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NEGLIGENCE AND ACCOMMODATION

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ABSTRACT
Whereas the Restatement of Torts and leading economic and justice-based approaches to explaining the standard of reasonable care advocate symmetric measurement of reasonable care across the defendant/plaintiff distinction, this article demonstrates that, in fact, the law applies this standard asymmetrically. Defendants are expected to discharge an objectively fixed amount of care, whereas plaintiffs are generally assessed using a subjective measurement of reasonable care. Normatively, I argue that an asymmetric assessment of care, because it combines an unfavorable assessment of defendant's negligence with a favorable assessment of plaintiff's negligence, means that the victim gets to fix the terms of the interaction. This argument resonates with the powerful egalitarian idea of accommodating, rather than overlooking, relevant differences; different treatment is *necessary* for the duty of reasonable care to give effect to the qualitative difference between the plaintiff's life and limb and the defendant's autonomy. Asymmetric assessment of due care, I argue, is the doctrinal metric by which the law determines what it is for the plaintiff and the defendant to relate as equals given that difference, or to relate as *substantive* equals.

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INTRODUCTION

In these pages I seek to document, explain, and justify an important legal phenomenon: negligence law's asymmetric treatment of the plaintiff and the defendant. I also show that the asymmetry in question is inconsistent with the two most familiar grounds of the tort of negligence—promoting efficiency and vindicating corrective justice. Furthermore, the existence and importance of this phenomenon have been obscured by some leading torts treatises[1] and, most importantly, past and present Restatements of Torts.[2]

To set the scene, two analytically separate questions animate the standard of reasonable care in negligence law: what counts as reasonableness and how it should be measured. Begin with the former. It is quite common to think that any successful account of the standard of reasonable care in negligence law must revolve around the question of *what* reasonable care is. Indeed, the two most comprehensive accounts of this standard to date—based in economic analysis and corrective justice—aim to address precisely this question: lawyer-economists have suggested that "reasonable care" depicts the deployment of cost-justified precautions, whereas corrective justice theorists have cast "reasonable care" in terms of the deployment of the precautions necessary to ensure that one's freedom of action coexists with the similar freedom of others.[3] And since these two explanations diverge radically, choosing between them can make significant practical difference *ex ante*, when the law aspires to guide the behavior of people, and *ex post*, when the law resolves their tort disputes.

It is further supposed that an answer to the question of what reasonable care is will provide us with the normative materials to address the question of *how* to assess conformity with the standard's prescriptions (whatever they are). For instance, lawyer-economists would prefer a subjective assessment of reasonable behavior,[4] whereas corrective justice theorists typically insist

1. *See infra* notes 32, 36–37, and accompanying text.
2. *See infra* notes 38–39 and accompanying text.
3. *Compare* Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal Stud*. 29 (1972) *with* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995), at 147–152. The respective approaches of the economic and the corrective justice theories purport to derive concrete recommendations concerning how courts should proceed with determining whether the defendant or the plaintiff is at fault. To be sure, other tort theories have offered their own distinctive takes as to how to divine the obscure notion of reasonable care. Just like lawyer-economists and corrective justice theorists, they do so by construing the standard in question in light of the connection they find to exist between reasonableness and diverse ideas such as Rawlsian fairness (Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311 (1996)) and the community's positive morality (Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315). For reasons that will become clear in due course, I shall not discuss these accounts in detail.
4. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970), at 144–160; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987), at 123; Ariel Porat, *Misalignments in Tort Law*, 121 *Yale L.J.* 82, 103–105 (2011); Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 *N.Y.U. L. Rev.* 627 (2016).

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that an objective one would best reflect an ideal of equal freedom.[5] In that, theorists on both sides proceed by presupposing that the *manner* in which reasonableness is measured is derivative of, and so fully compatible with, the standard's content and its corresponding value (whether it be efficiency in the case of lawyer-economists or formal equality in the case of corrective justice theorists).

However, I shall seek to show that this presupposition is wrong: the manner in which reasonable care is assessed is inconsistent with both the economic and the corrective justice depiction of this standard, and, for that matter, with any tort theory that fails to appreciate the *independent* work that the how-to-assess question can do. Whereas both economic and corrective justice approaches advocate symmetric measurement of reasonable care across the defendant/plaintiff divide, I shall show that, in fact, the law governing the negligent infliction of physical injury applies this standard *a*symmetrically. Defendants are expected to discharge an objectively fixed amount of care, whereas plaintiffs are for the most part assessed by reference to a subjective measurement of reasonable care. As I shall seek to show, the asymmetrical manner of measuring reasonableness frustrates both the promotion of efficiency and the preservation of formal equality.

An asymmetric assessment of care means that, in some measure, the victim gets to fix the terms of the interaction. I argue that this way of attending to the rights of others resonates well with a powerful ideal of *substantive* equality—that of taking seriously (some of) the *differences* that may exist between the parties in a tort interaction. I shall focus on one particular instantiation of this ideal within the arena of negligence law: cases involving the imposition of risk to another person's *life and limb*. I argue that the asymmetrical assessment of care reflects the difference in the respective vulnerabilities—namely, to loss of life and limb, in the case of the risk taker, and to loss of freedom to set ends and pursue them, in the case of the risk creator. It turns out, therefore, that the underlying point of the standard of care is neither merely promoting efficiency nor merely sustaining formal equality (nor merely both).[6] In particular, I argue, the standard of care anchors negligence law to an attractive answer to the question of what it is for persons whose respective courses of action come into conflict to relate as *substantive* equals.

5. *See* WEINRIB, *supra* note 3, at 177; Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 *McGill L.J.* 91, 109, 112 (1995).

6. Why do I focus on economic and corrective justice theories but ignore another prominent theoretical approach, namely, the civil recourse theory? The most immediate reason is that this approach has not developed a sufficiently comprehensive account of the standard of care. *See* Benjamin C. Zipursky, *Sleight of Hand*, 48 *Wm. & Mary L. Rev.* 1999, 2033–2040 (2007); Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 *U. Penn. L. Rev.* 2131 (2015); Jason M. Solomon, *Judging Plaintiffs*, 60 *Vand. L. Rev.* 1749 (2007) (extending the civil recourse theory to capture tort doctrines pertaining to the conduct of plaintiffs).

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The argument will run through the following stages and make the following arguments: in Section I, I set the stage for the main argument by introducing the test case of the physically disabled person. This introduction will generate two basic questions, one positive and one normative, concerning the right way to determine negligence on the part of physically disabled persons. Section II addresses the positive law question: I demonstrate that the law adopts an asymmetrical assessment of reasonable care, in which defendant care is assessed objectively and plaintiff care subjectively (properly conceived). Section III, by contrast, takes stock of two leading accounts of the standard of reasonable care, the economic and the corrective justice accounts. I argue that both call for symmetrical assessment of due care and, so, run afoul of the actual tort doctrine of reasonable care. In Section IV, I develop an alternative account, arguing that the asymmetrical assessment of the standard of reasonable care gives effect to a distinctive conception of substantive equality between participants in a tort interaction. It is distinctive in the sense that it picks out a relational, rather than multilateral, structure: although the exercise of due care, by both the defendant and the plaintiff, can help produce the *public* good of safety, the tort law duty of care, together with the plaintiff's "duty" of self-care, establishes the terms of interaction between a risk creator and a risk taker. These terms can be a source of both concern and value quite apart from their safety effects on society as a whole.[7] It is a conception of *substantive* equality in the sense that, unlike its formal counterpart, it takes seriously the difference between the normative situation of the risk creator and that of the risk taker. The relevant difference in this context is that of vulnerability: I shall argue that the different kind of vulnerability to which each exposes the other—the *life and limb* of the risk taker and the *freedom* of the risk creator—requires the asymmetry (and in some exceptional cases, may even call for the strict defendant liability famously associated with the doctrine of ultrahazardous activities). Thus, combining an objective assessment of defendant care with a subjective assessment of plaintiff care makes sense because it tackles the imbalance in their respective vulnerabilities, and to this extent establishes legal terms of interaction that accommodate, rather than neglect, the normative priority of the right to life and limb over the right to set ends and pursue them. Section V further elaborates on the proposed account, showing that this conception carries important implications that go beyond the test case of physical disability and, indeed, beyond negligence law.

7. The relational structure of primary duties in property law and tort law has been criticized in J. E. PENNER, THE IDEA OF PROPERTY IN LAW (1997), at 23–31, and Gregory C. Keating, *The Priority of Respect over Repair*, 18 *Legal Theory* 293 (2012), respectively. It is beyond the scope of my argument here to address this critique. I address it elsewhere, with special emphasis on property law and proprietary torts. *See* Avihay Dorfman, *The Society of Property*, 62 *U. Toronto L.J.* 563 (2012); Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 *U. Toronto L.J.* 402 (2014).

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I. SETTING THE STAGE

A. Methodology: When Will the Objective/Subjective Distinction Make a Difference?

Begin with a preliminary set of definitions. The measurement of reasonable care is objective in the *negative* sense that it does not take into account the idiosyncrasies of the particular person whose conduct is being assessed.[8] By implication, I shall use the notion of subjective assessment of reasonable care to capture all other cases, namely, those in which the law makes some—though *not necessarily complete*—allowance for certain forms of disability. And although this subjective test is sometimes cast in objective terms—the reasonable person with a similar disability—I shall treat this standard of care as subjective because, and insofar as, it sets a lower standard of care based *in part* on the particular traits and disabilities of the person in question.[9] As I explain below, this way of defining the subjective/objective dividing line reflects the actual working of the law and, most crucially, proves helpful in approaching the normative question of how the law should assess reasonable care on the parts of the injurer and the victim.

Now, the difference between objective and subjective measurements of reasonableness is not readily apparent among persons whose capacities of discharging care are more or less homogenous. In other words, the more closely a person's capacity matches what the law views as a reasonable, average, or normal person's capacity, the less likely it is that important differences will be discerned between the consequences of invoking an objective or a subjective measurement of reasonable care.[10] Furthermore, we cannot even tell under these circumstances whether the resort to the average or reasonable person expresses the law's commitment to an objective measurement or, instead, to a subjective one. After all, it is not worth the courts' while to engage in costly investigation of the actual capacities of defendants {1, 2, 3, . . . n} only to find out that the differences within this range of defendants is fairly trivial.[11]

Thus, in order to track more accurately how courts approach the task of measuring reasonableness, it will be necessary to focus the inquiry on

8. *See* Vaughan v. Menlove, 132 Eng. Rep. 490 (Ct .Com. Pl. 1837).

9. Oftentimes, a subjective assessment of care proceeds in two stages: first, creating a modified standardized person with like disabilities; and second, measuring the conduct of the plaintiff against this modified standard. Each of these stages falls within the definition offered in the text above of subjective assessment of care.

10. For the purpose of the present argument, it does not matter what counts as the "reasonable," the "average," or the "normal" person. What matters is that the reasonable, average, or normal person expresses an objective valuation of human capacities, that is, a valuation that does not turn on "the idiosyncrasies of the particular person whose conduct is in question." Glasgow Corp. v. Muir, [1943] AC 448, 457 (HL).

11. *See Vaughan*, 132 Eng. Rep. at 493 (judgment of subjective fault is "as variable as the length of the foot of each individual"); Leon Green, *The Negligence Issue*, 37 *Yale L.J.* 1029, 1029–1030 (1928); Steven Shavell, Economic Analysis of Accident Law (1987), at 74.

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defendants and plaintiffs whose caring capacities clearly and substantially deviate from those represented by the objectively fixed standard of care. The class of physically disabled persons is, to this extent, the *best* proving ground for considering the manner in which courts assess the conduct of defendants and plaintiffs in negligence law. That is, the retail case of the physically disabled serves to divine the wholesale case, which is to say tort law's general approach to assessing the conduct of parties to a tort interaction. Indeed, the results I find with respect to the private case of the physically disabled person—i.e., an objective measurement of the defendant's conduct coupled with a subjective measurement of the plaintiff's conduct—have ample support in the cases that lie *beyond* those of the physically disabled defendants and plaintiffs.[12]

Why focus on the class of the physically disabled person in particular? To begin with, this class consists of persons whose deficient caring capacities are typically clearly manifested—consider a person rolling a wheelchair or a blind person carrying a stick. These capacities are also sometimes virtually irreversible—consider a senior citizen possessing poor reflexes.[13] Moreover, I focus on physical disability mainly because it is widely acknowledged (though not necessarily true, as I argue below) that courts are highly responsive to deviations from the standard of the average person that result from physical disability, certainly more than to deviations resulting from other cases of disability (such as the mentally disadvantaged person).

B. Physical Disability: A Case Study

Consider the following two cases of negligence. (1) Roger, aged eighty-five, drove his automobile across the city. Although not exceeding the relevant speed limit, Roger failed to stop his automobile on time, striking down a person who was innocently walking on a designated crosswalk. Roger's failure is attributed to his poor reflexes, probably the upshot of his old age. (2) The same Roger, now acting as a pedestrian, is struck at the same place by an automobile. The driver is negligent for driving unreasonably fast (whatever unreasonably fast means). On his part, Roger's slow reflexes have amplified the gravity of his injury—had he responded more quickly to the approaching automobile, the harm he suffered could have been reduced or even avoided altogether.[14] For the sake of clarity, suppose that the *only* risk produced by Roger the pedestrian is risk to himself (though I shall

12. Concerning nondisabled defendants, *see The Germanic*, 196 U.S. 589, 595–596 (1905). Concerning the rule with respect to the nondisabled plaintiff, *see Reynolds v. New York Central & H.R. Co.*, 13 Sickels 248 (N.Y. 1874); *Noel v. McCaig*, 258 P.2d 234, 241 (Kan. 1953); *Porter v. Cook County*, 355 N.E.2d 561, 565 (Ill. App. 1976).

13. *Cf.* David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 *Geo. Wash. L. Rev.* 17, 30 (1981).

14. A somewhat similar factual situation appears in *Thomas v. Metzendorf*, 128 A. 162 (N.J. 1925).

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relax this assumption below, explaining that the argument I develop is *not* limited to such cases of "pure" contributory negligence).[15] In both cases, Roger's conduct is assessed against the baseline of reasonableness. Whereas in the first case the question is whether Roger the tortfeasor breached the duty of reasonable care he owed the injured pedestrian, the second one gives rise to the question of whether, and to what extent, his response to the injurer's negligence was itself unreasonable, which is to say contributory or comparatively negligent.[16]

Drawing on the hypothetical case of Roger, I shall seek to make more explicit two theses that will set the scene for the argument going forward: first, the controversiality thesis; second, the interdependence thesis. The discussion is meant to be a stage setter and, therefore, relatively brief.

The Controversiality Thesis. No matter how they proceed with these assessments, courts *must* take sides on the question of whether Roger's "weakness of old age"[17] should be treated either favorably or unfavorably.[18] His so-called weakness is treated favorably when generous adjustments to the standard of reasonable care are being introduced, effectively excusing him from taking the same precautions that a nondisabled person in his shoes would have been required to take under the circumstances. This way of assessing reasonableness gives rise to a subjectively fixed standard of care.[19] By contrast, an unfavorable treatment results in a demand that Roger take as many precautions as necessary to compensate for his weakness, effectively requiring him assiduously to make an additional effort (when compared to

15. Indeed, it also applies to cases in which the plaintiff fails to exercise due care over both himself and others. *See infra* text accompanying notes 67–68.

16. The fact that driving (as in Roger's first case) is a heavily regulated, and especially dangerous, activity does not make it an unusual case. In particular, driving is not distinctively insensitive to modified standards of care. An objective standard of care applies to defendants, drivers or otherwise, as cases like *Vaughan v. Menlove*, 132 Eng. Rep. 490 (Ct. Com. Pl. 1837) and *The Germanic*, 196 U.S. 589, 595–596 (1905) demonstrate. Furthermore, courts in fact do modify—viz, render more subjective—the standard of care upon assessing contributory or comparative negligence on the part of drivers. *See infra* text accompanying notes 82–84.

