed limit repeal. The values of 49% of the group opposed the repeal. Also, these respective percentages remained constant for the 10 years covered by the study. Let's further assume that, of the total dead or injured, 51% (25,055 people) were among the majority whose values supported the increased speed limits while 49% held the minority view.

In this scenario, democratic standard theory would deem that those individuals who drove faster yet below the higher speed limits did not breach the negligence standard of care. As such, any of those faster drivers who were involved in accidents, as a result of driving at speeds within the limits, are *not* vulnerable to negligence-based compensation claims for these accidents. Consequently, the faster drivers did not violate any rights of the 49,128 dead or injured. Even though 49,128 more individuals died or were injured, they (or their estates) are not properly entitled to any compensation from the other parties to the accidents. Based on these stipulated facts, the dead and injured alone bear their own accident costs and the consequences.

²²⁶ *Id.* at 1628.

²²⁷ *Id.*

In terms of this example, we can phrase the objections against democratic standard theory addressed above more starkly as follows:

- A. Were those individuals, who held the majority view and were among the 49,128 dead or injured, treated unfairly when the values of 51% majority (which included them) determined that driving within the higher speed limits did not breach the negligence standard of care?
- B. Regarding those dead or injured who held the minority view, were they treated unfairly by a tyrannical 51% majority who valued the higher speed limits?

Let's address each question in turn.

Even though the dead and injured fared horribly, as it turned out, the legal regime under which they were killed or injured reflected their own values. The relevant values are the ways a person weights the pros and cons of traveling faster including their assessment of how that faster travel furthers their other life plan parts. As for the pros, those traveling at the faster permitted speeds obtain the advantages of traveling faster without being vulnerable to compensation claims from any resulting accidents. As for the cons, each person on the road, including the 51% majority themselves, face a greater chance of accidental injury including devastating injury or death.

The death or injury of 25,055 individuals (the 51% majority) made them substantially worse off than they would have been had they lived or escaped injury and also obtained the advantages from faster driving. Nevertheless, the increased risk from the increased speed reflected the all-things-considered result of their own values. Thus, letting the standard of care reflect the values of the individuals involved creates a legal regime that facilitates these individuals' pursuits of their own life plans despite the risks involved. While a heavy price to pay, political institutions committed to facilitating

individuals' life plans will *always* create legal regimes that allow a greater amount of death and injury than otherwise available simply due to the fact that an alternative legal regime with greater safety is *always* an option. That is the grim reality of self-rule. As a side note, the same is true of any standard of care as greater safety is always an option even if that greater safety is unreasonable, inefficient, or leads to less overall social utility.

If the reader finds this grim reality unsettling, consider the issue from a different angle. How slow would one be willing to travel to reduce the risk of death from that kind of act? 10 mph? 5 mph? Perhaps, the cautious would prefer to completely dispense with motorized or horse-drawn transportation. On average, people walk about 3 mph. Is even that too dangerous? At some point, I hazard to guess that even the extremely cautious are willing to expose themselves to extremely minimal risk of death to travel where they are going. Take that amount of risk, whatever it is. To that amount of risk, even the extremely cautious cannot plausibly object. Regardless, any objection would be a mere complaint about the precarious nature of the human condition rather than an objection to a theory of the negligence standard of care.

Interestingly, according to democratic standard theory, even the extremely cautious person's values validate the amount of risk that reflects those values. Not giving effect to those values is bizarre paternalism. Thus, determining what constitutes negligent breach, at least as it pertains to those in the majority, enjoys a straightforward justification because the negligence standard of care is based on the values of that majority. So, legal outcomes reflect the "will" of that majority. The more difficult

question for democratic standard theory is whether the dead or injured who held the minority view were treated unfairly.

Prior to any accident, the person with the minority view is not as well off as if her view were the majority view. Even so, the person with the minority view still benefits from the overall system of social cooperation. The main benefits are as follows:

1. Her basic rights are protected.
2. Distributive justice allows her to obtain her fair share of the benefits of social cooperation, which she may use to advance her life plan.
3. In determining the negligence standard of care, she had an equal “vote” in that her values received equal weight.
4. Given the democratic standard of care, she has a degree of choice as to which risks she will likely be exposed to and how much risk she will likely bear.

Part of the price for these benefits from social cooperation is her being subject to some level of risk of accidental harm. In other words, one downside to social cooperation governed through democracy is that, while each person’s values are (ideally) factored into life plan sensitive issues, one is subject to the resolution of the issue whether or not one’s values “win.” Since the individuals among the 49% were entitled to the benefits of social cooperation listed above, they were treated fairly even though their values did not “win” in determining the standard of care on the speed limit issue.

It is true that the 24,073 dead or injured individuals who held the minority view “lost” in two ways. First, they died or were injured from the increase in non-negligent risk that did not reflect their values. Second, they were not entitled to compensation from other parties to the accidents since the greater speed reflected the majority’s values. At the same time, that would be true of some individuals no matter where the standard of

care is set. Under alternative theories of breach, an individual could be killed or severely injured from another's act that the individual herself did not value even if by some other measure that act was efficient or "reasonable."

Danger is inherent in social life. So, the issue is not whether individuals should be injured without the possibility of compensation as a result of risk that they themselves do not value. Rather, since such injuries are a fact of social life, what kinds of reasons provide the right basis for determining these political issues where some individuals will die or suffer devastating injury. It is not a question of whether some will be harmed (without compensation) from risks that they do not value; it is what reasons justify a legal regime where such things happen.

In the context of the law of risk regulation, Gregory Keating explores what kinds of reasons justify the risk of death and devastating injury. In my view, he rightly identifies (at a general level) that the reasons have to involve something comparable to death and devastating injury. Regarding the idea of comparability, Keating writes:

Harms are comparable when their impact on the lives of those they affect is similarly grave - when they impair ordinary activities, or important activities, or the pursuit of rational life plans, in similarly severe ways. Harms are comparable when they strike at the preconditions of rational agency in similarly severe (or similarly mild) ways. Harms are comparable when they disrupt the lives of those they affect in similarly urgent (or similarly insignificant) ways. Burdens and benefits are comparable when they improve or impair lives in similarly important or modest ways. When burdens and benefits are comparable, they may, other things equal, be traded-off against one another. When they are not comparable, it is unfair – unjust – to trade them off against one another.²²⁸

²²⁸ Gregory C. Keating, *Irreparable Injury and Extraordinary Precaution: The Safety and Feasibility Norms in American Accident Law*, 4 THEORETICAL INQ. L. 1, 10 (2003).

I agree with the gist of what Keating sketches though the real action is the greater detail of the criteria that can determine which harms and benefits are comparable.

Unfortunately, Keating does not explicitly provide adequate detail on this issue. We can characterize the speed limit case above in terms of arguably comparable harms and benefits: the freedom of traveling quickly versus diminished accident security from the faster travel. Keating's theoretical tools do not provide detailed enough theoretical resources to determine whether the freedom to drive somewhere between 55 and 75 mph is comparable to the death or injury of 49,128 individuals. Perhaps, his focus on risk regulation explains this lack of detail.

Even though Keating suggests and hints that his theory can be extended to negligence tort law, that extension is by no means straightforward.²²⁹ Keating continually claims that harms and benefits need to be comparable but provides little guidance on how to determine that issue. At the end of his article, Keating provides some guidance when he suggests that, in a society where background justice obtains, "the shutting down of major productive activities" would be "a grave injury comparable to a significant risk of devastating harm."²³⁰ He sees these major productive activities as morally special because they "arose out of a fair background situation, through procedurally fair transactions, and flourish in an economic system governed by principles of justice."²³¹ To me, Keating obscures or perhaps leaves out a major piece of what might be a persuasive moral justification.

²²⁹ *Id.* passim.

²³⁰ *Id.* at 87.

²³¹ *Id.*

What Keating obscures is that the moral importance of these major productive activities must also be based on individuals' values. The values of the individuals involved are what should decisively lead to the actual specifics of these major activities in light of the characteristics and possible results of those activities. Specifically, what needs to do most of the normative lifting here are the individuals' values about labor, leisure, the satisfaction of their daily wants and needs from those major activities, and so on—as individuals interact with each other and with political institutions of justice. As written, individuals' values at best play an obscure, unmentioned role in the fair transactions and economic system that Keating highlights.

Without including individuals' values centrally in the argument, Keating's argument appears to overly reify the status quo: he does not acknowledge that these major activities do and should change according to the values of the individuals involved. More importantly, if the major activities do not reflect the values of most of the individuals involved, then these activities are not comparable to the risks they engender even if the risks resulted from fair transactions and within Keating's ideal economic system. In that scenario, Keating's argument collapses without any way to revive it.

Dagan's reformulation of Keating's point (which, in my view, is actually an excessively charitable improvement over and above Keating's argument) is an attempt to save it from being a naïve avowal of the status quo. To reiterate Dagan's insight, he writes about the social process regarding risk as:

a social deliberation that identifies and validates the interests and activities that are, for the given community, intrinsic objects of value and that brings about a resolution of conflicts between divergent interests and activities according to the community's hierarchy of values.

