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HEIDI LI FELDMAN*

INTRODUCTION

Tort law assesses negligence according to the conduct of a reasonable person of ordinary prudence who acts with due care for the safety of others.[1] This standard assigns three traits to the person whose conduct sets the bar for measuring negligence: reasonableness, ordinary prudence, and due care for the safety of others. Yet contemporary tort scholars have almost exclusively examined only one of these attributes, reasonableness, and have wholly neglected to carefully examine the other elements key to the negligence standard: prudence and due care for the safety of others. It is mistaken to reduce negligence to reasonableness or to try to understand the sense of reasonableness contemplated by the negligence standard without reference to the virtues of prudence and benevolence. Taken together and analyzed in relation to one another, these three traits define a distinct evaluative perspective, according to which some actions expose oneself and others to inappropriate risk of physical harm, and others do not. In this Article, I only partially articulate this evaluative perspective, focusing on its dimensions defined by prudence and care and leaving to one side the dimension defined by reasonableness. I have restricted the exposition partly because of the limits of the article format,[2] and partly to counterbalance the overattention to reasonableness that has characterized tort scholarship of the last fifty years.

The dominant tort theories of the previous half century have

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1. *See* 57A AM. JUR. 2D *Negligence* § 7 (1989).

2. I postpone the complete articulation of the evaluative perspective designated by the negligence standard to HEIDI LI FELDMAN, CARE, CHARACTER, AND AMERICAN TORT LAW (forthcoming 2001), a book-length work-in-progress.

attempted to explain and shape the normative bite of the negligence standard by incorporating into it intensely moralized conceptions of reasonableness, usually borrowed from Kantianism or utilitarianism and its public policy counterpart, neoclassical welfare economics.[3] Certainly, a comprehensive interpretation of the reasonable person standard needs a satisfactory account of the reasonableness element of that standard.[4] But by itself no account of reasonableness can capture completely negligence law's approach to appraising conduct. The full negligence standard—set by the conduct of a person who is not only reasonable but also duly prudent and careful—advances a more fulsome conception of moral personhood, one that sets as the legal standard a figure who is not only reasonable but also prudential and careful.

This Article diagnoses contemporary tort scholars' inattention to the full figure that animates negligence law. I explore the moral and economic traditions—Kantianism, utilitarianism, and social welfare economics—that have informed tort scholarship of the past fifty years. These philosophical and economic traditions themselves neglect virtues such as prudence and care, and legal scholarship rooted in them not surprisingly ends up also ignoring these virtues and their centrality to the negligence standard. I introduce an alternative philosophical tradition, virtue ethics, to gain purchase on the role of prudence and care in evaluating conduct. One novel feature of the virtue ethics approach is that, while it relies on character traits as a way of appraising conduct, it does not appraise actions according to the actual subjective motives or character traits of the actor. In other words, virtue ethics does not think acts inherit their moral worth from the motive of the actor. Instead, virtue ethics identifies particular traits as more or less worthy, asks what sort of acts these traits dispose a person to perform, and then rates acts according to whether or not they are of the kind a person possessed of worthy character traits would perform. This approach to moral

3. As I explain further in Section III, I attribute this lapse to tort scholars' preoccupation with justice and efficiency, and correlatively with moral and economic theories related to these subjects.

4. In my view, tort law both does and should involve a naturalistic understanding of reasonableness. On this view, reasonableness is a cognitive trait of human beings, an evolved adaptation we employ to reason about risks and benefits. To fully understand reasonableness as it figures in tort law, then, we need to take into account both evolutionary and social psychological research into how human beings approach risk and gain. *See* Heidi Li Feldman, *Science, Reason, and Tort Law: Looking for the Reasonable Person*, *in* LAW AND SCIENCE 35 (Helen Reece ed., 1998); Heidi Li Feldman, Negligence Law and Human Psychology (June 29, 1999) (unpublished manuscript, on file with author).

epistemology—to the identification of virtuous acts—parallels the inquiry tort law asks juries to make when evaluating whether a defendant's actions were or were not negligent. As I argue below, a standard of conduct based on virtues achieves prescriptivity—the capacity to license or condemn particular acts—via the performance of thought experiments, in which the experimenter "predicts" the behavior of the idealized virtuous person and then sees whether the conduct under judgment coincides or differs from the act forecasted by the thought experiment. In a civil tort action, the factfinder—usually a jury—performs this sort of thought experiment to ascertain how a person possessed of two specific virtues, prudence and due carefulness, would behave in a specific situation. Through this experiment, the jury discovers whether negligence law permits or proscribes the conduct of the alleged tortfeasor.