17. W. Page Keeton et al., Prosser and Keeton on Torts (5th ed., 1984), §32, at 176.

18. For more on the inevitably controversial necessity of choosing between an objective and subjective measurement of due care, *see* Guido Calabresi, Ideas, Beliefs, Attitudes, and the Law (1985), at 23–35. Calabresi objects to the objective standard of reasonable care based on egalitarian concerns for "equal access," "equal participation," and "equal treatment" of disabled tortfeasors. *Id.* at 35, 39, 40, 42, 67. Instead, Calabresi defends a subjectively fixed standard of care for risk creators backed up by a publicly funded compensation scheme to ensure that tort victims would not bear an excessive burden as a result of implementing a subjective standard. I take stock of this solution in Avihay Dorfman, *Reasonable Care: Equality as Objectivity*, 31 *Law & Phil.* 369, 387 n.47 (2012). There, I argue that an objective standard of defendant care is part of the egalitarian solution; in the present argument I seek to explain, among other things, why the standard of plaintiff self-care must be fixed subjectively. Taken together, my overall ambition is to defend the asymmetrical valuation of reasonable care across the defendant/plaintiff divide on, broadly speaking, egalitarian grounds.

19. As mentioned above, I shall refer to subjective measurement of reasonable care whenever courts introduce accommodations to the standard of reasonable care to reflect the peculiar traits of the person whose conduct is being evaluated.

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a similarly situated *non*disabled person) in order to meet the *objectively* fixed standard of reasonable care.

The Interdependence Thesis. No matter what side courts ultimately take, the two sets of inquiry (concerning Roger the defendant and Roger the plaintiff) are interdependent.[20] Assessing favorably or unfavorably the reasonableness of the defendant's conduct necessarily affects the amount of care that the plaintiff is required to take in order either to stay out of harm's way or to reduce liability for her comparative fault. Likewise, assessing favorably or unfavorably the reasonableness of the plaintiff's behavior immediately impacts the extent of the precautions the defendant will need to deploy in order to avoid liability at all or in part. Thus, an objective assessment of the plaintiff's conduct implies that, upon determining the care he needs to discharge, the defendant may disregard the idiosyncratic traits of the potential victim. In other words, such a method of assessing the plaintiff's negligence renders permissible the defendant's inattention to any potential consequence of his carelessness insofar as it can be attributed (in the appropriate way) to the disability of the victim, and vice versa. This is precisely what is meant by observing that the process of evaluating the conduct of the parties to a tort interaction is interdependent. For, every time courts determine the reasonableness of the conduct of either one—the defendant or the plaintiff—they necessarily engage in the business of fixing the terms of the interaction for *both*.

The reason I mention the interdependence thesis up front is to forestall misunderstandings about the true connection between primary and contributory (or comparative) negligence. One dominant trend among tort scholars argues that the two doctrines of negligence are different by nature, in which case the principles that inform the method of assessing one cannot apply to the other.[21] For they reflect opposing philosophies: whereas the defendant's breach of the duty of care is a moral failure of disrespecting others, the plaintiff's failure to respond reasonably to the

20. *See also* CALABRESI, *supra* note 18, at 32–33.

21. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 *Yale L.J.* 697, 722–723 (1978); Kenneth W. Simons, *Contributory Negligence: Conceptual and Normative Issues*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995), at 461, 476–477, 480; Keating, *supra* note 3, at 371; Robert Stevens, *Should Contributory Fault Be Analogue or Digital?*, *in* DEFENSES IN TORT (Andrew Dyson et al. eds., 2015), at 247, 253; Zipursky, *Reasonableness*, *supra* note 6, at 2162 n.81. *Cf.* Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 *N.Y.U. L. Rev.* 114, 128 (2001) (driving a wedge between considerations pertaining to defendant care—"the safety principle"—and those that focus on "the amount of care individuals should take for their own protection"). Professor Richard Wright also argues that "no issue of Right immediately arises" in connection with contributory negligence. However, he does acknowledge that considerations of fairness (or, as he prefers, Kantian Right) "arise[] indirectly and appl[y] in a much more limited manner." Richard W. Wright, *The Standards of Care in Negligence Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995), at 249, 259. I argue, by contrast, that they arise directly and, more precisely, that primary and contributory negligence are interdependent.

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defendant's negligent conduct is, at best, a *prudential* failure to protect oneself.[22]

According to this line of thought, the distinction between moral and prudential (or other- and self-regarding) failure renders state enforcement of duties of reasonable self-care problematic.[23] The legitimate authority of the liberal state, the argument goes, might run out if pressed too hard against instances of plaintiffs' want of self-prudence. Those who hold this view do not ignore the implications of choosing between a subjective and an objective method of assessing the plaintiff's negligence as it impacts the extent of the defendant's liability.[24] They insist, however, that this causal effect does not make it legitimate for the state to compel plaintiffs to discharge as much care as it demands from the defendants. Whether or not the defendant's negligence should be assessed objectively (or subjectively), the only legitimate approach toward the plaintiff's conduct is that of subjective assessment. Thus, the alleged interdependence thesis, one might suspect, turns out to be a superficial statement about a mere causal connection between two doctrines—primary and contributory negligence—that are not, morally and legally speaking, on a par.

I shall reject this contention, because the interdependence thesis goes deeper than identifying a causal connection between primary and contributory (or comparative) negligence. Indeed, the thesis is better characterized as suggesting that the method of assessing comparative negligence is partially *constitutive* of what counts as primary negligence on the part of the defendant.

It is certainly true to hold, with the prominent tort scholars mentioned above,[25] that comparative fault reflects a failure on the part of the plaintiff to protect himself from danger posed by another. However, it is a mistake to suppose that this self-referential failure is irrelevant for the purpose of sustaining the fairness (or legitimacy) of the tort system, which is a state-run institution purporting to compel people to act in certain ways or to bear the consequences of failing to so act. Above all, to say that only the defendant's negligence expresses wrongful conduct, and that therefore the doctrine of contributory negligence does not play a role in analyzing the method of assessing primary negligence, is to beg the question. In particular, it begs the question because the method of assessing comparative negligence may

22. Schwartz, *supra* note 21, at 722–723; Simons, *supra* note 21, at 476–477, 480; Keating, *supra* note 3, at 371; Stevens, *supra* note 21, at 253; Zipursky, *Reasonableness*, *supra* note 6, at 2162 n.81. For support in the case law for the proposition that a plaintiff's fault marks a prudential, rather than a moral, failure, *see Welsh v. Jordan*, 194 A.2d 841, 844 (Me. 1963); *Cowan v. Doering*, 545 A.2d 159, 163 (N.J. 1988); and *Hofflander v. St. Catherine's Hospital*, 664 N.W.2d 545, 566 (Wis. 2003).

23. Keating, *supra* note 3, at 371.

24. *See, e.g.*, Simons, *supra* note 21, at 475 (acknowledging that the defendant incurs the cost of the precaution taken by the plaintiff "in the form of legal liability to the plaintiff for that injury").

25. Schwartz, *supra* note 21, at 722–723; Keating, *supra* note 3, at 371; Wright, *supra* note 21, at 259; Stevens, *supra* note 21, at 253.

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sometimes determine the *character* of the defendant's conduct—viz, is the conduct negligent *at all*?—and at other times determine the *scope* of the negligence that can be attributed to the defendant's risky conduct.

To see that this is the case, consider a society consisting of three classes of foreseeable tort victim. Pedestrians in the first class—the class of Olympic athletes—can easily escape the danger of an approaching car traveling at a maximum speed of 60 mph. The second class—the pedestrian pedestrians, as it were—can do the same when the car's speed is no more than 40 mph. Finally, the third class—the likes of Roger—can successfully respond safely insofar as the approaching car's speed does not exceed 20 mph. The controversiality thesis, recall, established that the law must take sides—it must decide which class of pedestrians to take as its reference when it judges the reasonableness of the plaintiff's conduct. And the interdependence thesis establishes that whatever the selected side or class of pedestrian is, thus selecting necessarily determines the content of the standard of care that *defendants* are expected to meet if they seek to avoid liability partially or totally.

Any nonarbitrary attempt at identifying the "reasonable" speed limit presupposes a *prior* judgment concerning what counts as reasonable conduct on the part of foreseeable plaintiffs responding to an approaching car. That is, the method of assessing the conduct of the responding plaintiff partially constitutes the content of the duty of care the defendant owes the plaintiff. It will be unreasonable to drive at 39 mph under the relevant circumstances if, and only if, the law assesses the reaction of the foreseeable plaintiff to thus driving subjectively. But when the method of assessment turns objective, it means that the law allows defendant-drivers to determine the speed at which they would travel, disregarding the idiosyncratic traits of the potential victims.

Thus, the interdependence thesis reveals that the method of assessing the plaintiff's negligence is not merely causally connected to the determination of the defendant's negligence; rather, it in part helps to determine the *wrongful character* of the defendant's conduct. All else being equal, the difference between an objective and a subjective assessment of comparative negligence makes the difference between characterizing a 39-mph drive as wrongful and deeming it to be risky but, nonetheless, reasonable driving. So far I have discussed the constitutive effect of comparative negligence on the characterization of the defendant's conduct as negligent in the first place. I shall now consider its more familiar impact on determining the *scope* of the defendant's definitely negligent conduct.

The same influence is felt even when the defendant's activity is certainly wrongful; say, the defendant drives at the speed of 61 mph. The different methods of assessing comparative negligence will not here bear on the question of whether the defendant's driving is wrongful at all. It certainly is. Rather, the choice between subjective and objective assessment of comparative negligence in effect determines the *scope* of the defendant's

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negligence. An objective assessment implies that the driver's breach of the duty of care expresses disrespect for the victim but only because, and only insofar as, the latter reacts to the former's negligence as a reasonable person would react under the circumstances. In effect, the driver is not required to take into consideration, upon determining how much precaution—and what precautions—to take, the peculiar degree of skill of the potential victim. His decision is deemed negligent for failing to respect the victim qua reasonable person, objectively defined as possessing ordinary skills and capabilities. It is only when the method of assessment turns subjective that the scope of the negligent act comes to reflect disrespect for the victim herself, including, in particular, her distinctive makeup.

Determining the character of the defendant's act and delineating the scope of the negligence are two ways in which the method of assessing the plaintiff's negligence can be said to be partially constitutive of deciding the question of primary negligence. Each of these ways shows that the objection that considerations of comparative negligence do not bear on primary negligence is misplaced. Taking a favorable stance toward the likes of Roger in the form of a subjective assessment of the plaintiff's negligence does give him the privilege to fix unilaterally the terms of the tort interaction. Roger may exercise this privilege by way of recharacterizing the defendant's act as negligent in the light of Roger's weakness—that is, were the plaintiff a nondisabled person, the defendant's conduct would not count as negligent at all. Or, he may do so by way of expanding the scope of the defendant's negligence by deeming the defendant's inattention to Roger's weakness negligent too (that is, in addition to being inattentive to Roger's more "ordinary" skills and capacities). Either way, a theory of negligence that denies the deep interdependence between primary and contributory negligence must be rejected in favor of accounts that take a more holistic approach to the question concerning the point of negligence. The two theoretical approaches I shall examine below—economic and corrective justice theory—seem to take seriously the interdependence thesis.[26]

C. The Two Basic Questions: The "Is" and the "Ought"

Against the backdrop of the controversiality and interdependence theses, there arise two questions—a positive one and a normative one—that stand at the center of this paper. First, what "side" *do* courts actually take? Second, what "side" *should* courts take? I take each in turn, arguing with respect to the positive law question that leading commentators have failed to

26. That said, in his most recent account of comparative negligence from a corrective justice perspective, Ripstein seems to make one aspect of the interdependence thesis (viz, that of the plaintiff's impact on defining the scope of *liability*) central while overlooking the other one (viz, that of the plaintiff's impact on defining what counts as negligence in the first place). ARTHUR RIPSTEIN, PRIVATE WRONGS (2016), at 105–106, 121–122.

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answer the former question, and with respect to the normative question that leading tort theories have failed to account for—to explain in theory—the law's actual position when articulating their preferred answers to the latter (normative) question.

II. THE PHYSICALLY DISADVANTAGED IN DOCTRINE: THE MYSTERY AND ITS RESOLUTION

A. Positive Law: A Doctrinal Mystery

As mentioned above, the case of the physically disabled person is commonly viewed as triggering the most generous adjustments to the standard of reasonable care, more so than all other forms of disability (such as mental ones).[27] Perhaps the most familiar and stylized statement of tort law's approach to physical disability reads: "the reasonable person may be said to be identical with the actor."[28] This assertion, by now an official provision in the Restatement (Third) of Torts,[29] is followed by what at first blush seems to be its logical conclusion, namely, that the content of the duty of due care must receive a *subjective* interpretation when employed to assess the conduct of the physically disadvantaged risk creator.[30] And although it is sometimes cast in objective terms—the reasonable person with a similar disability[31] —the duty is, in the conventional wisdom, subjective, since it fixes the required amount of care *in part* by reference to the particular traits of the person in question.[32]

Nevertheless, the derivation of a subjective standard of care from the familiar statement mentioned a moment ago is neither logically required nor, in fact, positively endorsed by the law of torts (on which more below). Indeed, the (arguable) fact that the reasonable person has physical properties identical to those of the actor does not entail any particular conclusion

27. *See, e.g.*, Patrick Kelley, *Infancy, Insanity, and Infirmity in the Law of Torts*, 48 *Am. J. Juris.* 179, 204 (2003); John V. Jacobi, *Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA*, 33 *U.C. Davis L. Rev.* 95, 103–104 (1999).

28. KEETON ET AL., *supra* note 17, at 175. An earlier version appears in Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 *Harv. L. Rev.* 1, 13 (1927) ("In physical characteristics, the standard man appears to be identical with the actor.").

29. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (2010), §11(a).

30. *See, e.g.*, Perry v. Fredette, 261 A.2d 431, 432 (N.H. 1970) ("The standard of care applied to . . . persons with physical disabilities is more flexible than that applied to the adult without disabilities."); *see also* KEETON ET AL., *supra* note 17, §32, at 175–176 ("The person who is blind or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world and to have allowance made by others for his disability, and the person cannot be required to do the impossible by conforming to physical standards which he cannot meet.").

31. *See, e.g.*, Muse v. Page, 4 A.2d 329, 331 (Conn. 1939) (defining "reasonable care" as the care "an ordinarily prudent person with a like infirmity would exercise under the same or similar circumstances").

32. *See* 3 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, THE LAW OF TORTS (2d ed., 1986), §16.7, at 421 ("The subjective standard finds its most complete acceptance in the case of physical characteristics.").

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about the appropriate level of care required from this actor. On the one hand, it is logically possible to infer from this fact that the actor in question may not be required to take the precautions a nondisabled person would reasonably take in the case at hand; say, a blind person sitting in a café, reaching for her hot cup of coffee, which then falls on and burns another person, might not violate her duty of care in the light of her excusing disability. On the other hand, it is equally possible to infer from the same facts that the same actor must take additional precautions (when compared to a similarly situated nondisabled person) in order to display appropriate vigilance; say, the blind person from the above example must approach the coffee with extra caution (and even then perhaps wait for the coffee to cool down). Thus, the logic of the familiar statement of the law (that the reasonable person has physical characteristics identical to those of the actor) is compatible with a subjective standard whereby allowance is made for the actor's disability in the form of a watered-down requirement of care.[33] And it is not inconsistent with an objective one, according to which the same actor must exercise reasonable care despite and, indeed, *regardless* of, her disability.

Indeed, in some cases, as when a blind pedestrian falls off a bridge because of the municipality's neglect in replacing a railing at the edge of the bridge, the disability in question may excuse the person from the requirement to compensate for the neglect and thus to exercise the vigilance a nondisabled individual would have displayed.[34] And yet in others, as when a person of small stature drives an automobile and is unable to see objects close to the auto's front, the law requires that the disabled person compensate for her disability in order to reach the standard of care that any reasonable person—disabled or otherwise—must meet.[35] Leading commentators and Restatement reporters often express this ambiguity by noting the "protective"[36] versus "demanding"[37] or "advantag[ing]"[38] versus "disadvantag[ing]"[39] duality implied by the standard of a reasonable person with the same physical disability.[40] But these descriptions of the law do not quite

33. This watered-down requirement is by definition subjective since it allows the idiosyncrasy of the particular actor to fix, in some measure, the appropriate amount of care.