In my view, which I also think reflects Dagan's meaning here, a group's hierarchy of values is not a ranking based on objective principles or criteria. Rather, the hierarchy is what that group of individuals do in fact value relative to other things that that particular group values. Put differently, the interests and kinds of acts at issue are not *intrinsically* valuable *tout court*; they are intrinsically valuable "for that given community," to use Dagan's words.

With this needed insight, we can respond to Keating's repeated inquiry of whether the harms are comparable or outweigh the benefits. Democratic standard theory informs us that Keating's questions are not exactly the right questions. Instead, the right questions are roughly as follows:

- Are the harms and benefits comparable *according to a certain group of individuals*?
- Do the benefits outweigh the harms *according to a certain group of individuals*?

The values of the individuals locally affected make certain benefits comparable to risk of death or devastating injury because those individuals *do in fact value* those benefits and their accompanying risk of death or devastating injury as comparable. Applied to the above speed limit example, driving faster and its accompanying benefits are comparable to (and outweigh) the death or injury of 49,128 individuals because the values of locally affected support deem that driving between 55 to 75 mph and its benefits as comparable to the particulars of the sizeable and virtually certain risk of death and injury. Assuming no misinformation, foul play, or epistemic problems, these individuals' values deem, put simply, driving between 55 to 75 mph as comparable to the death or injury of 49,128 individuals.

If the values of the individuals in the relevant group were identical, democratic standard theory would set the stakes of each kind of act in line with the life plans of everyone. Given conflicting values regarding risk, majority rule determines which acts are comparable with their inherent risks. By allowing as many individuals as possible to determine what kinds of acts are comparable with what risks, individuals may pursue their life plans where the stakes of negligent risk reflect those life plans of as many individuals as possible.

Identifying the Relevant Modular Group

To reiterate, democratic standard theory contends that the values of the group of locally affected individuals should determine what constitutes breach of the negligence standard of care for any given kind of act. In the last section, I argued for why values should almost entirely determine the contours of negligence. That is what I mean by the standard of care being democratic. If individuals had identical values, the argument for democratic standard theory would already be mostly complete. However, for nations that have diverse populations, individuals' values inevitably conflict. Despite its infamous reputation elsewhere, in the realm of risk majoritarianism best reconciles the competing values without violating any individuals' basic rights or anything of similar magnitude. While based on majoritarianism, the democratic standard of care is not a tyranny simply because no one has a right to perform any particular kind of act, which has a risk magnitude between 0 to 100 on my stipulated scale, without being vulnerable to a negligence claim if harm results. Instead, based on the overarching theoretical commitments of the Kantian tradition, majoritarianism in this limited context best fulfills

the goal to provide a legal regime that allows the most individuals to live according to their life plans.

In this light, identifying the relevant group of locally affected individuals is not a problem, the solution of which will make or break democratic standard theory. Rather, identifying the relevant group is more like a practical problem where the closer we get to the locally affected individuals the greater the advantages we reap. We aspire for identifying the relevant group as best we can, and yet we are content to settle for the rough approximations often necessary due to the large populations in modern nations.

In that vein, democratic standard theory could justifiably rely on national boundaries to specify the relevant group. Similarly, political subdivisions within a nation such as states or cities could also delineate the relevant group. These avenues are especially appealing for nations or their subdivisions with relatively small populations, substantial internal migration or travel, or other elements that unify the values of the individuals in the nation regarding the standard of care. As a practical matter, a national negligence standard of care should be the rebuttable default for the relevant group.

While existing political divisions are in a sense morally arbitrary, such do center the relevant group on a specific geographical location, which accords with the fact that proximity between the actors (or their agents or products) is necessary for accidents to occur. Using existing national boundaries or other political subdivisions to delineate the relevant group has obvious practical advantages. In reality, for democratic standard theory to be operationalized in real world tort cases, existing political divisions might be the only practical option for delineating the relevant group. Fortunately, existing political divisions may roughly approximate the locally affected individuals for the purposes of

democratic standard theory, especially if the nation or its subdivisions have effective democratic mechanisms.

As should be clear from the preceding paragraph, by no means do I intend to rule out the use of existing political divisions to delineate the relevant group even though I further explore the issue. I formulate democratic standard theory with the intentionally flexible concept of “group” to handle cases both involving actors or acts that transverse existing political divisions and those kinds of acts that are nuanced within these divisions. Whatever I may achieve in refining the relevant group better than existing political divisions adds appeal to democratic standard theory.

To illustrate the needed flexibility, consider the multiple spheres of driving in relation to existing political divisions. In a state like Pennsylvania, one has three medium-to-large metropolitan regions separated by vast stretches of rural regions. Mixed in with intrastate and interstate drivers, the Amish share the roads with their horses and buggies. So, within the political division of the Commonwealth of Pennsylvania, we find everything from horse and buggy to the average drivers of the country and suburbs to the overly aggressive automobile driver of the city. In some local spheres, the relevant group needs to include the Amish with their horse and buggies. In the cities, perhaps only pedestrians and overly aggressive drivers are the relevant group. In other spheres, such as the roads that individuals regularly use to transverse the nation, the relevant group is likely the nation. With national transportation methods such as automobile, airplane, and train, transnational travel is also possible suggesting that, at times, the relevant group may extend beyond national borders.

For example, 800,000 Canadians visit Minnesota each year.²³² Some have pointed out that Minnesotans have more similar political attitudes to Canada than to the “deep south” of the United States.²³³ Perhaps with some kinds of acts, the negligence standard of care needs to reflect the commonalities of Canada and Minnesota rather than including Minnesota with other parts of the United States in a national standard of care just because they share a national government.

Since a theory of negligence is ideally able to handle accidents between actors across existing political divisions, it is worthwhile to explore how flexible the relevant group may be. In other words, while I would settle for this dissertation having established that the relevant group pertains to the nation or existing political subdivisions, I think one of the advantages of democratic standard theory is its ability to identify relevant groups that do not match existing political divisions. Furthermore, elucidating how democratic standard theory understands the relevant group further displays appealing aspects of the theory.

The Duty of Care Identifies the Relevant Group

The primary issue for which I create democratic standard theory is to assign accident costs from accidents that have already occurred. Although democratic standard theory has relevance to issues regarding how to justify future risk impositions or new technologies, I must save these issues for future projects.

²³² Sam Brodey, *The 11th Province? Considering the State of Minnesota’s Special Relationship with Canada* (2016), <https://www.minnpost.com/politics-policy/2016/07/11th-province-considering-state-minnesota-s-special-relationship-canada>.

²³³ *Id.*

Given that focus of democratic standard theory, the relevant group is a group that existed at the time of the accident. In that sense, the relevant group is frozen in time. As a theoretical matter, we need not worry about if the relevant group or their values have changed since the accident occurred. We are solely interested in what the relevant group and the values of its individuals were at the time of the accident. As a practical matter, a substantial amount of time may have passed before these inquiries are made as when a lawsuit is filed only at the tail end of a long statute of limitations. If so, we would want to make sure we are properly assessing these matters as they were at the time of the accident rather than any changes that may have occurred afterwards.

Furthermore, when applying democratic standard theory, we are determining what standard of care existed at the time when the relevant acts were performed. We are not creating a standard of care, in light of an accident, and then applying that to the past event. The rationale is that, due to considerations pertaining to responsibility for acts and the rule of law, the actor must have been able to ascertain and conform to the standard of care to which she is adjudged negligent or non-negligent. Fortunately, this feature also leads us to the method for determining the relevant group of individuals locally affected.

Identifying the relevant group is not as difficult as it may initially seem. Recall that, following Coleman, the negligence standard of care is comprised of primary moral obligations regarding the permissibility of acts that risk harm to others. The relevant group is going to be largely or entirely dependent on the scope of the actor's primary moral obligation to act with sensitivity to others' interests. More specifically, in any situation, the actor's particular, context-based primary moral obligation to act with sensitivity to others' interests at that time and place determines the relevant group based

on the “others” whose interests are at play. This includes the moral concepts of the duty of care, outcome-responsibility, and various other senses of foreseeability. Put differently, the relevant group depends on those individuals to whom the actor owes a duty of care when performing the act at issue. Therefore, democratic standard theory does not need an independent argument for its concept of group apart from a compelling theory of the duty of care in tort.

In that light, democratic standard theory’s concept of the group may stand or fall alongside others’ theories of the other components of negligence, most especially the duty of care and outcome responsibility. The inextricable importance of the duty of care to a negligence tort claim has received much attention lately especially in the work of John Goldberg and Benjamin Zipursky.²³⁴ It is not worthwhile for me to regurgitate the arguments for other components of a tort claim. Rather, let me illustrate the plausibility of delineating the relevant group based on the actor’s duty of care. This approach should also be useful because democratic standard theory is designed to be practical for the current structure of tort law (even though the theory’s implications reach beyond that domain as I have mentioned). In the upcoming illustration of how democratic standard theory would operate in a specific tort lawsuit, I focus on harm to bodily integrity for ease of exposition. Nevertheless, the same points are adaptable to any of the other typical harms in accident law like damaged physical property and, more recently, emotional distress.