Viewing the reasonable person standard as a thought-experiment apparatus, which people can use to arrive at conclusions about which acts are inspired or rejected by the virtues of reasonableness, prudence, and due care together, will disquiet those who seek a more reductionist definition of negligence. In general, virtue ethics opposes reductionist interpretations of moral and ethical concepts, denying that we can decide upon good or worthy conduct by applying formulas or algorithms. Much recent tort scholarship has attempted to reduce the meaning of negligence to economic inefficiency or utility-minimization. While this may make calculating negligence easier for those entities supposedly set up to achieve economic efficiency or utility-maximization—that is, the modern corporation—it displaces the sort of context-sensitive, deliberative evaluation of actions traditionally invited by the reasonable person standard. Contrary to the plain language of jury instructions and case law, economic accounts of the reasonable person standard remake the person who animates American negligence law in the image of *homo economicus*, perhaps to make it easier for corporate persons to align themselves with the image of personhood put forth by tort law.

Aside from the hermeneutic problems with this makeover—the fact that it simply ignores the language of the negligence standard—it raises other, perhaps deeper, concerns. Using the jury to calibrate the meaning of negligence through context-sensitive, case-specific thought experiments allows the citizenry to continuously revisit a fundamental political question: the proper balance between safety and freedom. In a community whose members want to pursue their life plans, each member needs to be safe from risk of personal injury

and have the scope to take action. The results of the thought experiments juries perform in civil negligence actions are guideposts to the balance the citizenry endorses. In a political system that assigns sovereignty to the citizenry, it is the citizens who should decide how carefully each must act in an effort to avoid personal injury to others. We cannot hold a referendum each time somebody is about to act and incidentally risk injuring others. We need, therefore, another way of forming and expressing collective judgments about how carefully people should proceed in particular circumstances. Civil negligence actions, in which juries apply a virtue-based standard of care, perform this function.

Viewing negligence through the lens of virtue ethics brings the elements of ordinary prudence and due care into the foreground of our understanding of the negligence standard of care. This in itself sets the virtue-based interpretation apart from tort theory of the past fifty years. But the implications of the virtue-based interpretation extend beyond assigning significance to the elements of ordinary prudence and due care. Because a virtue-based approach conceives of the application of the negligence standard as a thought experiment best performed by lay people, the virtue-based approach is radically democratic and populist, in contrast to most major tort theories advanced from the 1960s through the 1990s.

These theories generally treat the tort system as a vehicle for social engineering. The different theories assign different outputs as the objective, ranging from economically efficient conduct to the realization or protection of Rawlsian equality or Kantian equality, or the implementation of the formal requirements of corrective justice. If these outputs were in fact the dominant point of the tort system, lay jurors and even civil tort actions would be largely superfluous. Lay jurors possess no particular expertise in economic analysis, liberal political and moral philosophy, or the structure of corrective justice. Civil negligence actions do not ask jurors to apply a standard of care that even refers to these matters. To construe the common law of negligence developed via judicial doctrine and jury verdicts as a mechanism of social engineering geared toward any of the goals I listed above is tantamount to rating the common law of negligence a failure. Neither the negligence standard nor the process for developing and applying that standard would be sensible components of an engine meant to churn out economic efficiency, Rawlsian equality, or Kantian autonomy.