34. The illustration draws on *Sleeper v. Sandown*, 52 N.H. 244 (1872).

35. *See* Mahan v. State, 191 A. 575, 580 (Md. 1937) (The law imposes on drivers with short stature a "duty of exercising greater watchfulness to avoid injuring others . . . than would be necessary for one of normal stature.").

36. Dan B. Dobbs, The Law of Torts (2000), §19, at 282.

37. *Id.*, §19 at 283. An ambiguity of this nature can be found in Keeton et al., *supra* note 17, §32, at 176 (noting that a blind person, whose disability exemplifies the category of physical disability, "must take the precautions, *be they more or less*, which the ordinary reasonable person would take if he were blind") (emphasis added).

38. Restatement (Third) of Torts: Liability for Physical Harm (2010), §11 cmt. b.

39. *Id.* A similar ambiguity appears in its predecessor. *See* Restatement (Second) of Torts (1965), §283c cmt. c (observing that "[a] person under . . . permanent physical disability may be required, under particular circumstances, to take more precautions than one who is not so disabled, while under other circumstances he may be required to take less").

40. *Compare* Traphagan v. Mid-Am. Traffic Marking, 555 N.W.2d 778, 787 (Neb. 1996) ("a reasonably careful person with a like disability may be required to put forth a greater degree

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explain precisely where to draw the line between cases with a subjective standard of care and those with an objective standard.[41] Nor, more importantly, do they elaborate on the grounds for making this cut.[42]

B. Dissolving the Mystery

In fact, however, the line between subjective and objective standards of reasonableness can be made more precise once it is sought. A key question, I argue, is whether the person with a physical disability occupies the position of a tort victim or a tortfeasor. I reviewed the canonical statements of tort law's approach to the standard of care as applied to physically disabled persons.[43] The results I have found show that, save for unknown illness (such as a heart attack), all the cases cited therein as evidence for the proposition

of effort than would be necessary by others in order to exercise ordinary care under the circumstances") *with* Davis v. Feinstein, 88 A.2d 695, 696 (Pa. 1959) ("A blind person is not bound to discover *everything* which a person of normal vision would.").

41. It is perhaps possible to argue that the line is drawn between known and unknown physical disabilities. A person who is reasonably unaware of her disability (say, a motorist having an unexpected seizure) is not required to meet the standard of reasonable care. Whereas, it may be supposed, the conduct of a person with a known disability is assessed by reference to an objective standard of care. But this distinction is incorrect on its own terms because known disabilities do not imply an objective standard of care, as I have already observed in the main text above. Moreover, the distinction is superficial because most cases of unknown disability (such as heart attack and seizure) belong to a more general category of causes that defeat tort responsibility in any system of tort liability (including strict liability). This category consists of causes such as *force majeure*, nonavoidability, and unforeseeability, all of which represent what can be called, following Jules Coleman, ineffective agency. *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE (2001), at 50. In short, physical disability is not a defining feature of it. And it is certainly not the reason why a subjective standard may apply—a driver having an unforeseeable seizure may be excused from discharging the duty of reasonable care not because of the seizure *as such* but because she could not preempt its consequences, say, by taking a taxi. *See* Ford v. Carew & English, 200 P.2d 828, 833 (Cal. Ct. App. 1948) ("if the jury believed that the accident was without any negligence of defendants and due to an *unanticipated* heart attack of the defendants' agent, it would be an *unavoidable* accident") (emphasis added); Caroll v. Bouley, 156 N.E.2d 687 (Mass. 1959) (an unforeseeable seizure rendering a defendant-motorist unable to control his motor vehicle is not negligence); McCall v. Wilder, 913 S.W.2d 150, 154 (Tenn. 1995) (observing that "[t]he generally accepted approach [across the nation] is to accept as a defense the sudden loss of physical capacity or consciousness while driving provided that the loss of capacity or consciousness was unforeseeable"). *Cf.* DOBBS, *supra* note 36, at 282 (no liability for harm inflicted by one who is "reasonably unaware of a physical limitation or disability until it results in harm"). A similar rule holds in English common law tort. *See* Mansfield v. Weetabix, [1998] 1 WLR 1263 (CA).

42. Notable exceptions to the ambiguous understanding of the law's operation with respect to the distinction between the physically disabled injurer and victim are CALABRESI, *supra* note 18, at 32–33; Wright, *supra* note 21, at 257–258.

43. Seavey, *supra* note 28, at 14–15; RESTATEMENT (SECOND) OF TORTS (1965), §283C; KEETON ET AL., *supra* note 17, §32, at 175–176; DOBBS, *supra* note 36, at 281–284. The Reporter's Note (comment b) to RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM (2010), §11, includes reference to sixteen cases (of which fourteen are cited and analyzed in various places in this article). I do not include this source among the canonical statements because of its ambivalence. The Reporter's Note lumps together these cases in support of the Restatement's ambiguous approach to the standard of care as applied to the physically disabled person: that this standard can sometimes be advantaging and sometimes disadvantaging without specifying what accounts for the "sometimes."

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that physical disadvantage warrants a watered-down standard of care are cases of contributory or comparative negligence.[44] A similar pattern can be discerned in jurisdictions not covered by those cases.[45] Which is to say, no one case concerning the conduct of the tortfeasor has made allowance for her physical disability.[46] Thus, tortfeasors are required to exercise the care a nondisabled tortfeasor would have been expected to exercise.[47] Bearing

44. These cases, cited in Seavey, *supra* note 28, at 14 n.14; RESTATEMENT (SECOND) OF TORTS(1965), §283C; KEETON ET AL., *supra* note 17, at 175–176 nn.16–20; DOBBS, *supra* note 36, at 281–284 nn.2–4, 6, are: Shepherd v. Gardner Wholesale, Inc., 256 So.2d 877, 882 (Ala. 1972) (impaired vision); St. Louis, I. M. & S. Ry. Co. v. Maddry, 21 S.W. 472, 474 (Ark. 1893) (blind plaintiff); Pennington v. S. Pac. Co., 304 P.2d 22, 29–30 (Cal. Ct. App. 1956) (one-eyed plaintiff); City of Denver v. Willson, 254 P. 153, 155 (Colo. 1927) (lame plaintiff); Goodman v. Norwalk Jewish Center, 139 A.2d 812, 815 (Conn. 1958) (same); Wray v. Fairfield Amusement Co., 10 A.2d 600 (Conn. 1940) (plaintiff suffering from a bone condition); Muse v. Page, 4 A.2d 329, 331 (Conn. 1939) (aged and poor-sighted plaintiff); Kerr v. Connecticut Co., 140 A. 751, 752 (Conn. 1928) (deaf plaintiff); Borus v. Yellow Cab Co., 367 N.E.2d 277, 282 (Ill. App. Ct. 1977) (physically disabled plaintiff); Memorial Hospital v. Scott, 300 N.E.2d 50, 56–57 (Ind. 1973) (plaintiff suffering from sclerosis); Apperson v. Lazro, 87 N.E. 97, 99 (Ind. Ct. App. 1909) (blind plaintiff); Balcom v. City of Independence, 160 N.W. 305, 308–310 (Iowa 1916) (same); Hill v. City of Glenwood, 100 N.W. 522, 523–524 (Iowa 1904) (same); Bennett v. State, 503 So.2d 1022 (La. Ct. App. 1987) (aged plaintiff); Garner v. Crawford, 288 So.2d 886, 888 (La. Ct. App. 1973) (same); Keith v. Worcester & B. V. St. R. Co., 82 N.E. 680, 681 (Mass. 1907) (blind plaintiff); Smith v. Wildes, 10 N.E. 446, 448 (Mass. 1887) (same); Jakubiec v. Hasty, 59 N.W.2d 285 (Mich. 1953) (deaf-mute plaintiff); Hefferon v. Reeves, 167 N.W. 423, 424 (Minn. 1908) (blind plaintiff); Bernard v. Russell, 164 A.2d 577, (N.H. 1960) (aged plaintiff); Stephens v. Dulaney, 428 P.2d 27, 33 (N.M. 1967) (plaintiff with no sense of smell), *overruled by* Williamson v. Smith, 491 P.2d 1147 (N.M. 1971); Cook v. City of Winston-Salem, 85 S.E.2d 696, 700–701 (N.C. 1954) (blind plaintiff); Mitchell v. Seaboard Air Line R. Co., 68 S.E. 1059, 1059 (N.C. 1910) (deaf plaintiff); Rosser v. Smith, 133 S.E.2d 499, 503–504 (N.C. 1963) (aged plaintiff with a hearing disadvantage); Plunkett v. Brooklyn Heights Railroad Co., 114 N.Y.S. 276 (1908), *aff'd per curiam*, 92 N.E. 1098 (N.Y. 1910) (aged plaintiff); Harris v. Uebelhoer, 75 N.Y. 169, 175–176 (1878) (blind plaintiff); Fletcher v. City of Aberdeen, 338 P.2d 743, 746 (Or. 1959) (blind plaintiff); Mackie v. McGraw, 191 P.2d 403 (Or. 1948) (plaintiff with a hearing disadvantage); Weinstein v. Wheeler, 271 P. 733, 734 (Or. 1928) (blind plaintiff); Felton v. Horner, 37 S.W. 696, 697 (Tenn. 1896) (aged plaintiff); Texas & N.O.R. Co. v. Bean, 119 S.W. 328, 349 (Tex. Civ. App. 1909) (plaintiff with a deformed foot); Brunner v. John, 274 P.2d 581 (Wash. 1954) (an aged plaintiff); Rhimer v. Davis, 218 P. 193 (Wash. 1923) (deaf plaintiff); Kitsap Cty. Transp. Co. v. Harvey, 15 F.2d 166, 168 (9th Cir. 1927) (aged plaintiff).

45. *See* Isenberg v. Ortona Park Recreational Ctr., Inc., 160 So.2d 132, 136 (Fla. App. 1964) (impaired physical faculties on the part of the plaintiff must figure in the valuation of contributory negligence); Noel v. McCaig, 258 P.2d 234, 241 (Kan. 1953) (noting that a "deficiency in physical capabilities" must be taken into account in assessing contributory negligence); Gill v. Sable Hide & Fur Co., 4 S.W.2d 676 (Ky. App. 1928) (poor-sighted plaintiff); Ham v. City of Lewiston, 47 A. 548 (Me. 1900) (poor-sighted plaintiff); O'Flaherty v. Union Ry. Co., 45 Mo. 70 (1869) (stating that "the lame and infirm ... are entitled to the use of the streets, and more care must be exercised towards them by persons controlling or managing cars and vehicles than towards those who have better powers of motion"); Buttelli v. Jersey City, H. & R. Elec. Ry. Co., 36 A. 700, 701 (N.J. 1896) (plaintiff who was a "little deaf"); Stout v. Wagner, 96 N.E.2d 50 (Ohio App. 1950) (aged plaintiff); Davis v. Feinstein, 88 A.2d 695 (Pa. 1952) (blind plaintiff).

46. *See also* 3 HARPER ET AL., *supra* note 32, at 428 n.17 ("Defendants rarely if ever attempt to interject their physical disabilities in order to escape or mitigate the standard of the reasonably prudent person."). Again, my findings do not consider the case of sudden and unexpected illness (such as seizure or heart attack) to be a legitimate member of the class of physical disability. *See supra* note 41.

47. Three cases of a physically disabled *tortfeasor* appear in the sources mentioned in *supra* note 44 (save, again, for sudden, unexpected illness). One of them is resolved on no-duty

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in mind the otherwise high variance that characterizes a common law tort system with multiple jurisdictions, these findings provide a good sense of the law's preference for limiting subjective assessment of conduct to cases of physically disadvantaged *victims* (and even then not without qualification).[48] There is good reason to believe that these findings are not peculiar to U.S. jurisdictions.[49]

Against this backdrop, it is possible to give a definitive answer to the question posed above—viz, which "side" do courts actually take? Courts apply an objectively fixed standard of care to tortfeasors, in which case disabled persons are treated unfavorably. Whereas on the tort victim's side, the prevailing tendency among courts calls for accommodating the standard of care in the favorable light of the disability in question. To this extent, our Roger is expected to "overcome" his so-called weakness when his activity generates risk of harm to others, while usually being excused for "suffering" from this weakness when the risk his activity generates is self-imposed. As I shall show presently, this conclusion can be generalized to include cases beyond that of the physically disabled defendant/plaintiff. The next natural step, however, will be to turn to the second question posed above (regarding what side courts *should* take), which will enable us to appreciate the critical gulf between the practice and the theory of the negligence standard.

grounds, and thus does not turn on the question of the appropriate standard of care, which is a question concerning what constitutes a breach of the duty. *See* Roberts v. State, 404 So.2d 1221, 1226 (La. 1981) (dismissing for no-duty reasons a suit against the state for failure to instruct a blind vendor to walk around using a cane while on the state's premises). The other two explicitly disregard the disability of the tortfeasor for the purpose of determining negligence. *See* Mahan v. State, 191 A. 575, 580 (Md. 1937) ("It is true that persons of small stature may and do lawfully operate automobiles, but if that condition makes it more difficult for them to discover the presence of children, or objects in the highway, it imposes upon them the duty of exercising greater watchfulness to avoid injuring others also in the lawful use of the highway than would be necessary for one of normal stature."); Masters v. Alexander, 225 A.2d 905, 909 (Pa. 1967) ("To drive with vision so defective that one cannot detect a bicycle until within 10 feet of it is an act of negligence as flagrant as driving with both hands off the wheel.").

48. *See* Poyner v. Loftus, 694 A.2d 69, 71–73 (D.C. 1997) (imposing an objective standard of reasonable care on a blind plaintiff); Sanders v. Walden, 217 S.W.2d 357 (Ark. 1949) (indirectly, acknowledging an objective standard of reasonable care for a plaintiff of small stature); Winn v. City of Lowell, 83 Mass. 177 (1861) (objective standard of reasonable care for a poor-sighted plaintiff); King v. Investment Equities, Inc., 264 So.2d 297, 301 (La. Ct. App. 1972) (objective standard of reasonable care for the physically disabled plaintiff); Mark's Adm'r v. Petersburg R. Co., 12 S.E. 299, 301 (Va. 1891) (objective standard of reasonable care for the blind plaintiff); Smith v. Sneller, 26 A. 2d 452, 454 (Pa. 1942) (objective standard of reasonable care for the blind plaintiff); *but see* Argo v. Goodstein, 265 A.2d 783, 788 (Pa. 1970) (subjective standard of reasonable care for the blind plaintiff).

49. *See, e.g.*, PETER CANE, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW (8th ed., 2013), at 53 (observing that under English common law, "[t]he test of negligence as applied to the conduct of claimants is more personalized than the test of negligence as applied to defendants"); GLANVILLE L. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE (1951), at 353 (observing that "[i]n theory the same standard should be required of a plaintiff . . . but one cannot help feeling in reading the [English] cases that the actual standard required has been lower").

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III. FROM IS TO OUGHT: THE SHORTCOMINGS OF EFFICIENCY AND FORMAL EQUALITY

What "side" *should* courts take, then? To address this normative question, I shall focus on two theoretical accounts of the standard of reasonable care: the economic analysis of negligence and the corrective justice theory.

As mentioned above, the reason I focus on these two accounts in particular is that both develop a sophisticated elaboration of the standard in ways that are fully compatible with the controversiality thesis and especially the interdependence thesis. In that, they allow us to see that choosing between a subjective and an objective assessment of comparative negligence bears directly on the *moral* values that underlie the requirement of discharging reasonable care—welfare and equality, respectively.[50]

The economic and corrective justice accounts hold in common the ambition to determine the best method for courts to assess negligence. They differ, however, in the principles they invoke in order to derive their respective prescriptions. The first account seeks to elicit a definitive prescription by asking what method of assessing negligence is all-things-considered the most efficient (on which more below). The second account, most famously associated with the idea of corrective justice, insists that the assessment of negligence can only be morally legitimate when governed exclusively by a principle of formal equality between the interacting parties (the tortfeasor and tort victim). I consider each in turn.