²³⁴ John C.P. Goldberg and Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733 (1998).

Finally, the following example pertains to hunting. I do not think individuals values regarding the moral permissibility of hunting are relevant to the issue of what constitutes negligent breach when someone is hunting. The moral permissibility of hunting may be a life plan insensitive issue. Regardless, since the below example is meant to be generalizable to most other instances of potential negligent breach, I assume that the moral permissibility of hunting is a separate matter.

Suppose that, on July 26, 2016, in the great state of Georgia, Gomer was hunting with his rifle's safety disengaged. Gomer tripped on a tree root and the rifle discharged a bullet injuring Barney who was taking pictures while stopped along a scenic Georgia country road. In his complaint in a Georgia state court, Barney alleges that (a) Gomer had a duty of care toward Barney; (b) Gomer breached that duty when he negligently hunted with his rifle's safety disengaged; (c) Gomer's negligence actually and proximately caused him to trip and the bullet from Gomer's rifle to shatter Barney's left femur; (d) Barney's injury resulted in medical costs, lost wages, pain and suffering, and lifelong limited functioning of his left leg; and (e) all other necessary allegations for a negligence tort claim.

In Gomer's initial responsive pleadings, Gomer alleges his hunting with his rifle's safety disengaged was not negligent. For that reason, Gomer denies any and all liability for Barney's injury and other resulting harms.

In addressing the question of Gomer's negligence in the context of this tort lawsuit, we are already dealing with a decision-making process that determines negligence on a case-by-case basis. At this stage, we need not concern ourselves with whether determining negligence in this case does or should have any implication beyond

resolving the dispute between Gomer and Barney. As it stands, existing tort law in the United States does not generally give precedential weight to negligence trials especially when no appellate court review follows.

As pointed out earlier, United States tort law generally states, in its traditional form, that for Defendant to have been negligent, Defendant must have had a duty to Plaintiff and must have breached that duty by her conduct that fell below the standard of care that a reasonably prudent person would have met. To operationalize democratic standard theory to determine if Gomer was negligent, we must first identify the relevant group of locally affected individuals. To do so, let's adopt a real-time perspective of Gomer's acts just prior to the alleged negligent act.

At 4:00 AM, on the day in question, Gomer begins actively hunting elk in the wilderness of Georgia. By about 5:15 AM, Gomer is stalking an elk that he had just seen. He has his rifle's safety disengaged so that he can aim and fire at a moment's notice.

Let's pause the scenario and take a step back. Tort law provides a mechanism for remediating, among other things, accidental harm. Tort law is also thought to guide behavior so that individuals are not vulnerable to negligence claims or, even better, so no one is negligently harmed in the first place. In my view, a better way to conceive of this guidance function is that tort law provides a legal institution that piggybacks on and provides legal backing to already existing moral requirements. In that sense, the negligence standard of care is comprised of primary moral obligations regarding the permissibility of acts that risk harm to others. Let's return to the hunting example to follow the implications of this point.

While hunting, the primary moral issue is:

Hunting Primary Moral Obligation Question – Does Gomer violate a primary moral obligation as he stalks with his rifle’s safety disengaged a recently-observed elk?

To address this issue, we first ask:

Hunting Duty Question – To which persons, if anyone, does Gomer owe a primary obligation to not injure while he is hunting?

I contend that the answer to the Hunting Duty Question provides the basis, if not the entirety, of the answer to who constitutes the relevant group of locally affected individuals in democratic standard theory’s formulation of negligence. Thus, the values that are relevant to breach are the values of the individuals to whom Gomer owes the duty of care to not negligently harm.

The importance of the concept of a duty of care in tort law is one of recent interest among scholars with some proposing that the concept of duty is unneeded while others contend that the duty of care is essential to a tort claim. Obviously, I side with the latter group. Let me continue with the reasoning in the hunting example to motivate the plausibility of deriving the relevant group from the duty of care, that is, the scope of the primary moral obligation at issue.

The most obvious individuals to whom Gomer may owe that obligation is to any individuals who are in fact in the vicinity where Gomer is hunting. Such could be other hunters, hunters’ companions, park rangers, passers-by, hikers, and any individuals who live in or at the borders of the wilderness. Perhaps Gomer may owe an obligation, in some sense, to himself as well given that he too is in the ambit of risk.

Barney, as it turns out, is a passer-by and, thus, falls within the relevant group. Those nearby-in-fact individuals are the ones that are risked injury from any of Gomer's acts. So, if Gomer owes an obligation to use the gun's safety mechanism, he owes it to at least those nearby-in-fact individuals, that is, anyone within gunshot range of the entire area in which Gomer hunts. Applying this point to democratic standard theory, due to the risk involved in Gomer's act, at least the values of those nearby-in-fact matter. By implication, those nearby-in-fact are in the group of locally affected individuals with regard to Gomer's act of hunting with the safety disengaged.

Before we investigate whether the scope of Gomer's moral obligation (and thus the scope of the locally affected group) expands beyond nearby-in-fact individuals, let's inquire whether anyone is clearly not part of the relevant group. What about individuals who are in fact on the other side of the Earth while Gomer is hunting? Initially, it seems Gomer does not owe any obligation to hunt in any particular way (e.g., with or without the safety engaged) to individuals who are so far away that his act could in no way risk them harm, except in bizarre scenarios so unlikely that their moral relevance is nil.

An example of such a bizarre scenario is as follows. Gomer trips, his gun discharges, and the bullet hits an arsenal of nuclear weapons, which were unknown to Gomer. Those weapons destroy all human life in Asia. While possible in the sense of logically possible, such bizarre and infinitesimally unlikely possibilities have no moral significance to the issues at stake in this dissertation. So, from here on out, I ignore them.

Back to reality, while Gomer hunts, nearby-in-fact individuals are definitely in the relevant group, and those individuals who in fact are on the other side of the globe are definitely not in the relevant group. Since we can identify individuals some of which are

clearly included in the scope of Gomer's moral obligation and some of which are clearly excluded, it is plausible that the scope of Gomer's moral obligation, if any, is limited (i.e., the scope does not necessarily include all persons). Similarly, by implication, democratic standard theory's concept of a group of locally affected individuals is not hopelessly vague or something of that problematic nature.

The proposition at issue could be as specific as: "Hunters may actively hunt with their rifle's safety disengaged once they have spotted their prey." Alternatively, the proposition could be as general as: "Hunters may actively hunt within a safety range of 40." Safety range 40 includes, among other things, actively hunting with one's rifle's safety disengaged in several scenarios.

As an aside, determining how to phrase the proposition is obviously not an exact science. Nevertheless, such a task is not one to which lawyers are strangers. Formulating an issue in any lawsuit involves some artistic license, abuse of which can be curtailed through argumentation in adversarial litigation. Guidance in how to formulate the proposition can be found in how those clearly in the relevant group conceptualize the acts at issue. For example, the following could be values of the relevant group that pertain to Gomer's act:

1. A right to carry a gun is a right *not* to have your gun's safety engaged.
2. A gun with a safety engaged is no gun at all.
3. A person in pursuit of his prey is on a Godly mission.
4. Better to burn the forest down than for a hunter to not kill his prey.
5. When it is hunting season, it is war time. Civilians, stay away!
6. Most hunter safety courses offered in Georgia do not mention any need to have a gun's safety engaged while one is actively hunting.

These are merely my fanciful creations. Nevertheless, I am suggesting the sorts of things that would be used to formulate the proposition.

Suppose that the relevant group for the accident between Gomer and Barney were limited to those nearby-in-fact individuals. Democratic standard theory would determine the Hunting Question based only on the values of those individuals. Suppose that the values of the relevant individuals unanimously supported the proposition, “Hunters may actively hunt with their rifle’s safety disengaged once they have spotted their prey.” In such a scenario, Gomer’s act was not negligent. That conclusion has intuitive appeal. If the values of those who are in fact risked harm support that kind of risk, then Gomer and others should be able to impose that risk without being vulnerable to a negligence claim. Since unanimous, I cannot see how Barney could plausibly claim that Gomer’s act was negligent, even if Barney wants to change his view *ex post* or just wants compensation in light of his harm. Such would be equivalent to claiming, “Even though everyone, myself included, holds that hunting with the rifle’s safety disengaged is a worthwhile kind of act, Gomer behaved improperly (negligently) because he hunted with his rifle’s safety disengaged.” That is hardly a defensible claim.

Again, we see the difficulty ultimately resting on whether we are equally persuaded when individuals’ values are not unanimous, which is admittedly the standard scenario. Put differently, since unanimity is never guaranteed and usually unlikely, then democratic standard theory may stand or fall based on whether majority rule is justified. While defending majoritarianism is the more important claim, I am not claiming that identifying the relevant group is moot. Instead, the persuasiveness of majority rule may depend, in part, on having a cogent sense of the relevant group. The more we are able to

exclude from the relevant group individuals whose interests are not actually at stake, the more clearly we see who are the individuals affected by the act at issue. Being able to reliably identify those individuals who are affected may ease any concern that the minority view is being out “voted” simply because extraneous individuals of the other view were included in the relevant group due to a wishy-washy concept of the relevant group.