As I shall show, both approaches fail to account for the peculiar pattern of cases I have identified above, in particular, the wedge that courts drive between an objective assessment of the defendant's conduct and a subjective such assessment of the plaintiff's conduct. Moreover, I shall argue that the source of this failure lies in each approach's regulative principle—both formal equality and efficiency are quite hostile to the introduction of a defendant/plaintiff-differentiated mode of assessing negligence.

A. Negligence as Inefficiency

The economic approach casts the law of negligence in terms of a scheme for regulating persons' entitlements to engage in risky activities. The need for this scheme arises due to the existence of prohibitive transaction costs. The pervasiveness of these costs in many of our daily interactions renders a market resolution of competing activities virtually impossible. Indeed, it is highly unlikely that any one motorist could negotiate an agreed-upon

50. Focusing on *normative* rather than conventionalist approaches to the standard of reasonable care such as the economic or corrective justice approach is important for another reason. Even tort scholars who view the reasonable care standard in terms of a social fact about the (conventional) rules of safety in a particular community would eventually have to account for the inevitably normative underpinning of these rules.

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resolution of conflicting road use with any and every potential driver and pedestrian.

The infeasibility of the market solution for most cases of accident creates the opening for the law to develop a regulatory scheme that best approximates the outcome that would have been secured through market negotiation between holders of entitlements regarding engagement in risky activities. An appropriate proxy should see to it that each one employs economic rationality to fix, in the absence of ideal-world negotiation, the scope of one's own entitlements in any given situation. Rather than trading benefits and costs with others on an actively mutual basis, the proxy in question induces each individual person to fix this trade-off on her own through incorporating cost-justified precautions into her preferred course of action. The standard of reasonable care in negligence law furnishes precisely this proxy.[51] Its canonical statement features the economic interpretation of the Learned Hand formula: an obligation on the part of the actor to take precautions insofar as their costs do not exceed the expected costs of injury to the potential risk bearer.[52]

Now, by intimating that persons should not engage in acts whose costs surpass their benefits, the standard of reasonable care singles out a subjective method of measuring these costs and benefits. This is so because *these* costs and *these* benefits, at least in part, cannot be specified apart from the idiosyncratic skill of the person who is called to take all, and only, cost-justified precautions. In other words, the investment this person must make in order to act cautiously is endogenous, rather than exogenous, to the cost-benefit analysis that determines what counts as reasonable care in the economic approach. And the cost of carrying out this investment is influenced at every turn by this person's particular skills.

For instance, in order to determine whether or not Roger has acted reasonably, it is necessary to ascertain the amount, and the kind, of precautions that are cost-justified under the circumstances. His poor reflexes may well affect the cost of his investment in care. For example, it is crucial for the purpose of promoting efficiency to discover whether it costs Roger 5 or 7 to bring about a reduction of 6 in expected loss (for himself or for another person). For only the former could reflect an investment in cost-justified precautions, in which case failing to discharge this amount of care renders

51. There can be other proxies as well (such as the imposition of state taxes). According to William Landes and Richard Posner, however, negligence law's standard of care is a superior alternative to the Pigouvian state tax on negative externalities. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 *Ga. L. Rev.* 851, 854 (1980).

52. The Learned Hand formula reads:

> [I]f the probability be called P; the injury, L; and the burden [of taking adequate precautions], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.

United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). The economic interpretation has been articulated in Posner, *supra* note 3.

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him negligent. Once again, the measurement of the true cost (5 or 7) must take into account Roger's idiosyncratic skills, including, most importantly, his poor reflexes.[53] Were courts to insist that he meet the objectively fixed standard of care, Roger would be compelled to take extra precautions whose cost might typically exceed the benefit of expected loss reduction. To illustrate the potential inefficiency of an objective standard, if a person with average reflexes needed to invest 3 to bring about a reduction of 4 in the expected loss, Roger would need to deploy an extra 2 (amounting to a total of 5) to bring about a similar benefit (which is 4).

Even given that deviating from a subjective measurement of persons' skills of discharging care is inefficient, an objective measurement might, nonetheless, be preferable. The reason is that subjective measurement has its own costs—information costs—that must be balanced against the benefits of discovering persons' actual investments in care given their respective skills. Under the economic approach, the costs of ascertaining each person's distinctive capacities in trial are, by hypothesis, sufficiently high to give *presumptive* priority to an objective, rather than a subjective, assessment of reasonable care.[54] This presumption holds insofar as the divergence in caring skills among persons is relatively small and is slightly less or more than average. This point goes back to an observation I made at the outset—that the greater the homogeneity among persons, the less important the distinction between objective and subjective assessment of reasonable care becomes, morally and economically speaking.

However, the presumption loses momentum when, first, the costs of identifying the actual caring skills of individuals are sufficiently low and, second, the divergence between the persons possessing these skills is relatively significant.[55] Now, the two elements are typically intertwined: the greater the heterogeneity in persons' caring skills, the less costly it would be for courts to measure these skills. For instance, the more his reflexes fall *far* short of the average, the more desirable it would be for courts to invest the (information) costs of determining Roger's actual level of cost-justified precautions, and vice versa.

It is an open question, of course, where precisely to draw the line between objective and subjective assessment of due care. However, no such indeterminacy arises with respect to the question that captures the center stage of my argument—the implications of the economic analysis of reasonableness assessment for the distinction between the defendant and the plaintiff.

53. I assume that the costs of compensating for his poor reflexes (say, by taking a taxi or driving slower) are *not* trivial for him. The difficulty with deficient caring skills like poor reflexes comes into being only insofar as there are no ready-made substitutable means of discharging care for reflexes.

54. This last point has recently been challenged by lawyer-economists who argue that resort to new information technologies, such as big data, may significantly lower the costs of devising a purely personalized standard of due care to risk creators and risk takers alike. *See* Ben-Shahar & Porat, *supra* note 4.

55. LANDES & POSNER, *supra* note 4, at 126–128.

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The most straightforward implication of the economic analysis is that, in principle, there should be no difference in assessing reasonableness on the part of the defendant, on the one hand, and the plaintiff, on the other.[56] In fact, precisely the same considerations—information costs—that weigh in favor of an objective measurement of the conduct of one person apply to assessing the conduct of the other.[57] In other words, economic reasons for employing either a subjective or an objective measurement of fault cut across the defendant/plaintiff distinction.[58] Thus, whether or not Roger's poor reflexes should receive favorable (or unfavorable) treatment from courts does not turn on the question of whether Roger is the tortfeasor or victim. Instead, it depends solely on the cost-benefit analysis of discovering his degree of skill in acting cautiously. It should not come as a surprise, therefore, that the Hand formula has been articulated for the first time for the purpose of assessing negligence (in admiralty law) on the part of the plaintiff, the tort victim.[59]

So what side should courts take when assessing reasonableness in the face of "weaknesses" such as poor reflexes? The economic approach, as we have just seen, recommends that courts employ the *same* method of measuring fault in assessing the conduct of the defendant and the plaintiff. They may do the measuring objectively for both or subjectively for both, but they cannot do so selectively, by which I mean measuring the conduct of the defendant (plaintiff) objectively and that of the plaintiff (defendant) subjectively. But this recommendation, and especially the proscription of a differential assessment of defendant and plaintiff fault, is flatly inconsistent with the findings in the previous section. The evidence, recall, shows the law's strong tendency to discriminate between the objective assessment of defendant fault and the subjective assessment of plaintiff fault.

The inconsistency between the law's actual working and the economic theory of this body of law reflects a theoretical failure, to be sure. But it also indicates two deeper shortcomings, structural and normative, in the economic analysis of the standard of reasonable care.

1. The Structural Shortcoming

Following the seminal work of Ronald Coase,[60] economic analysis's functional character rejects the significance of the distinction between

56. *Id.* at 124 (noting that the economic analysis of the due care standard applies to the potential injurer as well as the potential victim).

57. *Id.*, at 126.

58. The discussion in the main text focuses on (what I take as) the standard economic analysis of negligence law. It can be argued against this analysis that, in some cases, there is no economic justification for imposing a legal burden to take precautions on the potential victim. This is because when faced with a life-and-death situation, rational victims do not need *legal* incentives (in the form of comparative fault) to act cautiously. Note that were this true (though I doubt it is; after all, potential injurers often create risk of serious harm to their near and dear), it would reinforce my critique of the standard economic analysis by adding another, unrelated reason for rejecting the symmetrical treatment of defendant and plaintiff care.

59. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

60. Ronald H. Coase, *The Problem of Social Cost*, 3 *J. L. & Econ.* 1 (1960).

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defendant and plaintiff in determining what reasonable conduct requires. The distinct categories of tortfeasor and tort victim do not play any independent role in the economic analysis leading up to the recommendation to apply either a subjective or objective method of assessing negligence.[61] On some versions, "neither [party to the tort interaction] falls into the category of injurer or victim."[62] Rather, it is their interaction that "caused injury to one party, and shifting the loss to the other merely makes that party the accident victim."[63] The conclusion is that "the categories of injurer and victim are unhelpful."[64]

It is an open question whether this approach presents the most sympathetic reading of Coase on the subject matter of causation.[65] Be that as it may, the preceding analysis shows that the law of negligence works out

61. Richard A. Posner, Economic Analysis of Law (7th ed., 2007), at 191.

62. Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 *Geo. L.J.* 581, 591–592 (2003). Geistfeld, himself an economist, is critical of economic analysis's ambition to explain tort law in terms of welfare maximization. That said, Geistfeld's own characterization of defendant versus plaintiff care also seems counterintuitive. Geistfeld argues that "[r]ather than identifying a single 'cause' of the accident, the modern rule of comparative fault recognizes that each party caused the accident, resulting in multiple injurers for compensatory purposes." *Id.*, at 624. The notion that there is no single cause to an accident is not inconsistent with the interdependence thesis I proposed in the main text above. That said, the idea that interdependence turns a victim into an injurer (even for "compensatory purposes" only) strikes me as counterintuitive.

63. Geistfeld, *supra* note 62, at 592.

64. *Id.*

65. Very briefly, Coase is certainly right to observe with respect to one of his stock examples that *both* the trespassing cows and the trespassed-upon corn are necessary ingredients in the interaction leading up to the damage to the corn. That said, it does not follow that causation is by definition radically indeterminate or that causation in negligence law is vacuous. Concerning the former, it cannot be true that the "reciprocal nature" of an interaction between two or more parties entails the impossibility of making causal judgments. Were this true, it would mean that the study of the *causal* laws of nature—aka the natural sciences—were doomed. To illustrate, oxygen is certainly a necessary condition for the fire that broke out on the riverbank, but would we characterize it as a *cause*? *See* Jules L. Coleman, *Doing Away with Tort Law*, 41 *Loy. L.A. L. Rev.* 1149, 1163 (2008). Concerning the latter, whereas Coase raises the (rhetorical) question of whether the activity of corning or that of ranching, taken severally, is *the* cause of the damage to the corn, negligence law addresses the different causal question of whether the *negligent* conduct of someone is a but-for cause of the injury (to oneself or to another). In that sense, the concept of causation in negligence law does not seek to connect between doing and suffering, but rather between doing *wrong* and suffering therefrom. That is, causation in negligence law forges a link between fault and injury, not between action and injury.

To be clear, Coase shows quite convincingly that the question of what outcome is a cost of what activity cannot be fixed by reference to nonnormative considerations such as causation or the active/passive distinction. Instead, the determination of whether the damage to the corn is the cost of the farmer, the rancher, or both, depends on a normative theory of the content of the tort *duties* they owe each other. Whereas the economic approach takes these duties to demand an investment in precautions whose benefits exceed the costs, a noninstrumental approach would insist on the basic rights of individuals (to liberty and security, for example) as the source of the demands placed on us by these duties. More generally, any account of the content of such duties that denies pride of place to natural considerations (e.g., the distinction between being active and passive) satisfies Coase's point that any plausible conclusion concerning the attribution of responsibility cannot be derived from naturalized considerations. As my present argument (in the main text) seeks to show, the economic theory of the standard of reasonable care—the generic content of those duties—is inconsistent with the asymmetric manner in which it is being measured in negligence law.

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an altogether different account of the distinction between injurers and victims.[66]

In particular, with respect to any interaction resulting in injury, the law distinguishes between creating risk to others and creating risk to oneself. Every potentially risky action can pose risk to oneself, to others, or to both. And even actions generating risks to both oneself and others can sometimes be further broken down into the various aspects that create risk to oneself and various other aspects that pose risk to others. For instance, a biker may ride too fast, thereby simultaneously generating risk of harm to both herself and others; she can also ride without a helmet, in which case she is posing risk of harm to herself *only*. In principle, an activity can generate risk of harm to others *only*—that is, without endangering the person creating this risk, as when a tractor-trailer driver backs into a person who is standing behind the truck.[67]

Tort law first determines the "duty" question, that is, whether the risk characteristic of any particular activity justifies the imposition of a duty to exercise reasonable care. This inquiry, which is beyond the scope of the present argument, is normative, rather than causal or naturalistic. On top of this, there also arises the "breach" question, and it is at this stage that the asymmetric measurement of reasonableness kicks in. Suppose that A runs over B; B sues A for negligence. The court is then called to determine how, if at all, to divide the costs of B's injury between A the defendant and B the plaintiff. By contrast, the economic solution is to allocate the costs of the accident in proportion to the comparative failure of either party to take cost-justified precautions to prevent the accident. This way of approaching the matter, however, fails to account for the importance accorded in law to the difference between the two.

Indeed, although courts deploy the standard of reasonable care to assess the conduct of both, the distinction between such parties as A and B is, as already observed, vital. Concerning A, this assessment is made by reference to the risk of harm her activity posed to others (including, in particular, B). And with respect to B, the object of the negligence assessment is the risk his activity generated to himself. This is true even when B's activity generated risk to others as well; indeed, for the purpose of settling his legal dispute with A, the only relevant "risk" is to himself. Considerations pertaining to the risk to which B exposed others, such as C, D, and E, becomes crucial only insofar as these others sue him for negligently injuring them.[68] It should be recalled that although both of these processes of

66. *See also* JULES L. COLEMAN, RISKS AND WRONGS (1992), at 382–385.
67. The example comes from *Martin v. Evans*, 711 A.2d 458 (Pa. 1998).
68. By implication, the assessment of B's exercise of care would become objective when B was sued for negligent infliction of risk on C, D, or E. As I explain below (*see* Section IV) the distinction between the standard of care expected from B the plaintiff (as when he sues A) and B the defendant (when sued by C) is qualitative, normatively speaking. For it reflects the important difference between B's life and limb and his freedom of action, respectively. Of

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assessment deploy what is formally the same standard of reasonable care, the *manner* in which reasonableness is being assessed is qualitatively different—the reasonableness of A's imposition of risk *on others* receives an objective (unaccommodating) measurement, whereas B's *self-risk* is measured subjectively. To this extent, the categories of tortfeasor and tort victim are not mere placeholders for cost-benefit analysis. Rather, they set the baseline against which to determine which method of measuring fault—objective or subjective—should be invoked in the case of each party in the tortious incident.

It is perhaps tempting to speculate[69] on whether the economic analysis of negligence law can, nonetheless, make sense of the asymmetric measurement of reasonableness on the part of the tortfeasor and the tort victim. Rather than conceding that the distinction between creating and taking a particular risk is fundamental, the economic approach may embrace it as a proxy for a distinction between essential and nonessential activities.[70] This speculation stems from the thought that an activity such as pedestrianism (or the interest in basic freedom of action) is essential and therefore requires a lenient approach when one is assessing the conduct of victims falling within the category of physically disabled pedestrians. By contrast, driving an automobile can surely be important (consider Los Angeles), but it is not, strictly speaking, essential to leading a minimally adequate life. And for this reason, the assessment of negligence should not accommodate the actual capacities of physically disabled motorists. Thus, lawyer-economists may argue that although "the categories of injurer and victim are unhelpful"[71] as such, they are quite helpful insofar as they provide a shorthand for the respective categories of nonessential and essential activities, respectively.[72]

course, the economic approach would reject this analysis (*see, e.g.*, Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 *J. Legal Stud.* 19 (2000)). This is just another way to restate the point made in the main text above—that on the standard economic analysis, the injurer/victim distinction is conclusory and unhelpful.

69. Speculation is apt since the economic theory of negligence, as I have argued above, has not even fully realized that the assessment of reasonable care is, in fact, asymmetric.

70. Another way to put the point is by reference to the question of whether Roger, the aged pedestrian, stands for a paradigmatic risk taker (as I have been supposing) or a participant in an essential activity (as the objection currently discussed supposes).

71. Geistfeld, *supra* note 62, at 592.

72. It is not clear precisely what the substantive theory is that underwrites the distinction between essential and nonessential activities and the way in which it maps onto the distinction between pedestrianism and motorism. One possible candidate may be an account that emphsizes preference satisfaction as the moral basis of negligence law. Another possibility concerns the social value of activities measured objectively in the light of the contribution of the particular activity to the overall welfare of society (as determined by the appropriate social welfare function), in which case the criterion of preference satisfaction shifts from actual to rational satisfaction. *See, e.g.*, Louis Kaplow & Steven Shavell, Fairness versus Welfare (2002), at 410–413; Matthew D. Adler & Eric A. Posner, New Foundations of Cost-Benefit Analysis (2006), at 25–61, 129–130 (subjecting a preference-based account of well-being to the test of idealization).

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The most immediate difficulty with this speculation is that it finds no support in the case law.[73] This is readily apparent in cases where the tortfeasor/victim distinction defies the distinction between nonessential and essential activities. In these cases, the former distinction cannot possibly serve as a proxy for the latter. Nevertheless, the assessment of reasonable care remains asymmetric. Consider *Merkley v. Schramm* by illustration.[74] There, a physically disabled defendant[75] left the apartment he rented in a rooming house and walked across the hallway toward the floor's shared bathroom,[76] bumping into his eighty-six-year-old neighbor who was bent over in her open doorway for the purpose of taking off her boots.[77] It is virtually impossible to imagine a more essential activity than this, and yet the court insists that "[the defendant] must do more or put forth greater effort in order to attain the standard of ordinary care."[78] Ultimately, the court approved the lower court's finding that the defendant had met the standard.[79] But the crucial point is that the court does not allow the defendant's disability to water down the level of care he owes others. Quite the contrary, the court interprets the maxim that the defendant must "conduct himself as an ordinary prudent person with the same disability would under the same or similar circumstances"[80] to mean a demand "to do more or put forth greater effort in order to attain the standard of ordinary care."[81]

Now consider the opposite scenario involving a plaintiff engaging in a nonessential activity. One such case concerns a one-eyed truck driver whose contributory negligence is assessed subjectively so that allowance is made

73. Moreover, it is clear from reading the classical theoretical text on the objective standard of due care, Holmes's *The Common Law*, that the category of tortfeasor stands in for a person who creates certain risks to others, rather than engages in a nonessential activity. Holmes uses the person who is "born hasty and awkward, is always having accidents and hurting himself or his neighbors" as his stock example in the course of defending the imposition of an objectively fixed standard of due care. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881), at 108. The conclusion he reaches implies (1) that the hasty and awkward person might create risks to others, and (2) that he or she may be engaging in essential *as well as* nonessential activities. *Id.* (Holmes argues that "his slips are no less troublesome to his neighbors than if they sprang from guilty neglect." This person, therefore, must "come up to [his neighbors'] standard, and the courts which they establish decline to take his personal equation into account.").

74. 142 N.W.2d 173 (Wis. 1966).

75. *See id.*, at 175 (The defendant "suffered from an eye disease known as *retinitus pigmentosa* (known as 'tunnel vision'), which reduced his peripheral vision to 15 degrees in each eye. This means ... that ... [o]utside of this 15 degree central vision he is blind. He doesn't see anything unless he points his head in this direction and brings those 15 degrees around to where he wants to look. He can't see where he is stepping and points like a telescope and points at what he is going to see. He wont know if he is going to fall into a hole or what.") (internal quotation marks omitted).

76. There was no bathroom inside his room. *Id.*

77. *Id.* The plaintiff sustained "serious" injuries. *Id.*

78. *Id.*, at 178.

79. *Id.*

80. *Id.*

81. *Id.* In support of this exacting interpretation of the maxim, the court cites an earlier case dealing with a physically disabled defendant, *Lisowski v. Milwaukee Automobile Mutual Ins. Co.*, 117 N.W.2d 666 (Wis. 1963). According to the *Lisowski*, "a handicapped person must do more to exercise ordinary care than would be required if he were not handicapped. ... " *Id.*, at 670.

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for his disability in the form of a watered-down requirement of self-care.[82] Another case in point involves the activity of motoring as well, although this time for leisurely purposes (i.e., deer hunting).[83] Certainly, this activity is not on a par with pedestrianism or other essential activities. Here, too, the court does not demand that the plaintiff compensate or otherwise overcome her disability for the purpose of determining contributory negligence.[84]

The mismatch between a subjectively fixed standard of contributory negligence and nonessential activity can be extended, and so generalized, to capture cases beyond the context of road accidents. Indeed, a physically disabled plaintiff may sometimes engage in what is best characterized as nonessential activity without thereby being expected to take the same precautions that a nondisabled person in his shoes would have been required to take under the circumstances.[85] This is clearest in slip and fall cases involving physically disabled persons engaging in an important, though not essential, activity such as that of vacationing: whether or not their exercise of care for their own safety counts as reasonable is assessed subjectively, that is, by reference to their below-average ability to discharge due care. [86]

Against this backdrop, the nonessential/essential distinction fails to make sense of negligence law's insistence on the distinction between the risk creator and the risk taker. As I have just shown, apart from coincidental overlap between the activity's importance and the measurement of reasonable care, participating in a nonessential (or essential) activity says virtually nothing about the choice between the objective or the subjective manner in which reasonable care is being evaluated. The crucial question is whether one has created risk of physical harm to oneself *or* to others. It is a question concerning the fundamental right to bodily integrity, not necessarily concerning the social costs (and benefits) of particular activities.

2. The Normative Shortcoming

A second, normative difficulty goes to the heart of the explanation of the standard of reasonable care. The inability of the economic analysis to account for the differentiated treatment of the defendant and the plaintiff by the law of negligence implies that efficiency alone is not *the* regulative principle of the standard. A consistent application of the principle of efficiency cannot tolerate the inefficiency that results from denying that considerations of information costs should figure in determining the method of assessing negligence. Indeed, there is simply no principled reason, under

82. Pennington v. S. Pac. Co., 304 P.2d 22, 29–30 (Cal. Ct. App. 1956).

83. Stephens v. Dulaney, 428 P.2d 27, 31 (N.M. 1967) *overruled on other grounds by* Williamson v. Smith, 491 P.2d 1147 (N.M. 1971).

84. *Stephens*, 428 P.2d at 33.

85. Recall that on my analysis of the case law, the crucial question is whether the plaintiff is physically disabled, rather than whether the activity in which he participates is essential (or nonessential).

86. *See, e.g.*, Mutterperl v. Lake Spofford Hotel, Inc., 216 A.2d 35 (N.H. 1966); Jackson v. Frederick's Motor Inn, 418 A.2d 168 (Me. 1980). *See also* Smith v. Wal-Mart Stores, Inc., 167 F.3d 286 (6th Cir. 1999).

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the economic approach, to insist on an objective (unfavorable) assessment of fault in the case of a physically disabled defendant even when the costs of discovering her true degree of skill are modest and, moreover, even when the same person, now standing in the plaintiff's shoes, will be subject to a subjective (favorable) assessment of her conduct.[87] Likewise, it would be counterintuitive to defend the subjective assessment of the plaintiff's conduct on economic grounds when these same grounds—information costs—are categorically rejected by the law's treatment of the disabled defendant.[88] Thus, demonstrating the existence of a critical gulf between what the law does and what the economic theory thinks it ought to do warrants the following conclusion: that the standard's underlying principle (whatever it is) far exceeds what a commitment to efficiency or welfare could possibly require.

Can this shortcoming be adequately addressed by the economic analysis of tort law? I shall argue that such an effort would require admitting that the basic right to bodily integrity can and should overwhelm considerations of efficiency and, ultimately, welfare. To see that, recall that the Coasean starting point is that tort duties and liabilities do not bear on the resolution of conflicting interests in a world of zero transaction costs. Instead, these duties and liabilities represent the law's *response* to the actual human condition of high transaction costs, serving as means by which to encourage actors to refrain from acts whose costs suppress their benefits to society. Let's consider now a qualitatively different way of applying economic analysis to the study of law in order to see whether the inconsistency between the actual law of reasonable care (as I have documented) and the economic analysis may be resolved.

What if the economic analysis began from the opposite starting point—that the right to bodily integrity (and life itself) is negligence law's ultimate value? By implication, considerations of efficiency are subservient to the tort law protection of this right. In this case, it may be argued, there may be ample economic sense in employing an asymmetric standard of assessing reasonable care. This is because violating the physical integrity of another is, by definition, far more costly than setting back her other interests (whatever they are). It would be economically wise, then, to demand higher levels of investment in precautions when the physical integrity of others is at stake and vice versa. Accordingly, this prescription may comport with the asymmetric assessment of reasonable care in the negligence law.[89]

87. *Cf.* LANDES & POSNER, *supra* note 4, at 126–127.
88. *Id.*
89. I say "may comport with" because there exists the question of what to make of the conduct of the risk taker. By generating risk of harm to one's own bodily integrity, it may be argued that comparative negligence must also be assessed objectively to reflect the interest at stake, in which case the asymmetric measurement of due care should be abolished. That said, it could be argued that this outcome is too paternalistic, because it coerces one to prefer her own bodily integrity to her other autonomy-enhancing activities.

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However, this way of resolving the tension between the economic approach and the law of negligence carries an important implication for the economic theory of negligence law. That is, the insistence on the right to bodily integrity might come at the expense of welfare maximization. Indeed, the opportunity cost of sustaining the primacy of this right is forgone social welfare, unless it can be shown that maximal investment in bodily security can generate maximal social welfare. Were this true, it would mean that social welfare is better served by protecting bodily integrity even when doing so inhibits otherwise socially desirable activities.[90] Certainly, lawyer-economists can agree that this proposition may sometimes be appropriate;[91] the trouble is that it seems implausible, or conclusory at best, to suppose that giving a priori status to the right to bodily integrity is *necessarily* welfare-enhancing. This conclusion returns the argument to my preceding observation, according to which the welfare-oriented economic analysis is either hostile to or incapable of developing a principled account of the asymmetric assessment of due care in negligence law.

I do not deny the possibility that contingent explanations may be able to account for *some* of the cases. One such explanation could focus on a factual setting involving *one* injurer creating risk of harm to *many* potential victims. Under these circumstances, the argument may go, it may be wise to demand more vigilance from the single injurer rather than from the many potential victims. However, the difficulty raised by this explanation is that it is purely contingent on the factual setting just described and, so, cannot be generalized, nor can it account for the simplest case of one injurer versus very few victims (or even one victim) as in the hypothetical case of Roger.[92]

B. Negligence as (Formal) Inequality

The corrective justice school of thought consists of various different theories of the morality of tort law.[93] But they typically begin from, and thus share, the basic intuition that tort law is best explained and justified by reference to an idea of "transactional equality," which is not reducible to substantive

90. Moreover, strict liability may become an arguably more attractive default rule of liability for accidental harms than its negligence counterpart.

91. *See* ADLER & POSNER, *supra* note 72, at 178 (observing that "[a]ctions that result in premature death reduce overall welfare, *ceteris paribus*; regulatory interventions that prevent those actions increase overall welfare, *ceteris paribus*"); Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 *Cornell L. Rev.* 749, 766 (2011).

92. Furthermore, it seems that the ultimate challenge is not merely to come up with a coherent economic rationale for due care asymmetry. The rationale ought to be normatively appealing, especially when the competing rationale is grounded in an idea of substantive equality (an idea to be developed in Section IV below).

93. *See, e.g.*, WEINRIB, *supra* note 3, ch. 4; ERNEST J. WEINRIB, CORRECTIVE JUSTICE (2012), at 21–29, 270–280; COLEMAN, *supra* note 66, at 197–439; ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999), at 24–132; RIPSTEIN, *supra* note 26.

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equality.[94] This intuition is deeply ingrained in the familiar observation that tort law grounds duties of repair in notions such as fault and responsibility, and that these notions are, to an important extent, indifferent to the distributive consequences of such duties:[95] a poor college student may be required to compensate an extremely wealthy plaintiff for accidentally destroying her fancy car; the only relevant question for this requirement to arise is whether the former has breached a duty of reasonable care toward the property of the latter, regardless of the possible unfairness of the preexisting distribution of resources in that society, and irrespective of insurance considerations. Theorists of corrective justice aspire to develop a principled defense of tort law in spite of its potentially regressive tendencies[96] —the aspiration is to establish the morally crucial place of *formal equality* in a relatively distributively unjust society.

An important aspect of this defense focuses on the standard of reasonable care.[97] In particular, the corrective justice approach seeks to show that what counts as "reasonable care" is and should be governed by a commitment to treating the liberty and security of the defendant and the plaintiff, respectively, as equally important.[98] The key for a successful account of its content begins with the simple observation that the standard of reasonable care fixes the terms of the interaction between defendant and plaintiff. That is, the standard regulates the extent to which the free action of each party may permissibly be limited by the free action of the other.[99] The immediate implication of this observation is that formal equality requires that the terms

94. *See, e.g.*, Martin Stone, *The Significance of Doing and Suffering*, *in* PHILOSOPHY AND THE LAW OF TORTS, *in* PHILOSOPHY AND THE LAW OF TORTS (Gerald J. Postema ed., 2001), at 131, 156–157 (noting that tort law "treats the parties as equals when it assesses their transaction in terms that have a correlative significance for each of them, rather than in terms ... which pick out their several qualities and are therefore suitable for relating them ... in a distributive scheme"); WEINRIB, *supra* note 3, at 82 (arguing that "the equality of the parties corresponds to the irrelevance for the normative dimension in agency of the particular features—desires, endowments, circumstances, and so on—that might distinguish one agent from another"); Coleman & Ripstein, *supra* note 5, at 109, 112; Jules L. Coleman, *Second Thoughts and Other First Impressions*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY (Brian Bix ed., 1998), at 257, 304 (noting that "the fault principle is best conceived as an elaboration of an idea of equality between the [injurer and the victim]").

95. WEINRIB, *supra* note 3, at 74; COLEMAN, *supra* note 66, at 352; Jules L. Coleman, *Mistakes, Misunderstanding, and Misalignments*, 121 *Yale L.J. Online* 541, 553–554 (2012), http://yalelawjournal.org/2012/03/20/coleman.html.

96. For discussions of this point, *see* Dennis Klimchuk, *On the Autonomy of Corrective Justice*, 23 *Oxford J. Legal Stud.* 49, 63–64 (2003); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *Fordham L. Rev.* 1811, 1843 (2004).

97. The standard of reasonable care picks out the content of the duty to exercise due care. In contemporary parlance, this is the breach element of the prima facie case of negligence. The discussion in the main text does not consider the different element of duty. Whereas the duty element concerns the very existence of the duty to take care, the breach element spells out the level of care that is required in order to meet the duty.

98. *See, e.g.*, WEINRIB, *supra* note 3, at 148, 177–178; Coleman & Ripstein, *supra* note 5, at 109, 112; Avihay Dorfman, *Can Tort Law Be Moral?*, 23 *Ratio Juris* 205, 216–217 (2010); *see also* Ernest Weinrib, *Causation and Wrongdoing*, 63 *Chi.-Kent L. Rev.* 407, 428 (1987).