Let’s return to this idea that the relevant group may include more than those nearby-in-fact but less than everyone in the world. The twin issues to deal with are Specificity and Foreknowledge.

The Specificity Issue is related to what I addressed earlier about how to formulate the relevant proposition. I now take up some of the finer difficulties that I glided over above because they primarily get ugly in the issue of identifying the scope of the relevant group and its brother, the scope of the duty of care. In particular, the more specifically we describe the act or even the kind of act at issue, the smaller the reference class of acts is and the fewer the individuals in the relevant group seems to be. For instance, suppose we specify Gomer’s act as “hunting, at 4:53 AM on July 26, 2016, with his rifle’s safety disengaged and tripping on the tree stump at 31.1799° N, 83.7888° W.”²³⁵ If so, then Barney may have been the only other person who was in fact within gunshot range of Gomer’s highly-specific act. Also, the notion of appealing to the locally affected individuals becomes a silly contest between the group of two, Gomer and Barney, with no one to break a possible tie.

²³⁵ These are GPS coordinates for the quaint area of Moultrie, Georgia.

A related problem arises as well because such a specifically described event presents a mismatch between it and values. While values themselves contain a high degree of specificity, they are unlikely to have any information nuanced enough to address that specific tree root at 31.1799° N, 83.7888° W or even tripping in particular while hunting or while carrying a gun. Thus, specificity is needed but only up to a point.

The other twin issue here pertains to the limitations of human foreknowledge and even knowledge in general. If they are to be useful as guidance, moral obligations must be able to apply to situations where the actor does not know all possibly relevant information. At best, an actor has limited knowledge, and, for other pertinent information, she will estimate probabilities of other facts or what could occur based on present information and any pertinent past experience. Any meaningful sense of responsibility, whether moral, legal, or causal, needs to take into consideration these limits on foreknowledge.

To deal with these twin issues, we need to abstract to some extent from the particulars of Gomer and Barney's accident. Fortunately, a layperson's understanding of their moral obligations and duty of care can guide us through these issues. Here I am also assuming that individuals have a minimum threshold of the capacity to foresee and avoid harm. In his theory of outcome responsibility, Stephen Perry describes this threshold as "the degree of capacity regularly exercised by ordinary or average people who strike us as possessing meaningful agency."²³⁶

²³⁶ Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72, 104 (Gerald Postema ed., 2001).

Return with me to Gomer. I trace his possible thoughts, not in the sense that he likely had these thoughts or that he could have them in this form. Rather, I trace what his thoughts could be if he were sufficiently attentive to such matters as opposed to focused on other things or distracted by the lovely song of the morning birds, for example. In other words, these are the issues that Gomer should have been aware of and attended to given that he is a competent moral agent. Once again, Gomer may not articulate these ideas in these specific ways or even through words. He may respond to instinct, emotion, habit, an unarticulated sense of duty, or memories as well as any general or specific word-like thoughts.

Suppose that Gomer keeps his rifle's safety engaged while traveling to the hunting site. As he begins to actively hunt, he loads a bullet in his rifle and considers disengaging the safety. But, he has heard that many other hunters have hunted all day for the last two days without seeing any prey. So, he thinks that disengaging the safety is not "worth it" until he sees prey or recent evidence that prey was near.

At the moment of the thought in the last sentence, we already have enough to set the scope of Gomer's duty of care and the corresponding relevant group of affected individuals. Implicit in Gomer's thought (or instinct, emotion, habit, etc.) is that the added danger from disengaging the safety on a loaded rifle would persist throughout the day exposing himself and others to danger from any number of possible mishaps.

While Gomer himself has never had a rifle misfire, he has heard of such events happening over the years. Last fall, Andy, who is one of Gomer's friends had his rifle's safety disengaged when a previously unknown flock of birds took flight as Andy was wiping sweat from his forehead. The birds startled Andy such that he immediately

grabbed his rifle with his now sweaty, slippery hand. His grip slipped such that his finger hit the trigger and the gun fired. The sudden, unexpected discharge startled him even further and he instinctively put his hands protectively over his face. Gunpowder from his hands got into his eyes such that he suffered partial eyesight loss for several months.

While Gomer has limited knowledge about what will happen that day, he has a general sense of possible dangers that may result from a disengage safety mechanism. Even though no one else aside from Gomer's friend was injured from the accidental discharge, Andy was denied a hunting license the next year, and none of Andy and Gomer's hunting buddies are willing to go hunting with Andy since the accident occurred. That thought spurred Gomer to wonder how many of those buddies were hunting that day as well.

So, while Gomer is not specifically thinking about the possibility of his tripping, he has a sense that disengaging the safety, at that moment, was not the best thing to do. From the few thoughts I have sketched, we see imbedded in them the outlines of the scope of the group to whom an actor owes any possible moral obligation. Other hunters are clearly within that scope as indicated by the ostracism from Andy's former hunting buddies, some of whom may be hunting in the vicinity of Gomer on the day in question. By implication, anyone nearby-in-fact is also included.

Given that Gomer cannot plausibly know who among his hunting buddies, or other hunters in general, are nearby-in-fact, the scope of his moral obligation includes anyone who might be in that area whether hunting or not. We again must not get carried away with bizarre and infinitesimally unlikely possibilities here. While it is logically possible, that the Dalai Lama, for example, is meandering about where Gomer is hunting,

nothing about the Dalai Lama suggests he has or will ever intend to go to Georgia let alone the wilderness in southern Georgia where Gomer is hunting. So, there must be some appreciable likelihood that such persons would be within gunshot range of the area where Gomer is hunting. Individuals who live in Georgia, especially southern Georgia, and perhaps surrounding states are candidates for being within gunshot range of Gomer's hunting. We have reason to doubt whether anyone outside this region has an appreciable likelihood of being within gunshot range on the day in question, aside from perhaps hunters, vacationers, and nature enthusiasts who have traveled to Georgia at that time.

In this scenario, who specifically is in the group of possible nearby-in-fact individuals may not and need not necessarily play a role in Gomer's practical reasoning. In other situations, such considerations would be auspicious. In others, morally obligatory. Regardless, another helpful avenue for piecing together the scope of Gomer's moral obligation is to investigate what Gomer, or someone similarly situated, would anticipate as those to whom he is accountable. In other words, if Gomer were to consider the possibility of his rifle accidentally discharging, which resulted in an injury, to whom would he anticipate that he would be accountable for that accident. The ultimate question is would such a person anticipate that he is accountable to anyone beyond Georgia or perhaps to anyone beyond Georgia and the states that border Georgia. My sense is no.

Gomer is likely to anticipate being accountable to those nearby-in-fact especially any person who is injured and that person's companions. He may have to defend his acts to those involved in the sport of hunting in Georgia to keep any licenses or avoid ostracism. He will anticipate some legal consequences if another suffers more than trivial harm and Gomer neither wants to compensate the person nor thinks he should have to do

so. Of course, regardless of whether he was attending to these matters, Gomer would have any appropriate moral obligation and would likely have to account, in some sense, to some or all of these individuals after any accident. Again, we can elicit the scope of Gomer's obligation by attending to these matters from his perspective prior to the accident.

Let's return to the issue of whom Gomer, or someone similarly situated, would *not* deem himself accountable to. Put simply, he is not accountable to anyone who could not even possibly have been, to an appreciable degree, within gunshot range of Gomer's hunting area, including any hunting area that he could have possibly reached, to any appreciable degree. The "could have" in the previous sentences contains a number of aspects worth sketching. First, included are the people who would have been in gunshot range had the accident not occurred in at the specific place and time that it did occur. For instance, if Gomer would have likely reached within gunshot range of a large swath of people had the accident occurred later or at the very end of his likely hunting period, those individuals' values would be also included. Second, suppose that Gomer could have been hunting the day before or the day after or even any day plus or minus two weeks (or, e.g., any day in the month-long elk hunting season). We should include those individuals who had an appreciable chance of being in Gomer's hunting area such as anyone with an appreciable chance of hunting in that area on any day where there was an appreciable chance of Gomer hunting as well.

Similarly, if there was an appreciable chance of Gomer hunting instead in Northern Georgia or Southern Alabama on any day in elk hunting season, then included would be everybody for whom there was an appreciable chance of their being in any of

those areas on any of those days. On the other side of this coin, excluded is almost everyone in Oregon, Maine, Arizona, etc. as well as virtually all of the rest of the world because there is no appreciable chance of, say, 99.999% of them (e.g., the over 7 billion individuals in China and India) being in any of these areas on any day during elk hunting season in 2016 (or even plus or minus a few years).