99. For a Kantian elaboration of the universal principle of freedom in the domain of law, *see* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2009),

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of the interaction must not be determined *unilaterally*, that is, by reference to the specific skill, judgment, or attitude of only one of the parties to the interaction.[100]

The thought that equality constrains the way in which the standard of reasonable care is specified produces two, increasingly general, prescriptions. At the concrete level, courts must ignore the "B" component of the Hand formula, which represents the actual costs of taking precautions.[101] The reason is that by allowing the actual costs of taking precautions to weigh in the decision of what reasonable care requires one to do, courts let *one side* of the tort interaction fix the terms of the interaction. For instance, by exempting the defendant from taking an otherwise necessary precaution on account of its relatively high cost, courts authorize the defendant to pursue her risky activity *necessarily* at the plaintiff's expense. In that, the mere choice of the defendant to engage in this activity determines—unilaterally—the terms of her interaction with the plaintiff.[102] After all, the amount of care she is expected to exercise toward the plaintiff is, in effect, the upshot of the cost of the precautions that follow her decision to pursue the activity in question. Some corrective justice theorists even go one step further by denying the relevance of the costs of precautions—actual or otherwise—for the purpose of fixing the standard of reasonable care in most cases.[103] But for the purpose of my argument, suffice it to observe that corrective justice (in almost all its variations)[104] evaluates the fairness of the standard of reasonable care by reference to a concern about who gets to determine the terms of the interaction—it integrates equality and legitimacy into a normative unity.

Second, at the more general level of analysis, the connection between equality and the standard of care produces the prescription that the powers of one party to the interaction cannot determine the terms of the

especially at 171 (arguing that "objective standards of conduct are required by a system of equal freedom, in which no person's entitlements are dependent on the choices of others").

100. *See id.*, at 171 (noting that "[e]qual private freedom presupposes objective standards of interaction"); WEINRIB, *supra* note 3, at 148, 177–178; Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, *in* PHILOSOPHY AND THE LAW OF TORTS (Gerald J. Postema ed., 2001), at 183, 205 (asserting that "[f]airness requires that no person be permitted to set the terms of cooperative interaction between individuals unilaterally"); Coleman & Ripstein, *supra* note 5, at 109, 112; ALAN BRUDNER WITH JENNIFER M. NADLER, THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE (2d ed., 2013), at 296 (criticizing, on formalistic grounds of "equal security," the subjectivist bent of the Hand formula).

101. WEINRIB, *supra* note 3, at 148; Coleman, *supra* note 100, at 206; RIPSTEIN, *supra* note 99, at 59. *But see* Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS (Gerald J. Postema ed., 2001), at 72, 113 (defending the resort to the Hand formula in noneconomic terms in situations where the risks in question are within an acceptable range and are jointly, rather than unilaterally, created).

102. *See also* Dorfman, *supra* note 18, at 376–377.

103. This approach is most famously defended in WEINRIB, *supra* note 3, at 148–152. *See also* RIPSTEIN, *supra* note 26, at ch. 3. Other leading corrective justice theorists take a somewhat less rigorous approach, acknowledging that the standard of reasonable care features a balance between interests in liberty and in security and that this balance turns on substantive considerations about the value of these interests in general and in particular instances.

104. To be sure, not *all* torts accounts that go by the name of corrective justice subscribe to this notion of formal equality.

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interaction. Negligence must be measured objectively, that is, without allowing the idiosyncratic characteristics of the person in question to influence the assessment of this person's conduct. To this extent, the present prescription generalizes the previous one. Wherever the previous prescription singles out the illegitimacy of taking actual costs of precautions into consideration, the present one excludes, with certain exceptions to be discussed below, the subjective measurement of conduct, *tout court*. For otherwise, making allowance for the particular degree of skill possessed by either the defendant or the plaintiff is tantamount to conferring on her the privilege to fix unilaterally the terms of her interaction with the other party. To be clear, the impermissibility of subjective valuation of conduct applies just as vigorously in the cases of defendant and plaintiff fault. It might be protested that accommodating the disabled plaintiff need not be inconsistent with formal equality—there is no qualitative difference between this case and the one of slowing down in the face of a ditch on the road. Both are instances of taking additional precautions and no one can claim that the latter is inconsistent with the demands of formal equality. However, this argument fails, since the analogy between a disabled plaintiff and a ditch cannot do the work corrective justice theorists expect it to do. Indeed, it is one thing to say that an increase in the motorist's amount of care due to an adverse road condition does not undermine the demands of formal equality; it is quite another to use a similar argument in which the increase in the amount of care is due to the condition of a human agent. It is only with respect to the latter condition that the demands of formal equality can become intelligible at all. After all, the whole point of the concern for inequality in the determination of the standard of care arises when, and only when, one *person*, as opposed to a ditch, gets to fix the amount of care the other party to the tort interaction would owe the former. Accordingly, the failed analogy to the permissibility of a requirement to slow down in the face of changing road conditions returns the corrective justice approach to its point of departure: the persistent impermissibility of allowing the plaintiff's situation to fix the terms of her interaction with the defendant. [105]

The discussion reveals that, as with the economic analysis of the standard, there exists a critical gulf between what the law does and what the theory of corrective justice thinks it ought to do. Similarly, this gulf warrants the conclusion that *the standard's underlying principle (whatever it is) far exceeds what a commitment to formal equality could possibly require*. While objective assessment of negligence is definitely the rule with respect to defendants, courts' established tendency toward subjective assessment of negligence on the part of plaintiffs conflicts with the demands of transactional equality. Following the interdependence thesis, treating a plaintiff (such as Roger) favorably

105. *Compare* WEINRIB, *supra* note 3, at 169 n.53(1); Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 *Fla. St. U. L. Rev.* 163, 181 (2011) *with* RIPSTEIN, *supra* note 93, 111–113.

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means that the peculiar circumstances of one party determine the terms of the interaction for both parties, including, in particular, the amount of care that the defendant must discharge in order to avoid liability partially or totally.

(As I argue elsewhere, the preceding discussion helps to show that, contrary to the ongoing debates between proponents and opponents of corrective justice, the widely accepted dichotomization of corrective and distributive justice may be misguided. The prevalence of asymmetric assessment of due care suggests that neither form of justice can make sense of the tort doctrine of reasonable care. Whereas corrective justice is founded on a noncomparative conception of equality among formally free persons, distributive justice concerns the fair allocation of the costs of accidents across society according to some measure of merit. I have already presented an argument for why care asymmetry is inconsistent with the demands of formal equality. It will be apt to add (very briefly) that care asymmetry does not express, let alone turn on, an ideal of distributional equality either. To be sure, a norm of care asymmetry imposes extra costs on the defendant and, so, carries obvious distributive implications. But, as I shall argue in Section IV, such a norm can be grounded in concerns for the terms of the relationships between individuals, rather than in comparative considerations of justice in the holdings of persons, taken severally. This is why the requirement to accommodate, to some extent, the vulnerability of the likes of Roger does not draw on the distinction between his brute luck and his option luck, nor even between his bad luck and his choice. That is, the responsibility of Roger the pedestrian concerning how his disability came about—viz, whether through some fault (no fault) or choice (no choice) of his own—lies at the moral center of the liberal theory of distributive justice. However, it makes absolutely no difference when considering the content of the motorist's duty to exercise additional care in the face of his disability.)

C. Subjective Measurement of Negligence: Equality and Physical Disability

Before moving the argument to its affirmative stage, I shall seek to raise and reject a potential objection to my characterization of the corrective justice approach to the analysis of the standard of reasonable care: that some prominent accounts of corrective justice do allow for a subjective assessment of negligence. I shall argue that this objection is misplaced and that, at any rate, it cannot refute my argument that vindicating equality cannot fully capture the lived experience of the law's standard of reasonable care.

Consider Weinrib's acknowledgement that the Kantian relationship of entailment between a right (say, not to be exposed to unreasonable risk of

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harm) and a duty (say, of reasonable care) may not support the imposition of an objectively fixed duty of care on people with insufficient caring skill, at least in some cases. Weinrib argues that "consistent[] with Kantian right," it is appropriate for common law to "allow subjective factors to exonerate" in cases such as those of the physically disabled defendant.[106] The reason is that the Weinrib account of the correlativity of right/duty, which stems from the Kantian ideal of formal equality of rights,[107] is predicated on a substantive conception of *agency*, namely, the capacity to act as a free and purposive being.[108] That is, the possibility of subjecting a risk creator to a duty of reasonable care that correlates with a right to be so cared for depends on the prior question of whether this person can meet the bar of self-determining agency, which is precisely why Weinrib retreats from an objectively fixed standard of care in cases such as that of the physically disabled tortfeasor.

However, this position, which is not at all peculiar to Weinrib's theory of corrective justice,[109] cannot make good on the critical gulf between the law of negligence and the corrective justice theory of that law. Before I explain why this is so, I shall first make two clarifying notes. First, it is important to recall that the argument I develop focuses on the physically disabled person as a case study for the *general* proposition, according to which the law distinguishes between an objective measurement of negligence in the case of the tortfeasor and a subjective assessment of negligence in the tort victim's case. The corrective justice approach, by contrast, begins with the *rule* of objective assessment of negligence for both the tortfeasor and the tort victim. It then acknowledges an *exception* to this rule in the form of a subjective assessment narrowly applied to three categories of cases: physical disability; unforeseeable lack of volition (such as unexpected insane delusion or heart attack); and infants. And second, as I argue elsewhere, there may be reasons to believe that a commitment to an ideal of formal equality should lead one to deny a subjective assessment of the *defendant's* negligence.[110] But these are beyond the point of the present argument.

106. WEINRIB, *supra* note 3, at 183 n.22. Weinrib notes that denying the physically disabled tortfeasor a subjective assessment of her conduct and insisting, in its stead, on an objective one is disrespectful of this person's agency, rendering her "interaction with others impossible." *Id.* A somewhat similar, though not necessarily identical, approach appears in Arthur Ripstein, *Justice and Responsibility*, 17 *Can. J.L. & Juris.* 361, 372 (2004) (defending a "thin" conception of agency in which persons must at the very least possess the capacity for being "in general self-determining beings," and thus allowing for "narrow exceptions for those who, because of ... disability, cannot be guided by particular norms of conduct"). *But see* Ripstein, *supra* note 105, at 181.

107. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., 1996) (1797), at 62 [6:278] (arguing that to acquire a part of another's person amounts to acquiring "the whole person, since a person is an absolute unity").

108. WEINRIB, *supra* note 3, at 127.

109. *See, e.g.*, Ripstein, *supra* note 106, at 372; MAYO MORAN, RETHINKING THE REASONABLE PERSON (2003), at 52–54.

110. Dorfman, *supra* note 18, at 389–400.

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Indeed, my ambition is merely to show that even if, for the sake of the argument, we grant that equality commands a subjective assessment of negligence in the case of the physically disabled person, this command runs afoul of accounting for the point of the standard of negligence in law. Thus, a subjective turn may (arguably) accord with the principle of formal equality, but it reinforces the point I made earlier: that the standard's underlying principle (whatever it is) far exceeds what a commitment to equality could possibly require.

To see this, recall that on the corrective justice approach, the subjectivist exception to the objective assessment of negligence is intended to capture the conduct of *both* the defendant and the plaintiff. Furthermore, this must be so, since the basic prescription of the corrective justice approach in matters pertaining to the standard of negligence is that the terms of the interaction between them must not be fixed one-sidedly, that is, by either one acting unilaterally. But this commitment to the principle of transactional equality is precisely the reason why this principle cannot account for the law's actual working when it comes to the standard of reasonable care. As explained above, the law insists on distinguishing between the physically disabled defendant—to whom an objective assessment applies as a matter of course—and the plaintiff—to whom a subjective assessment is ordinarily extended. And this insistence is inconsistent with the corrective justice emphasis on furnishing a method of assessing negligence that *cuts across* the defendant/plaintiff distinction, be that method objective or subjective. Bluntly put, the critical gulf between the practice and the corrective justice theory of the negligence standard implies that the latter fails to explain what the point of the former actually is.

IV. THE EGALITARIAN FOUNDATIONS OF CARE ASYMMETRY: TAKING DIFFERENCE SERIOUSLY

The argument going forward will develop an explanation of the objective/subjective asymmetry in negligence law. The centerpiece of the argument is simple and intuitive: that the asymmetry in question is *necessary* for the duty of reasonable care to give effect to the qualitative difference between the life and limb of the plaintiff, on the one hand, and the autonomy of the defendant, on the other. Asymmetric assessment of due care is thus the doctrinal metric by which to determine what it is for the plaintiff and the defendant to relate as equals *given* that difference. This difference is not merely one among many possible others; rather, it is both necessary and sufficient for the purpose of justifying a principled asymmetry between the plaintiff and the defendant. To see this, consider the hypothetical case of Roger once again. Roger the plaintiff and Roger the defendant are literally one and the same person. Their *rights*, however, are importantly different when they occupy the respective roles of plaintiff and defendant: the

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former holds a right to bodily security against his potential tortfeasors while the latter holds a right to pursue ends by exposing his potential victims to some measure of risk.[111]

Why focus on "difference" and the demands it places on negligence law? The answer is that the notion of difference (properly conceived) addresses the most basic shortcoming that both the economic analysis and the corrective justice approach exhibit. These two develop arguments that *eliminate* the qualitative normative difference that (in the proposed account) exists between the defendant and the plaintiff. As explained above, the economic analysis of the standard of care sets to one side the difference between the two by reducing both to economic firms, so to speak, whose task is to promote aggregate welfare by taking all and only cost-justified precautions. And the corrective justice approach discussed above brackets out differences by reducing equality to formal equality, according to which both the defendant and the plaintiff are conceived as equals no matter how different they might be (in their traits, circumstances, and basic entitlements). In that, both fail to make sufficient space for the qualitative difference between two critical aspects of what makes people's lives go well: a threshold aspect of bodily security and a freedom aspect of pursuing ends autonomously. More specifically, both neglect the different *kinds* of vulnerability to which the tort interaction exposes the participants, namely, to physical harm, in the plaintiff's case, and to impediments to the pursuit of ends, in the defendant's case.

Substantive equality, by contrast, takes difference seriously by supposing that people can relate as genuine equals only insofar as their different situations are brought to bear (in the appropriate sense) on the legal determination of the terms of their interactions.[112] The need to take difference seriously, and so to approach the matter from an egalitarian perspective, arises from the overwhelmingly interdependent world we happen to occupy.

111. To be clear, not all physical harms are sufficiently serious to warrant asymmetric assessment of care. The argument going forward takes the paradigmatic case to be that of serious personal injury (including, most extremely, death). Even given that it is possible to articulate a test for telling serious from "light" injuries, there are good second-order reasons why negligence law treats *all* physical harms (with the exception of trivial injuries) as falling within one category of setbacks to the person. Accordingly, the proposed argument, although it most acutely addresses asymmetric care in the context of risk to serious personal injuries, can be extended to capture all nontrivial personal injuries.

112. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977), at 227 (distinguishing between equal treatment, which is a variation on formal equality, and treating persons as equal, which is a basic pillar of substantive equality). To be sure, my account does *not* share Dworkin's controversial view that distributional equality is equality's only or main concern (or that realizing substantive equality is the state's, rather than the individual's, distinctive responsibility). The notion of substantive equality on which I draw in these pages—a nondistributive substantive conception of relational equality—is further developed in Avihay Dorfman, Private Law Exceptionalism? Part II: A Basic Difficulty with the Argument from Formal Equality (unpublished manuscript). For a tort theorist who casts his theoretical account of tort law in terms of Dwrokin's distributive justice framework, *see* Mark A. Geistfeld, *Compensation as a Tort Norm*, *in* THE PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS (John Oberdick ed., 2014), at 65, 68–70, 84.

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In the context of tort law, interdependency means that many of our otherwise legitimate activities and interests may come into conflict with those of others. My plan to cross a street on my way to the grocery store and your plan to drive through this street on your way to a job interview might be on a collision course. In principle, there are any number of ways (legal and nonlegal) to address this potential conflict. Instead of devising an extremist solution that would provide maximal freedom to one of the parties (necessarily at the other's expense), negligence law addresses the conflict by determining terms for interactions that respect, simultaneously, *both* parties. It is at this point that equality—the principle that decides what counts as respecting both parties—suggests itself. As I argue presently, for these parties to relate as genuinely, rather than formally, equals, their negligence law terms of interaction must take seriously their respective vulnerabilities: your freedom to drive for a job interview and my bodily integrity. The standard of care that is expected from each of them is the doctrinal mechanism by which negligence law sets these terms.

One final point of introduction is apt. As I have observed at the outset, the context within which I develop the argument from substantive equality focuses on negligent creation of risk to *bodily security*. This way of proceeding can generate two further insights about the doctrine of reasonable care in tort law: first, the argument from caring asymmetrically can be extended to capture other instances insofar as they feature important differences in the rights (or vulnerabilities) that the interacting parties assert against one another; and second, it can rule out resort to asymmetric assessment of due care when no such differences exist.[113]

A. Setting Egalitarian Terms of Interaction: Outline

Care asymmetry, because it combines an unfavorable assessment of defendant's negligence with a favorable assessment of plaintiff's negligence, conveys the thought that the *victim* fixes the terms of the interaction. In particular, the amount of care that tortfeasors owe their potential victims is determined, at least in part, by reference to the caring skills of the latter (and, by implication, the amount of self-care the victim owes himself is also fixed subjectively). To this extent, the duty of reasonable care demands that tortfeasors attend to others as the persons they are, at least in some measure.[114]

113. *See infra* Section V.B for more on the scope of the proposed egalitarian argument.

114. In requiring the defendant to adjust her level of care in the light of the plaintiff's skills, I do not argue that *all* possible capacities on the part of the plaintiff deserve such adjustments. Taking seriously the actual person of the victim shares *some* similarities with the thin-skull doctrine's requirement that the injurer take the injured as she finds him, especially in the context of wrongful infliction of physical and emotional harm. It is true that the thin-skull doctrine, but not the reasonable care doctrine, applies to *un*foreseeable sensitivities. However,

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This way of attending to others addresses the problem of *vulnerability imbalance* that is distinctively formed when a person pursues an end that happens to place the physical security of another person in danger. The imbalance picks out the difference between death and serious injury, on the one hand, and constraints on setting ends and pursuing them, on the other. As mentioned above, being subject to constraints on the pursuit of ends cannot be treated as though it is on a par with being vulnerable to risk of physical harm. Thus, the challenge for tort law is to establish terms of interaction that would satisfy two basic demands: first, reducing vulnerability imbalance by sustaining the normative priority of life and limb over autonomy;[115] and second, avoiding excessive imposition on the autonomy of risk creators. Put together, the challenge is that of giving effect to the *limited priority* of physical security over autonomy. As mentioned above, the normative framework with which to approach these demands is that of equality—that is, it takes up the challenge of establishing terms of interactions under which participants relate as genuinely, as opposed to formally, equal. To meet this challenge, the argument going forward will follow the interdependence thesis defended above and, so, will avoid the familiar, but questionable, tendency to treat defendant and plaintiff care as conceptually distinct questions. As a result, the two-prong argument I shall develop in connection with defendant and plaintiff care makes up an articulated unity. In contrast to a framework in which each prong is conceived as freestanding, their interdependence makes it the case that defendant and plaintiff care are mutually reinforcing so that no one prong can be specified or justified apart from its relation to the other.

To see why asymmetric care is required, begin with the case of Roger the defendant. His pursuit of ends—his autonomy—might be adversely affected when success or failure in exercising due care is measured objectively. Why, then, can't there be a more accommodating assessment of due care in such a case? The answer is that *any* subjectively fixed standard of care would make the plaintiff's right to physical security hostage to the right of the likes of Roger to set ends and pursue them. Thus, in exercising his right to set and pursue ends, the caring skills of the defendant will unilaterally determine how much vigilance the plaintiff is owed. Accordingly, subjective assessment of defendant care necessarily undermines the important normative difference between life and limb, on the one hand, and autonomy, on the other. Note that the structure of the argument against subjective assessment of defendant care is the same as the one developed by corrective justice theorists. However, the rationale behind this structure is remarkably different, which

for reasons I discuss in the main text accompanying notes 123–124, *infra*, the difference in question is far less significant than believed.

115. For otherwise diverse normative claims that negligence law (and the reasonable care standard, in particular) upholds the lexical priority of bodily integrity, *see, e.g.*, Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 *Am. J. Juris.* 143, 170–194 (2003); Keating, *supra* note 3, at 344; Geistfeld, *supra* note 21, at 122–128.

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is the concern with the priority of the plaintiff's physical security over the defendant's autonomy, as opposed to holding them formally equal.

Now consider Roger the plaintiff. Suppose that plaintiff care receives an objective test. According to the interdependence thesis, a nonaccommodating approach to his ability to respond to risk would necessarily imply that the defendant is *not* required to take additional care in the face of Roger's disability. If Roger the plaintiff faced Roger the defendant both would face the same formal demand of objectively fixed care: that in determining what counts as reasonable care the law ignores the disabilities of *both*. In that case, the terms of their tort-governed interaction treat them symmetrically as though they are equal, which is to say formally equal.

But formal equality does not exhaust the moral universe of equality. In particular, there is an important sense in which formal equality obscures an underlying *im*balance of their vulnerabilities—physical security and autonomy, respectively. The imbalance in question does not imply that autonomy is ancillary. Rather, physical security enjoys priority because it is a basic prerequisite to the pursuit of most human values, including that of autonomy; to this extent, physical security gets its pride of place *because* autonomy, et alia, matters. Leading autonomous life presupposes life itself; and the ability autonomously to pursue ends depends, to an important extent, on the pursuer's healthy physical (and mental) constitution.[116] Saying that formal equality obscures the vulnerability imbalance may understate the precise way in which a commitment to formal equality may displace considerations of substantive equality: the symmetrical assessment of objective care across the defendant/plaintiff divide not only overlooks this imbalance, but it *authorizes* it by relieving the defendant of the requirement to accommodate the plaintiff's disability. A subjective assessment of plaintiff care, by contrast, overcomes this difficulty.

To fix ideas, consider the representative case of *Fletcher v. City of Aberdeen*,[117] in which an infrastructure construction worker who was about to leave the working area negligently forgot to mark with barricades the ditch he was digging in the sidewalk's edge adjacent to the road.[118] A blind pedestrian walking with a cane failed to notice the ditch, fell into it and as a result suffered a serious personal injury.

Imagine that the court would have embraced an objective approach to assessing the victim's conduct. On this approach, the construction worker would not have been answerable for failing to take the *extra* care involved in protecting the physically disadvantaged, as opposed to the nondisadvantaged, from the former's dangerous omission. It would mean that, contrary to our moral intuitions, the autonomy of the construction worker and the physical security of the victim are *equally* valuable in the eyes of negligence

116. *See* Amartya Sen, Inequality Reexamined (1995), at 44–45; *see also* Joseph Raz, Value, Respect, and Attachment (2001), at 77; Kant, *supra* note 107, at 62.
117. 338 P.2d 743 (Wash. 1959).
118. *Id.*, at 744.

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law. Unsurprisingly, however, the court in *Fletcher* rejects an objective measurement of victim's negligence, saying that the defendant "is obliged to afford that degree of protection which would bring to the notice of the person so afflicted the danger to be encountered."[119] Indeed, a subjective measurement demands that the care owed by tortfeasors be determined, in part, by reference to the physical disability of the victim, as opposed to the nondisabled person only.[120] For only thus can the standard of care reflect the important difference that exists between the plaintiff's right to physical security and the defendant's entitlement to set ends and pursue them.[121]

On the proposed view, therefore, the manner in which risky conduct should be assessed must resist the teachings of both the economic and corrective justice approaches—it must repudiate the symmetrical measurement of reasonable care across the defendant/plaintiff divide. In its stead, the negligence standard must reflect the notion that the terms of the interaction between the two are set by reference to the plaintiff's disabilities. This is precisely why our imaginary Roger the defendant receives an unfavorable (i.e., objective) treatment while the same person, when occupying the position of the plaintiff, receives the opposite (i.e., favorable) treatment. This asymmetry, to conclude, can be neither wholly efficient nor fully compatible with the demands of corrective justice's equality. Nevertheless, it is not arbitrary. Indeed, it puts a basic egalitarian commitment in our practical lives to the task of setting terms of interaction between substantive equals: within limits, concern for a person's life and limb takes some priority over the free pursuit of ends. The next stage of the argument seeks to address the limits of this priority.

B. Controlling for Excessive Imposition on the Defendant's Autonomy

Asymmetric assessment of due care gives rise to two opposing worries about the autonomy right of defendants to set ends and pursue them. First, demanding that defendants take extra care to accommodate the disabilities of others might threaten too much flexibility—accordingly, is there an upper limit beyond which defendants are relieved of taking additional precautions? Second, must excessive imposition on autonomy be avoided always? In addressing these worries, I shall treat the former as the more general

119. *Id.*, at 746.

120. *See also* Balcom v. City of Independence, 160 N.W. 305, 308 (Iowa 1916) ("[W]hosoever did that which might injure [the blind person] should use more precautions than would be necessary where the one to be affected was not blind.").

121. *See* Weinstein v. Wheeler, 271 P. 733, 735 (Or. 1928) ("Those who drive automobiles on the streets of a city, and who observe, or in the exercise of reasonable diligence ought to know, that a pedestrian is blind, must use care commensurate with the danger involved. It will not do to drive on under such circumstances and assume that one thus deprived of sight will jump the right way. The automobile should be stopped.").

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worry and the latter as forming an exceptional case. In that, the argument will track tort law's division of labor between negligence and strict liability.

1. Negligence

Begin with the former worry, according to which asymmetric assessment of care might threaten too much flexibility and, ultimately, become excessive. In denying this worry, I shall argue that it occupies a middle ground between two opposing poles. On the one hand, asymmetric care assessment places a demand on tortfeasors not to ignore the victim's disabilities. On the other hand, however, taking the insufficient caring skills of others seriously need not amount to anything close to the enslavement of the tortfeasor at the hands of the potential victim. Thus, under the current negligence regime (which, recall, incorporates care asymmetry) the tortfeasor is typically not obliged to forgo his or her freedom of action completely, say, to refrain from going out or engaging in all daily activities *merely* because of the risk his or her acting generates.[122] On the proposed account, the reason for this is that the underlying idea of substantive equality is not focused single-mindedly on the plaintiff, but rather on whether the terms of the interaction between the plaintiff and the defendant give effect to their relating as equals. And substantive equality's commitment to take the difference between physical security and autonomy seriously is not the same thing as trivializing the latter. Precisely for this reason, and save for exceptional situations to be discussed below, a standard of reasonable care grounded in equality cannot coherently require tortfeasors to respect others at the expense of *self*-disrespect. Accordingly, the vindication of substantive equality through negligence law has its own internal stopping point, a limit that is inherent to the very ideal of relating as equals, which is that neither the plaintiff nor the defendant can be reduced to a mere instrument in the service of an otherwise compelling ideal.

To forestall misunderstandings, the proposed account may, nonetheless, be very costly to physically disabled risk creators due to the negative impact it may have on their autonomy. Consider the hypothetical case of Roger once again, this time in connection with the worry that his autonomy may be demoted by the asymmetric assessment of due care. Roger's ability to set and pursue ends may be severely curtailed if it turns out that his driving will be assessed by reference to the skills of the nondisabled driver, which is to say the skills he had some years ago. If the state is sufficiently egalitarian, by which I mean sufficiently attentive to the needs of its physically disabled constituents, Roger's ability to set and pursue ends could easily survive the imposition of an objectively fixed standard of due care on his risk-creating activity (such as driving). Indeed, such a state would be committed to provide public transportation that is both effective and affordable to facilitate autonomous lives on the part of the likes of Roger. If, however, the state

122. *See, e.g.*, Adams v. Bullock, 125 N.E. 93 (N.Y. 1919) (the duty of reasonable care does not demand utmost care).

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runs afoul of its egalitarian commitments, the autonomy-decreasing consequences of imposing an objective standard of care on risk-creating activities may not be neutralized, at least not in any systematic fashion. It is important to distinguish between two such scenarios. First, suppose that Roger lives under the extreme conditions of pervasive street violence so that using public transportation is likely to pose a real threat to his life and limb. Against the background of this extreme scenario—a Hobbesian war of all against all, really—I shall concede that my proposed account (as well as *any* other plausible account of the justice or the efficiency of the law of torts) is irrelevant; it can only be applicable under circumstances of relative stability and civility. Second, suppose that there is no such violence, but the government provides a very poor system of public transportation (alternatively, it provides an effective but incredibly expensive system instead). It seems that this case renders most vividly the trade-off that underlies the asymmetric assessment of due care. Negligence law's focus on asymmetric care in connection with the right to bodily integrity does not merely produce inefficiencies and lost aggregate welfare, as I have argued above. It may also generate adverse consequences for anyone whose pursuit of autonomous life involves the creation of risk of physical injury to others.

A note on the practical manifestations of taking extra care of another person's life and limb. Respectful regard for potential victims can manifest itself on two different occasions and to various degrees. Begin with the two relevant occasions. First, accommodating the physical disability of the victim can occur *ex post*, as when the court is called to divide the costs of the victim's injury between the defendant and the plaintiff on the basis of their respective—primary and comparative—fault. There, the asymmetric manner in which fault is being assessed expresses the thought that the defendant had to display due regard for the plaintiff's disabilities. Second, the respect expressed through the taking of extra care can also be established *ex ante*, as when the potential tortfeasor is expected to moderate his or her activity in compliance with the duty of care. There, the foreseeable presence of physically disabled victims within the zone of danger partly determines the level of care that would properly count as "reasonable." In some cases, the *ex ante* influence exerted by the presence of such victims on the tortfeasor's exercise of care will be quite overwhelming. This will be so if the presence within the zone of danger of a physically disabled person is *particularly* foreseeable. For instance, the tortfeasor knows (or can be expected to know) that she is driving in a closed community of elderly people. At other times, however, the possible presence of physically disabled persons becomes a matter of statistical foreseeability.[123] In such cases, the disabilities of victims

123. Statistical foreseeability reflects the frequency and distribution of a given disability across society. Tortfeasors are not expected to know the exact numbers, but they are certainly aware of the existence of physically disabled persons in their society and of the possibility that some of them might happen to be within the zone of foreseeable danger relevant to these tortfeasors' risky conduct.

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exert their (*ex ante*) influence on fixing the amount of care in a way that reflects their (statistically) possible presence within the zone of danger.[124] Thus, whether the disability of a victim is particularly foreseeable or merely statistical, the duty of care places a demand on risk creators to incorporate it into their decision concerning how much care they ought to exercise in any given case.

2. Strict Liability for Ultrahazardous Activities: Asymmetry on Steroids

The preceding argument has taken the following form: *all else equal*, asymmetric assessment of reasonable care is grounded in the vulnerability imbalance that exists between the defendant's right to set and pursue ends and the plaintiff's right to physical security. But all else is not always equal. The imposition of strict tort liability for ultrahazardous activities presents an important exception, according to which asymmetric assessment of *due care* does not reflect sufficiently well the morally important difference between the defendant's and the plainitff's normative situation. My argument concerning strict liability for ultrahazardous activities will not focus on the second-order question of whether this or that activity should count as ultrahazardous. Instead, it takes up two first-order questions: negatively, why it is that in cases of ultrahazardous activities the asymmetric assessment of *due* care becomes inconsistent with establishing terms of interactions between substantively equal persons; and affirmatively, why it is that strict tort liability provides a better solution in these cases. The only assumption made in setting aside the second-order question is that the concept of ultrahazardous activities is not vacuous, which is a working hypothesis widely shared among common law jurisdictions. For instance, courts disagree on whether the activity of storing water in a reservoir is properly called ultrahazardous.[125] A disagreement of this kind would be pointless if it turns out that the concept of untrahazardous activities is empty. The argument now turns to this concept and, in particular, its relationship with the proposed framework of substantive equality.

The explanation offered above as to why defendant care must be assessed objectively can also help explain why and when asymmetric assessment of care must give way to strict tort liability. Recall the argument from objective assessment: a subjectively fixed standard of defendant care when applied to physically disabled persons would make the plaintiff's right to physical

124. *See* Haley v. London Electricity Board [1965] AC 778, 791 (HL) ("We are all accustomed to meeting blind people walking alone with their white sticks on city pavements. . . . I find it quite impossible to say that it is not reasonably foreseeable that a blind person may pass along a particular pavement on a particular day.") (*per* Lord Reid). *See also id.*, at 806 (observing that "[in] view of the large number of blind persons who fall into the category of abnormal and are users of the road it cannot be said that the risk of causing them injury is so small as to be minimal and therefore to be excluded from the realm of foreseeability.") (*per* Lord Hodson).