Another sense of “could have” excludes individuals that coincidentally were in fact within range, or could have been, due to bizarre, infinitesimally unlikely scenarios that virtually no individual, similarly situated as the defendant, could have anticipated. For example, in the sense of logically possible, due to an unprecedented, never to be repeated event, numerous Army Rangers could have been performing a top secret, live ammo training session within gunshot range of the area where Gomer was hunting on the same day as the accident at issue. The standard of care applicable to Gomer and Barney’s accident does not change just because there was an *unappreciable* chance that, unbeknownst to Gomer (and, as stipulated, unrealistically discoverable), a legion of Rangers could have been milling about that area without the safety engaged on their guns.

Look at these “could have’s” from the other direction. Group together everyone who could *not* have had any chance (in any plausible sense), to any appreciable degree, of being within in gunshot range of Gomer’s hunting. How could individuals in this group plausibly claim that Gomer had any meaningful duty to avoid accidentally shooting them while hunting? Any such duty is an exercise in fantasy or sheer nonsense. I also hazard to say that virtually no individual, aside from perhaps some philosophers and others with quirky, extreme views, actually believes such duties exist.

Based on the above considerations, we have what we need to specify the scope of Gomer's moral obligation. His obligation, framed from Gomer's real-time perspective prior to his disengaging his rifle's safety, extends to all individuals who had or could have had a chance, to any appreciable degree, of being within gunshot range of any area in which he did hunt or could have hunted in that season or any season give or take, say, one or two in either direction.

Due to the same considerations, the scope of the relevant group is, well, the same. So, the pertinent standard of care, according to democratic standard theory, is whatever standard is supported by the values of the majority of the individuals in that group, to wit, those who had or could have had a chance, to any appreciable degree, of being within gunshot range when Gomer was or could have been hunting. To generalize, democratic standard theory determines breach according to the values of individuals who had or could have had any chance, to an appreciable degree, of being harmed by the kind of act at issue (which includes what was and what could have been the particulars of the act).

Determining which individuals had or could have had a chance, to any appreciable degree, of being harmed involves epistemic approximation. Some kinds of acts in some contexts will be more straightforward than others. For Gomer and Barney's accident, the relevant group seems limited to those individuals with even minimal ability to travel into or near the pertinent wilderness and those who reside in southern Georgia and nearby parts of other states. Based on my anecdotal evidence of that region, my sense is that the values of a clear majority of individuals in that group would support a particular standard of care regarding Gomer's kind of act. While we would need to include, based on my discussion above, some likely negligible amount of visitors from

outside the aforementioned region, my sense is that not enough outsiders, on average, with drastically different views visit that region such that we would have sufficient reason to conclude that the clear, regional majority would be outnumbered.

I realize that my claims in the last paragraph are speculative, in a way, and better evidence would be needed to substantiate them. I do not pretend to know what that standard would be in southern Georgia for Gomer's kind of act, and the actual answer to that issue is irrelevant for my purposes. Nevertheless, what seems to be missing from that inquiry is empirical information about a discrete area. Such seems well within the reach of social scientists, if not some laypeople with substantial knowledge about that region. I address issues related that epistemic claim in various ways below.

Since a legal inquiry into the relevant group always takes place after the accident at issue, such an inquiry could take on other forms than what I specified above. For example, connections between the defendant and the actual harmed may provide a rebuttable, initial outline of the relevant group. Next, who was nearly harmed by the act? By "nearly harmed," I mean were there any specific, actual individuals close to the accident in time and place. If the accident had happened a little earlier or later or a small distance in any direction, would different individuals have been harmed? Here, we are looking for connections between the defendant and those *nearly* harmed for more plausible information to sketch out the relevant group for the kind of act at issue.

Next, is the act in question the kind of act that is regularly repeated in that location or the surrounding area? At this step, we are making an abstraction, possibly even greater than those above, when we move from a specific act to a *kind* of act. This abstraction requires caution, as also discussed above, since any single act could also be

described so generally that acts with substantially different, relevant features might be improperly included. Finally, adopting the *ex ante* perspectives of the actors or similarly situated individuals, as illustrated in Gomer and Barney's case, would provide additional data as to the relevant group.

Structural Points in the Argument

Let me clarify what the structure of my argument is *not*. My argument is not based on an *ex ante* notion of fairness. I am not claiming, like some utilitarian theories do, that before the accident each potentially harmed individual was in a state of equality vis-à-vis one another because they each had a chance at winning or losing in terms of benefiting or getting injured from the permitted risk. While at times I encourage an *ex ante* perspective, that is not because I claim that that *ex ante* state is important morally speaking in the way just stated.

Rather, what is important for democratic standard theory is that the standard of care reflect the values of most individuals possible. That inquiry would not change even if, under bizarre circumstances, we knew *ex ante* that 99% of the relevant group would be accidentally injured as a result of a kind of act that meets that group's standard of care and each injury would far outweigh any of the benefits that each may receive from the permitted act. A party to an accident is treated as an equal when she is vulnerable to a negligence claim that resulted from an act that was not supported by the values of the most locally affected individuals—even if her values and the values of many others, but still less than a majority, do support the act. She is treated as an equal, among other reasons, because her values are given equal weight in the calculus that determines what

the standard of care is for that kind of act. *Ex ante* or *ex post* conceptions of equality or fairness are irrelevant to that calculus.

Possible Epistemic Procedures

1. Insiders Have Pertinent Information

Democratic standard theory's concept of democracy does not require standard institutional markers such as voting, equal participation, or elected officials, although such procedures or intermediaries may play a role in discovering what a group's standard already is. In contrast, the theory advocates we use (or discover and then use) the best available procedures to determine the standard of care that the values of the group require. Without intending to suggest that I endorse any particular procedure, I want to make it plausible that such an endeavor is realistic at least to an extent that is "good enough for government work."

Determining a group's standard of care for the wide variety of acts that can lead to accidents is no simple matter. Fortunately, we do not need to create a compendium of each standard for each of the various kinds of acts for each group. Nevertheless, I need to show that the democratic standard of care is possible to construct at least to resolve numerous disputes over accident costs. Even though the standard of care is based on a group's values, we may not need to isolate each value of each individual, determine its weight, count the number of people that weight that value each particular way, and then calculate the totals of the group. Such a labor-intensive process would likely be more expensive than the total accident costs in many disputes over accident costs. Instead, aggregative techniques may sufficiently approximate the values at issue and identify the

group's standard of care. One way to look for such techniques is to consider who has access to the information sought.

Individuals have conscious or unconscious access to their own values and standards. Simultaneously, most members ("insiders") of a group generally have access to the information needed to act in ways that generate positive or neutral responses from others and avoid negative responses. Often an insider's values are the same as or are in harmony with the values of the group. That harmony is common because the insider often acquires his values from the group via his parents and other group members. Even when an insider acts contrary to the group's values, often she does not act ignorantly. When an insider is not sure whether an act will elicit a negative response, the insider can often seek indirectly or directly more information from those with relevant experience or from those potentially affected by the act at issue. Generally, insiders are regularly engaged in seeking and sharing such information not only privately but also publicly in the news, political activities, social organizations, and the media's numerous vehicles.

While individuals usually act according to their own values to achieve their aims, in general, they consciously or subconsciously restrict or modify their acts to avoid negative reactions from others. The lack of constant, socially destabilizing conflict among most members of a group suggests that group members can and often do conform to a substantial extent their behavior to acts that the group's values permit. One way this phenomenon is manifested is by sufficient conformity to criminal prohibitions to avoid societal breakdown. Another manifestation is when an individual displays good manners, avoids rudeness, or at least refrains from eliciting too strong of a negative reaction from others such that others seek to frustrate the individual's aims. The manifestation that I

want to focus on is how insiders act to minimize the chance of accidental harm and to avoid fault for any harm that might occur from their acts. To accomplish this accident and fault avoidance, insiders have conscious or subconscious access to information of a certain kind and are regularly adding, refining, and updating that information.

This accident related information pertaining to our group values can be most salient when we encounter others with different values. Many who have traveled or lived abroad have experienced shock when a parent asks, as if it were no matter of concern, a ten-year-old son to climb, without any safety device, a forty-foot tree to cut down coconuts for newly arrived and previously unknown visitors. Similarly, parents may regularly leave only an eight-year-old daughter to care for her four younger siblings while the parents are working in fields far away. Such acts contravene Western values about exposing children to danger such that a Westerner who acted similarly would be blameworthy, according to Western values, especially if a child was harmed as a result.

We may be curious how we acquired our risk-related values and why we may feel as confident about the propriety of our values as others feel about their conflicting values. Here, I am merely highlighting that these values exist within groups and that insiders have access to their group's values, including those values that determine whether the risks involved in an act are acceptable. It is these values that the democratic standard theory uses as the basis of the standard of care. So, insiders have access to the information that the democratic standard theory seeks. The question remains how a social institution can gain access to that same information to determine what constitutes breach of the negligence standard of care.