125. *Compare* Dye v. Burdick, 553 S.W.2d 833 (Ark. 1977) (denying strict liability) *with* Forrest v. Imperial Distrib. Serv., Inc., 712 P.2d 488 (Colo. Ct. App. 1985) (upholding strict liability). *Cf.* Jed Hendelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 *Yale L.J.* 333 (2000).

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security hostage to the right of the likes of Roger to set ends and pursue them. In particular, it would necessarily undermine the important normative difference between life and limb, on the one hand, and autonomy, on the other. There, the basic concern was not so much the appropriateness of the demand to exercise reasonable care, but rather the defendant's *inability* to meet such a standard.

The case for strict liability takes up the opposite concern, namely, that the very requirement to make an effort to discharge reasonable care, rather than the ability to make such an effort, is the source of the problem. This is because, and insofar as, making such an effort leaves intact a substantial part of the danger implicit in the activity. Indeed, the tort law concept of ultrahazardous activity is meant to capture precisely this *functional deficiency* on the part of the duty of reasonable care: exercising reasonable care, or, for that matter, utmost care, will systematically fail to reduce the activity's risk to sufficiently satisfactory levels of safety.[126] The imposition of strict tort liability for injuries caused by those who engage in ultrahazardous activities is a familiar common law response to *this* deficiency.[127]

To see this, consider the case of a defendant whose business is that of executing fireworks displays. Further suppose that handling fireworks (or, for that matter, explosives) counts as an ultrahazardous activity.[128] The very choice of engaging in this business places potential victims in a special state of vulnerability. It is special in the sense that mitigating the danger is beyond the systematic control of a duty to exercise more (and more) care. By implication, a mere duty to exercise due care cannot establish terms of interaction that display appropriate concern for the difference between the autonomy of the defendant to pursue an ultrahazardous activity and the physical safety of the plaintiff. Accordingly, negligence-based liability would reinforce, rather than help eliminate, the vulnerability imbalance between the two by subordinating the plaintiff's life and limb not simply to *how* the defendant pursues an end, but rather to *what* end she prefers to pursue in the first place.

Against this backdrop, the law implements several measures, including the imposition of strict tort liability to defuse vulnerability imbalance. Thus, engaging in some ultrahazardous activities may be banned completely; this would likely be due to the high probability that physical harm would ensue

126. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM (2010), §20(b)(1) (defining "abnormally dangerous activity" in terms of an activity that "creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors").

127. *Id.*, cmt. h (observing that "whether reasonable care is effective in eliminating risks has been the most important factor influencing courts as they have decided which activities are abnormally dangerous"). *See, e.g.*, Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1233 (Utah 1995).

128. *See, e.g.*, Klein v. Pyrodyne Corp., 810 P.2d 917 (Wash. 1991) (imposing strict liability on a pyrotechnic company in charge of a public fireworks display).

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and/or the extraordinary gravity of that harm.[129] In other cases, a special permission from the relevant state agency may be required; some further restrictions—such as time and place limitations—may also apply.[130] The imposition of strict tort liability adds a private law dimension to these measures. A regime of strict liability, that is, implies that a person's autonomy to pursue an ultrahazardous activity can be allowed, if at all, only insofar as it can be made accountable for the mishaps that even a reasonable exercise of care cannot prevent. Otherwise, falling back to a regime of negligence liability would, in effect, relieve this person of responsibility for his or her decision to embark on an activity whose dangerousness in terms of risking the physical safety of others cannot be systematically contained by the exercise of reasonable care.

V. ELABORATIONS AND IMPLICATIONS

The argument in Section IV has focused on the characterization of the common law's asymmetric standard of reasonable care. The current section moves from the character to the *scope* of the standard in question. In particular, I demonstrate the important extent to which the preceding characterization can illuminate tort law's approach to the standard of due care outside the test case of physical disability. In that, I seek to suggest that the egalitarian idea underlying the standard of due care—and especially the commitment to taking difference seriously—can go beyond that case.

A. The Mentally Disadvantaged Plaintiff

At first glance, the most challenging case for the proposed analysis is that of mental disability. If I am right, asymmetric assessment of care should apply also in this case insofar as the risk to which the plaintiff is being put is that of physical security. However, a widely held conventional view is that mental disability is largely ignored in the law of torts. Indeed, on this view, there exists a sharp contrast between the current law's treatment of the physically disabled person and the mentally disadvantaged one.[131] More specifically, the latter case does not feature an asymmetric measurement of reasonableness,

129. Indeed, contemporary public debates concerning gun-control regulations in the United States exemplify this point.

130. For instance, pyrotechnic companies may be subject to safety regulations over and above the torts-based regime of strict liability (e.g., rules concerning the transportation of firearms). For more information *see* the website of the U.S. Department of Transportation: Pipeline and Hazardous Materials Safety Administration, http://www.phmsa.dot.gov/.

131. *See, e.g.*, Kristin Harlow, Note, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 *Ohio St. L.J.* 1733, 1735–1736, 1741–1742, (2007); Kelley, *supra* note 26, at 204; Mark A. Geistfeld, Tort Law: Essentials (2008), at 183, 191; Benjamin C. Zipursky, *The Cathedral Through the Looking Glass: A Commentary on Dagan and Dorfman's Just Relationships, Colum. L. Rev. Sidebar* (forthcoming 2017).

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but rather opts for an objective measurement *across* the defendant/plaintiff divide. Thus, persons with either mental illness or developmental disability are expected to exercise the care that a reasonable person would exercise, their disability notwithstanding.[132] It is further noted that exceptions to this rule are *very* stringently extended.[133] And even when they are granted, they mainly arise under the special circumstances of professional treatment and institutionalization.[134]

Moreover, the conventional view in question makes sense when approached from both economic and corrective justice perspectives. From an economic perspective, the costs of identifying the actual caring capacities of the mentally ill are substantially higher than the costs of identifying these capacities in connection with a clearly manifested physical disability.[135] And from a corrective justice perspective, allowing the idiosyncratic capacities of the mentally disadvantaged person to influence the amount of reasonable care offends formal equality since it amounts to granting him or her the power unilaterally to fix the terms of the tort interaction.[136]

That said, my proposed account challenges the conventional view among commentators and tort theorists concerning the manner in which the conduct of the mentally disadvantaged person is assessed not merely in the contexts of institutionalization and custodial care but also in the context of interactions between strangers. Indeed, a closer examination of the law reveals that courts are increasingly more willing to apply an asymmetrical measurement of reasonableness than the conventional view implies. In particular, mentally disadvantaged defendants incur an unaccommodating objective duty of care.[137] By contrast, and this is the point the conventional view misses, there is a strong trend toward assessing the conduct of the mentally disadvantaged plaintiff subjectively.[138] This trend can be broken into two classes. First, most states exonerate plaintiffs suffering from outright

132. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (2010), §11 cmt. e.

133. On the received convention, whereas most courts prefer a uniform, objective approach to mental disability, a notable exception is *Breunig v. American Family Ins. Co.*, 173 N.W.2d 619 (Wis. 1970) (a sudden, unexpected mental disability absolves an individual of tort liability).

134. *See, e.g.*, Creasy v. Rusk, 730 N.E.2d 659, 667 (Ind. 2000) (finding that an institutionalized, mentally disabled defendant "owed no duty of care" to plaintiff-caregiver); DeMartini v. Alexander Sanitarium, Inc., 13 Cal. Rptr. 564 (Ct. App. 1961) (asserting that "the issue of contributory negligence of a mentally disturbed person is a question of fact").

135. LANDES & POSNER, *supra* note 4, at 127–128.

136. *See* MORAN, *supra* note 109, at 52–54.

137. *See* DOBBS, *supra* note 36, at 284 (stating that "[o]nly limited and somewhat peculiar authority qualifies" the objective standard of care to be applied to mentally disadvantaged tortfeasors).

138. Typically, defenders of the conventional view merely assert the view, providing very little evidence in its support. *See, e.g.*, DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS (2d ed., last updated 2015), §130 (asserting that the mentally disabled plaintiff faces the same unaccommodating standard of objective care and citing two cases, one of which seems to rely on the fact that there was no evidence that the plaintiff's disability played any role in this case), https://1.next.westlaw.com/Document/I4020bbe5db4c11e18cd29897efb1f23a/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

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insanity or incompetency from being held contributorily or comparatively negligent.[139] And second, with respect to plaintiffs suffering from diminished capacity short of outright insanity, it was observed a half century ago that "many"[140] states deploy a subjective assessment of contributory or comparative negligence.[141] A comparative study reports that a "majority"[142] of states follow this trend, further amplifying the asymmetrical manner in which reasonableness is measured in negligence law in the context of bodily security.

B. An Egalitarian Case for Symmetrical Assessment of Due Care

As I have mentioned from the outset, the proposed account focuses on what seems to be negligence's core case, namely, the negligent infliction of physical harm to life and limb. The vulnerability imbalance that exists in *this* case supports an asymmetric assessment of due care. If the proposed analysis is right, care asymmetry should be abandoned when no such imbalance obtains. In this section, I seek to show just that. The intuitive reason is straightforward: some rights, such as property rights and economic interests held by the plaintiff, need not justify the defendant's extra investment in precautions, in which case the standard of care treats both parties in a symmetric fashion.[143] It is one thing to respect another person in connection with his or her bodily integrity; it is quite another to respect this same person, say, in connection with his or her entitlement to control external objects.[144]

139. As the New York State Court of Claims has observed:

> As a matter of law, insanity has never been a defense to civil liability in tort. Where the incompetent is the plaintiff, however, numerous trial court decisions have refused to find contributory negligence where plaintiff was suffering either from severe mental retardation ... or from psychosis ...

Young v. State Dept. of Social Services, 92 Misc. 2d 795, 796 (N.Y. Ct. Cl. 1978) (multiple references to supporting cases omitted).

140. Snider v. Callahan, 250 F. Supp. 1022, 1023 (W.D. Mo. 1966) (Missouri Law).

141. *See, e.g.*, *id.*, at 1023; Noel v. McCaig, 258 P.2d 234, 240–241 (Kan. 1953); Feldman v. Howard, 214 N.E.2d 235 (Ohio App. 1966), *rev'd on other grounds*, Feldman v. Howard, 226 N.E.2d 564 (1967).

142. W. C. Crais III, Comment Note, *Contributory Negligence of Mentally Incompetent or Mentally or Emotionally Disturbed Person*, 91 *A.L.R.2d* 392 (1963), at §2[a]; *see also id.*, at §4[a] for references to case law.

143. To fix ideas, extra investment in care would (not should) have been needed, say, if the defendant knows or can know that the plaintiff, who walks on a crowded sidewalk next to the defendant, carries a glass-made, and hence extremely fragile, suitcase. Or to draw on the famous case of *Wagon Mound No. 1* (Overseas Tankship (U.K.) v. Morts Dock & Eng'g Co., [1961] 1 All ER 404 (Privy Council)): imagine that the defendant's crew knows or can know that the plaintiff's dock is made of thin plywood.

144. I defend this claim, including a more ambitious one concerning the importance of accommodating certain basic choices in addition to physical sensibilities (such as religious, ethical, and familial commitments), elsewhere. *See* Avihay Dorfman, Private Law Exceptionalism? Part II: A Basic Difficulty with the Argument from Formal Equality

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However, it can be immensely complicated to discern the prevalence of this moral intuition in the law of negligence. Most negligence law cases addressing the question of whether the defendant ought to adjust the amount of care in the reaction to the plaintiff's insufficient caring skill arise *in and around* the context of harm to life and limb. Indeed, even many of the cases resulting in property or economic injury are not sufficiently removed from the category of cases dealing with bodily injury. This is because they often involve property damage, *but not of necessity, only as it happened*. The original risk imposed by the defendant's activity could just have been materialized into personal injury to the plaintiff or to another person. Accordingly, it will be quite intricate to test in a systematic fashion the extent to which negligence law gives effect to substantive equality and its underlying prescription to take vulnerability seriously.[145]

Consider the famous case of *Vaughan v. Menlove* by illustration.[146] There, the defendant negligently built a haystack prone to catching fire next to his plaintiff-neighbor's cottage. It caught fire and burned down the cottage. In assessing whether the defendant exercised due care, the court declined to take account of the defendant's cognitive disability.[147] Does this decision imply that asymmetric assessment of care applies in the context of property damage, too? As just explained, it would be too hasty to draw such an inference. This is because the risk originally created by the defendant does not single out the property right of the plaintiff. After all, the fire in *Vaughan* could have been just as dangerous to the life and limb, rather than merely to the property, of the plaintiff and other neighbors.

A better way to make progress on this front will be to identify cases in which bodily security and other entitlements are clearly disentangled. An especially apt place to begin is the tort of private nuisance and, in particular, the standard of reasonable interference that lies at its doctrinal center. This is because the context within which courts determine what counts as "reasonable interference" typically involves the right, shared by the plaintiff and the defendant alike, to the enjoyable use of land. In this context, the law takes the plaintiff's idiosyncratic condition to be irrelevant to determining whether the defendant provoked unreasonable interference with the plaintiff's use and enjoyment of the land.

Thus, a typical nuisance dispute would feature a property owner seeking to enjoin the disturbing consequence of an otherwise legitimate activity of a

(unpublished manuscript); Hanoch Dagan & Avihay Dorfman, Justice in Private (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463537; Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 *Colum. L. Rev.* 1395 (2016).

145. Certainly, some negligence law cases may be apt. A particularly relevant category of cases involves pure economic loss in connection with negligent misrepresentation and defective products. That said, courts typically attend to the question of plaintiff caring skills through the doctrinal lens of contract law (unconscionability, for example) and consumer protection law. Against this backdrop, I shall explore instead the nuisance doctrine of unreasonable interference (on which more below).

146. 132 Eng. Rep. 490 (Ct. Com. Pl. 1837).

147. *Id.*, at 492–494.

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neighbor, be it loud noise, offensive odor, or some such annoyance. And the typical statement on the part of the court would then be that "[t]he activity complained ... must be offensive to the person of ordinary and normal sensibilities. The result is not to be measured by its effect upon those of extreme sensibilities."[148]

Indeed, it would be objectionable if courts would insist, instead, on *a*symmetric treatment of the dispute between the clashing neighbors. Once again, the reason is that the egalitarian idea underlying reasonable care is not scopeless. A key consideration in determining its proper scope concerns the relative importance, and possible imbalance, of the vulnerabilities that define the tort interaction at stake. The category of nuisance cases under discussion involves qualitatively similar rights and, so, vulnerabilities on the part of the plaintiff and the defendant. Compelling the defendant to accommodate the unusual sensibilities of the plaintiff expresses a preference for the latter's right to the enjoyable use of his land over the former's *similar* right. Insisting on such preference cannot be justified by substantive equality's commitment to taking difference seriously: simply put, the context in which respectful accommodation is sought—viz, a person's right to the enjoyable use of land—is not *comparatively* important enough to warrant the extra care of another land user.

CONCLUSION

Contrary to the two most dominant accounts of the standard's content, the economic approach and the corrective justice theory, the asymmetric assessment of reasonable care that I find in the common law of negligence frustrates the possibility of promoting efficiency or preserving formal equality. Moreover, and more importantly, the frustrating tendency of the asymmetric manner of assessing negligence is not arbitrary or otherwise a liability. Rather, it implies that at the core of the reasonable care standard, at least in connection with risk to bodily security, lies a basic commitment to a distinctive form of relating as substantive equals. Substantive equality takes *difference* seriously by insisting that the defendant and the plaintiff can relate as genuine equals only insofar as their different normative and factual situations are brought to bear (in the right sense) on the legal determination of the terms of their interaction. Within this egalitarian framework, due care asymmetry, I have argued, gives effect to the principled priority of physical security over the autonomous pursuit of ends.

148. Bie v. Ingersoll, 135 N.W.2d 250, 252 (Wis. 1965). *See also* Goeke v. National Farms, Inc., 512 N.W.2d 626, 632 (Neb. 1994); Rogers v. Elliot, 15 N.E. 768 (Mass. 1888).

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