One option for the social institution is to ask (in an effective way) an insider to reveal the group's standard of care. By an "effective way," I mean to signal that we need to indicate of all of the problems that researchers have uncovered while trying to figure out what a person believes. These problems are many and complex. For example, how a question is framed to an individual can influence his answer to the point of leading him to display opposite or conflicting beliefs.²³⁷ Individuals with different levels or kinds of job training can advocate seemingly incongruent opinions about the acceptability of a risk because the individuals are focusing on different aspects of the risk.²³⁸ Such individuals, even with different training, may agree more on the underlying values than is first apparent. The minutia can matter in ascertaining a person's beliefs, and so every minute detail of the method of using one or more insiders to determine a group's standard of care should be scrutinized. The problems of extracting information from insiders are real but not necessarily unsurpassable barriers. To be clear, I am not naively thinking that such problems will be easily or even entirely solved, even though I do not attempt to defend that claim in this dissertation.

2. *Jury Adjudication is Worth Further Social Scientific Experimentation*

As one may have guessed, I have jury adjudication in mind above. To reiterate, I am not advocating that democratic standard theory requires jury adjudication or any particular institution, mechanism, or procedure. Nevertheless, consider how the jury adjudication, as presently practiced in the United States, might be an effective mechanism

²³⁷ Paul Slovic, *The Risk Game*, 86 J. HAZARDOUS MATERIALS 17, 20-21 (2001).

²³⁸ *Id.* at 18-19, 21.

to discover exactly what democratic standard theory requires to determine breach of the standard of care. That would be good news since jury adjudication is likely here to stay in the United States, and democratic standard theory would fill a sizeable gap in the justification of jury adjudication. Of course, I advocate rigorous experimentation to test jury adjudication's effectiveness against alternative viable mechanisms. This experimentation is necessary especially in light of the work that has shown that jury deliberations can be random, bizarre, and inconsistent. Further experimentation could also offer ways to adjust jury adjudication to better instantiate the requirements of democratic standard theory.

The first aspect to consider is that the jury is not directly tasked with the objective that the democratic standard theory requires. Recall that the judge instructs the jury to determine whether the defendant acted as a reasonably careful or prudent person (or something similar) in the pertinent circumstances.²³⁹ The concepts of acting reasonably careful ostensibly point the jury to determine a different kind of question from what conduct is supported by the values of the majority of group members. The former asks for a moral evaluation while the latter asks for facts about a number of individuals that hold certain beliefs or dispositions. So, the judge directs the jury to answer an ostensibly moral question and, in doing so, the jurors likely believe that they are providing an answer that contains moral truth, that is, an answer that is connected to the moral fabric of the universe. Note that democratic standard theory need not be revisionary as to the best wording for negligence jury instructions. Democratic standard theory does not mandate

²³⁹ See *infra* Chapter One.

that a jury be asked what is the standard of care supported by the values of the most individuals as possible or anything even remotely similar. Further social scientific experiments could possibly reveal that asking a jury, in the context of adjudication as presently structured, about whether the defendant's conduct was what a reasonably prudent person would have done in a similar situation yields the best possible approximation of what democratic standard theory requires. Or, experimentation could reveal that providing slightly different jury instructions from what are predominantly used along with providing certain expert testimony or statistical data as evidence would yield the best possible approximation of what democratic standard theory requires

When twelve-person jury agrees that an act is not what a reasonably prudent person would have done in a similar situation, their verdict at least reveals some commonality among their values, assuming that significant breakdown of the intended process did not occur during jury deliberation. In the unique context of a jury trial, that verdict may also reveal commonalities among the values of a larger group to which the jury members belong.

Let's sketch aspects of jury adjudication in the United States that seem to encourage the jury toward a verdict which incorporates their understanding of the view held by as many of the locally affected individuals as possible.²⁴⁰ The twelve jury members have been randomly chosen to hear argument and render a verdict about a dispute that often rests in part on the conduct of the defendant. Assuming good conditions, jury members are not biased and do not otherwise know the litigants in the

²⁴⁰ Wells at 2402-10 (discussing how the structure of jury adjudication shapes a process that is more likely to express the view of the social group rather than just the viewpoints of the jury members).

lawsuit, even though they often reside in the same general area as the litigants or where the accident occurred. Jury members travel to a government building for their service. Their jury service is framed as a person's civic duty. Jurors hear argument in a courtroom that is structured and decorated in ways that symbolize law, government, power, etc. Court officials conduct and facilitate the process.

While jurors deliberate together, I want to be careful not to idealize the substance or process of those deliberations. Yet, it is still a group process where unanimity is usually required of them. The jury must present its verdict in the courtroom to court officials, the litigants, the lawyers, and perhaps an audience. Along with others, these aspects of jury adjudication make its verdict likely to reveal more than some commonality among their own values. These aspects seem to encourage the jurors to reach as a group a verdict that may roughly approximate the standard of care that is supported by the values of the group's majority.

At the same time, the "jury is still out" on jury adjudication. Jason Solomon explores the arguments for and against jury adjudication.²⁴¹ He points out valid concerns about a jury's ability to be unbiased, jury adjudication's ability to provide consistent outcomes in like cases, a layperson's ability to assess social norms, and so on.²⁴² While much of the research he cites about a person's ability to assess social norms is not specific to jury adjudication, the research and Solomon's critique suggest that jury adjudication needs further assessment and likely some modification.²⁴³

²⁴¹ Jason M. Solomon, *Juries, Social Norms, and Civil Justice*, 65 ALABAMA L. REV. 1125 (2014).

²⁴² *Id.* at 1173-87.

²⁴³ *Id.* passim.

In What Sense of the Overarching Theoretical Commitments of the Kantian Tradition?

In this subsection, I am not explicating or advancing my claim that democratic standard theory protects, and thus furthers, individuals' life plans and also succeeds in its other objectives within accident law. The prior sections sought those goals. Now, I am elucidating why I categorize democratic standard theory within the overarching theoretical commitments of the Kantian tradition. I will also distinguish this Kantian aspect of democratic standard theory from aspects that belong in the consequentialist category.

Democratic standard theory adheres to the overarching theoretical commitments of the Kantian tradition in at least three meaningful respects. First, forming and advancing each individual's life plan is one of the fundamental objectives of the overarching theoretical commitments of the Kantian tradition. Democratic standard theory provides a standard of care under which more individuals may pursue their life plans more than under any competing theory of negligence.

Second, democratic standard theory suggests that constitutional essentials set an upward boundary between reckless acts and negligent acts.²⁴⁴ Individuals have fundamental interests, generally speaking, in others never acting in ways that are reckless for the same reasons that individuals have accident security interests. (Recall from above that I define "accident security" as each individual's interest in being free from accidental

²⁴⁴ Samuel Freeman, in conversation, provided helpful comments to elucidate the significance of this point in terms of the Kantian tradition.

harm to their body and property.) Reckless acts are not, in a moral sense, a necessary part of social life, even if due to human frailty such may be ineliminable.

Consequently, democratic standard theory does *not* tolerate any level of risk, however high, even if the values of those locally affected support such. Instead, democratic standard theory understands a reckless act as similar to a violation of a fundamental right or a constitutional essential which have lexical priority over the legal importance of the values of the individuals in the group affected by the reckless acts. As such, the boundary between recklessness and negligence marks the point where no further increase in the legal permissibility to impose risk on another is ever justified. Like the well-worn fundamental rights found in the overarching political commitments of the Kantian tradition, democratic standard theory respects an upward boundary to the amount of risk imposable on others.

Finally, the overarching theoretical commitments of the Kantian tradition demand meaningful equality, perhaps even the most robust sense of equality possible in any given context—subject to its being in harmony with the other political institutions based on the overarching theoretical commitments of the Kantian tradition. Democratic standard theory treats each individual with a more robust form of equality, compared to competing theories, by factoring each individuals' values equally into the standard of care while at the same time not letting morally irrelevant factors substantially influence the negligence standard of care.

A Kantian Pursuit of a Life Plan and its Parts

As stated earlier, establishing and maintaining a political institutional framework where each individual may advance a life plan is one of the fundamental aspects of the overarching theoretical commitments of the Kantian tradition. As Rawls puts it, one of an individual's two fundamental capacities is the ability to develop, revise, and pursue her own life plan; this capacity reflects her value of being free.²⁴⁵ Rawls's two principles of justice aim to provide a legal regime under which individuals may advance etc. their life plans by, among other things, protecting basic liberties and ensuring fair equality of opportunity. Since liberty is in a straitjacket without wealth/resources, Rawls's difference principle seeks to regulate the economic aspects of society's basic structure so that, over complete lives, either everyone shares equally all wealth, power, resources, etc. or that inequality redounds to the greatest possible benefit to the least well off individuals in society.

For this dissertation's purposes, all is well and good, insofar as those principles go, until someone is accidentally harmed. Initially, the harmed person's pursuit of her life plan is hampered in either one or more of the following ways:

1. Bodily injury and pain directly limit or prevent an individual from doing what he would otherwise do, possibly including acts that meaningfully contribute to his life plan. Such physical injury can be devastating and permanently life-altering;
2. Expenses and lost wages due to bodily injury diminish his wealth, which he could otherwise use to further his life plan;
3. Property damage inhibits his use of that property to further his life plan;
4. Expenses to replace damaged property diminish his wealth, which he could otherwise use for furthering his life plan; or
5. Death.

²⁴⁵ JOHN RAWLS, POLITICAL LIBERALISM 30-31 (1993).

Democratic standard theory protects individuals in that it entitles a harmed individual to pursue a negligence claim. Compensation from a successful negligence claim assists the harmed to pursue his life plan by mitigating the setbacks from the harm.

We need not be naïve by assuming that compensation is a complete fix. Again, bodily injury, especially, can be devastating and permanently life-altering. Nevertheless, compensation can help to restore the harmed's ability to pursue his life plan (e.g., through medical care or assistive devices). Especially in, but not limited to, situations where restoration of an ability is not entirely possible, compensation allows the harmed to pursue other endeavors that hopefully substitute for what the individual previously did. So, compensation to the harmed hopes to ameliorate, albeit often imperfectly, setbacks to one's pursuit of one's life plan.

Of course, any theory of negligence that provides for compensation (and all plausible theories do so) will, in that way, at least partially ameliorate setbacks to individuals' pursuits of their live plans. However, not all theories justify compensation for that specific reason whereas democratic standard theory does so. It is true that any other theory would laud compensation for this or similar reasons. Nevertheless, democratic standard theory maintains the focus on tort law's ability to provide a framework under which individuals may pursue their life plans. In other words, providing a framework for pursuing individuals' life plans is a central and organizing aspect of democratic standard theory in addition to its primary justificatory base. This centrality lands democratic standard theory in the overarching theoretical commitments of the Kantian tradition.

Furthermore, democratic standard theory provides an additional mechanism that protects and allows individuals to further their life plans over and above other theories. By crafting the standard of care in line with the values of the most individuals possible, those individuals may pursue their life plans without being vulnerable to negligence claims if harms result. In other words, since the negligence standard of care corresponds with most individuals' life plan parts, as long as individuals adhere to their life plans, they will not be vulnerable to negligence claims for anyone else's harm. Other theories neither have this mechanism to the same extent nor can obtain it without mirroring democratic standard theory.

Also, democratic standard theory incentivizes others from engaging in the kinds of acts that do not sufficiently advance the life plans of most other individuals by providing a legal regime that, in effect, "penalizes" individuals who engage in those acts by making them vulnerable to a negligence claim for compensatory damages. In this way, democratic standard theory helps to protect individuals from risks due to the kinds of acts that do not sufficiently advance most individuals' life plans. This also advances individuals' life plan indirectly because, as mentioned above, many individuals not only prefer not to be accidentally harmed, but they also prefer not to be harmed from particular sources of risk, even if they will tolerate risk of harm from different sources of risk. Recall my example above about an individual tolerating risks from the use of radioactive material to develop cancer treatments but not to develop alternative energy technology.

Consequently, democratic standard theory, more than any competing theory of negligence, provides a standard of care under which the most individuals possible may pursue their life plans. That central justificatory basis is advanced at multiple levels to

advance that objective rather than as some ancillary benefit tangentially connected to its primary justification. This central thread weaves democratic standard theory into the overarching theoretical commitments of the Kantian tradition.

The Recklessness Boundary Protecting Constitutional Essentials

So far, I have discussed risk primarily as if resulting accidental harm is only vulnerable to a legal claim for compensation if such is supported by values of individuals' locally affected by the underlying acts. Some readers may be concerned about how democratic standard theory handles the numerous acts that involve excessively high risk due to the nature of the acts or the manner/context in which acts are performed. There is likely an upward boundary where the probability of harm is so high or the severity of the harm is so dire that moral theory may universally prohibit the act, even though the actor does not at all intend to harm anyone. Commentators and legal doctrine often refer to this category of risk as "recklessness." Reckless acts involve less risk than acts where one intends harm or knows that harm is virtually likely to occur. At the same time, recklessness involves more risk than mere carelessness or negligence that most people encounter daily as illustrated in most of the examples in this dissertation. While this formulation of recklessness is intentionally coarse, it suffices for my present purposes.

Here, I am excluding ultra-hazardous acts that are both excessively risky and also have substantial social value. The common law deals with those acts with under the legal doctrine of strict liability in tort. I address democratic standard theory's implication for strict liability elsewhere. Instead, in this subsection, I am addressing excessively risky

acts that have little or no social value—especially when compared to the excessive risk. Usually, reckless acts bring, at most, value to only the actor.

While this dissertation's primary purpose is to draw the line between non-negligence and negligence, democratic standard theory also contains the theoretical resources to draw and justify the boundary between negligence and recklessness. The boundary between recklessness and negligence need not be set by the actual values of those individuals locally affected by the kind of act in question. Instead, but still consistent with democratic standard theory, reckless acts seem to be those acts that have the following characteristics:

1. Excessive riskiness either in its probability of occurring or the dire extent of the probable harm; and
2. Virtually no or very few fully informed individuals would have a life plan that included that one's own ongoing exposure to the risk in that act.

If an act meets those characteristics, we need not further consider whether the act meets the democratic standard of care. Additionally, if for some quirky reason the values of an actual group support a proposition for a reckless act, these individuals' values may be permissibly ignored or overridden, while in so doing advancing constitutional democracy, because those individuals must not be fully informed or must have some gross misunderstanding about the issues involved.

Another way to identify and justify the boundary between recklessness and negligence involves borrowing and extending one of the Rawlsian arguments for constitutional essentials. I suspect that this justification and the previous one are identical in substance though phrased differently. My previous answer is a version of the reasoning

underlying why Rawlsian deliberators behind the veil of ignorance adopt and give lexical priority to the constitutional essentials. This second justification appeals *directly* to and fleshes out the constitutional essentials. I keep these two justifications separate because explicating their connection would take us too far afield.

Getting back on the track of the second justification, individuals not only have interests in the government or other persons never intentionally depriving them of constitutional essentials, but they also have interests, generally speaking, in others never acting in ways that recklessly threaten their constitutional essentials. For example, a person who tosses construction debris from a tall building without regard to potential passers-by creates a danger so severe that it improperly restricts their basic liberty of free movement. Free movement may also be improperly restricted by driving at a highly excessive speed or in an excessively dangerous manner.

Intentional and knowing infringements on individuals' constitutional essentials are often criminalized or remediable in law in various ways. Similarly, reckless acts are usually criminalized or remediable in law through compensatory or punitive damages when harm results. Together these legal mechanisms provide various kinds or levels of legal protection to a person's right to bodily integrity and other constitutional essentials. Explicit criminal prohibition of many reckless acts is appropriate because reckless acts are *not a necessary* part of social life. [Even ultra-hazardous acts that contribute to a substantial social good could be eliminated without major disruption to social life even if eliminating ultra-hazardous acts required some dramatic changes.] Furthermore, recklessness does not have the same mitigating feature that negligence does. Specifically, imposing a reckless risk is not generally due to small or momentary lapses in judgment or

awareness like many of the acts that we generally think fall within the domain of negligence. We may think of these small or momentary lapses due to human frailties as partial excuses, to borrow a concept from criminal law, So, recklessness is not mitigated by the partial excuses common to negligence, making recklessness properly subject to stiffer legal sanctions like outright criminalization or punitive damages.

Constitutional Essentials Protect Against Too a Restrictive Standard of Care

Similar to setting the boundary between recklessness and negligence, now at the excessively cautious end of the risk spectrum, democratic standard theory would also invalidate an excessively restrictive standard of care that prevents individuals from meaningfully exercising their constitutional essentials. On my stipulated risk magnitude scale, we could set the problematic region of excessive caution between 0 to 15 for some kinds of acts. Obviously, some banal or trivial acts have a small risk magnitude, but such are not burdensome at all.

Conjuring up realistic examples at this end of risk spectrum is tricky because, as stated earlier, it takes two actors to tango their way into an accident. So, if even a standard of care always held actors who were traveling in any way other than walking, it does not mean that no one can travel via car (e.g., a kind of act with a 16-to-100 risk magnitude). It only means that car drivers are always vulnerable to negligence claims when one individual's driving and another's walking lead to accidental harm. Such would be similar to placing the boundary between negligence and recklessness so low (e.g., at 16 in risk magnitude) that constitutional essentials are meaningfully burdened.

Presumably, such standard of care would still have to address accidents between, say, two

car drivers. Even a plausible yet excessively cautious standard of care would distinguish between one erratic driver and one non-erratic driver even if both drivers would be negligent vis-à-vis an erratic pedestrian.

Nevertheless, it is possible that, in every form of travel, the values of the most individuals supported an excessively restrictive standard of care that deemed acts negligent such as:

- Automobile driving must not exceed 18 mph;
- Bicycling must not exceed 5 mph;
- Only one airplane *per hour* may take off or land at any airport; and
- Trains may not exceed the speed of the beloved and aptly named Heber Creeper.

The standard of care could severely limit all modes of travel including other aspects of travel aside from speed. If that standard of care led to a screeching halt of these modes of travel, plausibly such a standard of care would violate the constitutional essential of freedom of movement in modern societies.

However, keep in mind that, even under such a standard of care, numerous individuals, even everyone, could continually violate it and continue to travel exactly as they do today. If no one's travel conduct changed even slightly, the consequence of universal, continual violation of the supposed, excessively cautious standard of care would primarily be that some accident costs would shift to different parties to the accidents compared to the status quo's standard of care. The accidents would be the same, but the assignments of accident costs would differ in some cases (but perhaps not many).

For illustration purposes, let's assume that the excessively cautious standard of care led to almost no travel by means other than walking and bicycling. Since travel is a large part of modern life, perhaps this standard of care would also violate constitutional essentials other than freedom of movement mentioned above, such as:

- **Freedom of Association:** One is now unable to visit those far away as such is practically impossible.
- **Freedom of Thought:** Education and other modes of exchanging ideas are only available to those nearby certain institutions, although internet technology may counterbalance this concern. In addition, perhaps the best education, even more than the status quo, is only available to rich given the burdens of travel.
- **Freedom of Religion:** Religious pilgrimages and religious duties to proselytize would be burdened such that only the rich few could realistically perform them.

The list could go on. The point is that democratic standard theory provides the theoretical resources to justifiably trump an excessively cautious standard of care even if supported by the values of the most individuals locally affected.

I do not think the conclusions in this or the previous subsection are controversial. Yet, a full defense of how constitutional essentials would limit excessive risk or excessive caution requires further attention in my future work. As a teaser, though, note that what constitutes recklessness or excessive caution seems to still depend ultimately, at a macro level, on individuals' values in a particular society at a particular point in time and place. Some isolated groups of individuals in the world rely only on human-only, unmechanized walking/jogging/running for travel. A standard of care that deems negligent the first person in such a group who rides a bicycle and collides with a pedestrian is not obviously violating or even burdening the bicyclist's freedom of movement or any other constitutional essential. At the end of the day, we do not utilize to

only human-only, unmechanized travel, like some isolated tribes, because the values of individuals in the pertinent groups overwhelmingly do *not* support exclusively using human-only, unmechanized travel. In fact, such may seem obvious because we are virtually unanimous about allowing travel beyond human-only, unmechanized travel despite the death and serious injury that is virtually certain to occur. For now, let it suffice that articulating a more detailed normative theory of excessive risk and excessive caution and their boundaries with negligence justifies more extensive treatment in future work. For now, I focus on the details of a theory of how to justify the distinction between negligent acts and non-negligent acts while placing IOUs at both bookends of the risk spectrum.

Best Interpretation of the Theoretical Commitments of the Kantian Tradition

Among the theories available, democratic standard theory best encapsulates what it means to treat every individual as free and equal. Democratic standard theory, more than any competing theory of negligence, provides a standard of care under which the most individuals possible may pursue their life plans. Given diverse, irreconcilable, and competing conceptions of the good, not every person's values can determine negligent breach. Yet, the overarching theoretical commitments of the Kantian tradition support the majoritarian standard of care because it furthers the life plans of the most individuals possible.

As for equal treatment, democratic standard theory handles the latter by counting each person's values with equal weight in determining breach of the standard of care. While practical considerations suggest voting as an inefficient or ineffective way to

determine each person's values as they relate to a particular kind of act, the theory sets the equal input of each person's values as the ideal that institutions and practices should attempt to attain.

In democratic standard theory, persons with the minority view are not part of a persistent minority group. Nevertheless, as is generally true in a democracy with majority rule, these persons still end up "losing" in the sense that their values are not reflected in all of the contours of the negligence standard of care. At the same time, persons with the minority view are not being treated unequally since they may attain their fair share of the society's wealth to pursue their life plans, their basic liberties are protected, and their values are given equal weight in determining what constitutes breach of the negligence standard of care. Finally, if democratic standard theory is successfully instantiated, the judge's or jury's excessive discretion would be curtailed. With the effective utilization of democratic standard theory, parties to an accident would not be subject to the possibility of disparate treatment or privileged *ab initio* injustice.

Democratic standard theory denies a single answer to what constitutes negligent breach that universally applies across groups and over time. Instead, negligent breach varies with the values of the relevant individuals affected by the act at issue. Although likely too difficult to actually do so, we can, in principle, amalgamate the various standards of care throughout a society into a sort of macro schematic of what the acceptable risks are within that society. That schematic would have multiple aspects to capture the variety and nuances across the numerous individuals with diverse, irreconcilable, and competing conceptions of the good. Nevertheless, democratic standard

theory would deem such a schematic that society's negligence standard of care. Such would be invariant, if you will, until the values of the individuals themselves change.

Punitive Damages in Democratic Strict Liability

Democratic standard theory has revisionist implications for punitive damages in a strict liability claim and explanatory power for punitive damages in gross negligence claims. As Stephen Perry has emphasized from time to time strict liability does not require that the defendant had exercised any, even minimal, care, i.e., that standard does not require that the defendant act as a reasonably prudent person would have so acted as well as requiring some additional amount of care. In other words, setting aside possibly related foreseeability issues that at least one court, *Madsen v. East Jordan Irr. Co.*, 101 Utah 552, 125 P.2d 794 (1942) (holding defendant was not strictly liable because the type of harm that defendant's blasting actually caused at the neighboring mink farm was not foreseeable, thereby breaking the legal causal link)), handled as a proximate cause issue, virtually all that matters is but-for causation for an actor to be vulnerable to a strict liability claim in tort (assuming all other elements pertinent to that kind of strict liability claim are also satisfied). So, the actor who acts with no or minimal care is vulnerable to a strict liability claim in the same way as an actor, in an entirely separate and unrelated act, who acts with the utmost care as long as each respective act actually caused harm.

In contrast, democratic standard theory requires that the actor at least meet the negligence standard of care even in regard to abnormally dangerous acts. Such assumes that most individuals do not want to be subject to that risk *at all* without a "guarantee," if you will, that the actor would be *vulnerable* to a claim for compensatory damages. One

implication (and here is the revisionist part) is that democratic standard theory would require punitive damages in addition to compensatory damages if, even in a strict liability claim (regarding abnormally dangerous conduct), the defendant's behavior fell (even a little) below the negligence standard of care.

Importantly, in democratic standard theory, products liability (even in its quasi-strict liability form) would likely be handled (limited here only as it pertains to this specific aspect of punitive damages) analogously to a negligence claim. In contrast to an abnormally dangerous act, a product, without a serious defect, may not be abnormally dangerous. That puts a products liability claim, even for a product with a defect that made it abnormally dangerous, closer (morally speaking) to negligence.

To restate, under democratic standard theory, with abnormally dangerous acts (and perhaps others that are morally similar) but-for causation is sufficient for the actor to be vulnerable to a strict liability claim for compensatory damages. At the same time, but-for causation and breach of the negligence standard of care (or something similar) for an abnormally dangerous act is sufficient for the actor to be vulnerable to both compensatory and punitive damages in a strict liability claim.

Interestingly, for abnormally dangerous acts, gross negligence or the like is too stringent of a standard to use before punitive damages are possible. As a result, punitive damages could have two tiers, based on how far below the negligence standard of care the actor's conduct was with gross negligence requiring a greater amount of damages. The lesser amount of punitive damages for mere negligence need not be extreme to still reflect the underlying rationale.

An insightful, intuitive, and justified asymmetry surfaces here. With negligence, one's act, which is not abnormally dangerous, merely needs to fall below the standard of care for compensatory damages to be possible. For strict liability, one's act, which is abnormally dangerous, merely needs to actually cause harm for compensatory damages and only needs to fall below the negligence standard of care for punitive damages to be possible.

Why punitive damages for *mere* negligence regarding abnormally dangerous acts? Put simply, most, if not virtually all, individuals do not want to be subject to the risk of harm from abnormally dangerous acts *at all*. They want *even less* to be subject to negligently performed abnormally dangerous acts because, presumably, a negligently performed abnormally dangerous act is more dangerous along one or more dimensions compared to an abnormally dangerous act performed with more care than the negligence standard of care requires.

Dangerousness, up to a point, is still evaluated according to the values of the individuals locally affected. At the same time, negligently performing an abnormally dangerous act is analogous to recklessness, which may mean that the actor is vulnerable to punitive damages based on limits to risk required by constitutional essentials, as discussed above.

Putting differently the overarching point, the implicit "compromise," if you will, is that actors may nonetheless perform abnormally dangerous acts if they pay compensatory damages for any but-for-caused harm and they pay punitive damages also if they perform the act negligently (and harm occurs). In this way, damages reflect the two senses in which other individuals are risked harm. One sense is the danger from the

abnormally dangerous act; the other is negligently performing that abnormally dangerous act, which, to repeat, presumably makes the abnormally dangerous act even more dangerous along one or more dimensions.

From the insights of democratic standard theory, we see that, as to punitive damages in a strict liability claim for an abnormally dangerous act, existing tort law doctrine contravenes what virtually everyone would deem sensible and appropriate. If instantiated in law, democratic standard theory would provide an additional mechanism, over and above what is doctrinally available in extant tort law, to discourage negligently performed abnormally dangerous acts.

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