One somewhat plausible response to this observation would be

to scrap the negligence standard or the common law approach to accidental injury, or both, in favor of a legal or political institution designed specifically to achieve one's preferred output. Even if such measures could be instituted—a doubtful prospect—they are not a good idea. Eliminating the negligence standard and the jury's role in applying it would sacrifice something of political and social importance: the opportunity for popular, collective judgments about how each citizen should conduct herself or himself when the pursuit of her or his own objectives creates the risk of injuring somebody else. Jury verdicts in negligence actions give social content to the virtues of prudence and due care, repeatedly providing concrete conclusions about the sort of conduct that is consistent or inconsistent with these dispositions. In this Article, I argue that ordinary people are cognitively well-equipped to reach these conclusions through collaboratively comparing a specific defendant's conduct to that of a fictional person endowed with the virtues of prudence and due care who is faced with the circumstances confronted by the actual tort defendant. Jury verdicts reached by such a process preserve popular sovereignty over the appropriate balance between safety and freedom, a fundamental and persistent political question in a society in which people's liberty to act consistently exposes themselves and others to risk of physical injury.

I. VIRTUE ETHICS IN THE LANDSCAPE OF MORAL THEORY

For most of the twentieth century—the century of modern tort theory—the majority of moral and political philosophers have been either Kantians or utilitarians. Kantian moral theory focuses primarily on questions of individual autonomy and equality; Kantian political theory focuses on distributive justice, working from the premise that the allocation of resources fundamentally influences autonomy and equality. Utilitarianism focuses on maximizing pleasure and minimizing pain. Utilitarian moral and political philosophy begot microeconomic social welfare theory, the dominant theoretical approach to political economy in the United States for at least the second half of the twentieth century. In the realm of public policy, neoclassical economists have defined the central issue as efficiently maximizing overall social welfare, a project cast in terms of satisfying as many preferences as possible rather than as a problem of

increasing pleasure or decreasing pain.[5]

In contrast to these moral and economic traditions, virtue ethics does not concern itself with individual autonomy, social equality, or the monolithic centrality of pleasure or desires in human life. Nor does it fundamentally address distributive justice or the objective of satisfying as many people's preferences as possible (the maximization of social welfare). What unites philosophers in the virtue ethics tradition—a tradition that ranges from ancient Greece to contemporary western societies[6]—is their concern with the quality of human life and an effort to identify both what counts as a life of high quality or worth and the character traits it takes to achieve one.[7]

The virtue ethics enterprise differs in kind from Kantianism, utilitarianism, and welfare economics. Kantianism asks, Which acts accord with moral law, a law that preserves the autonomy of the agents who answer to it? Autonomy and freedom are of central moral importance, and other human concerns fall outside the domain of ethics. Utilitarianism asks, Which acts promote pleasure and diminish pain? These experiential states are all that are relevant to moral life. Welfare economists ask, Which measures maximize the satisfaction of preferences? Subjective desires are the only variable

5. *See* Robin West, *The Other Utilitarians*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 197, 206 (Brian Bix ed., 1998).

6. The most prominent classical virtue ethicist was Aristotle. During medieval times, St. Thomas Aquinas developed a Christian virtue ethics. In the eighteenth century, Scottish philosophers such as Francis Hutcheson, David Hume, and Adam Smith connected virtue ethics to emotion and its role in moral judgment. In the mid-twentieth century, English philosophers such as Philippa Foot and Iris Murdoch championed a secular virtue ethics as a rival to Kantianism. Late twentieth century virtue ethicists such as Martha Nussbaum and Rosalind Hursthouse develop virtue ethics against a background reality of liberal political systems that diverge greatly from the political setting assumed by Aristotle. Contemporary virtue ethicists such as John McDowell, David Wiggins, and Simon Blackburn fall into the category because of their emphasis on how character and specific sentimental responses to the world figure in moral judgment.

7. Aristotle argues for the identity of human flourishing, happiness, and "the soul's activity that expresses virtue." ARISTOTLE, NICOMACHEAN ETHICS 17 (lines 1098a10-15) (Terence Irwin trans., 1985). He maintains that the end of human life is a "sort of living well and doing well in action" and that "the happy person lives well and does well," thus confirming the identity between the end for humans, happiness, and action in accord with virtue. *Id.* at 19 (line 1098b25); *see also* PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 3 (1978) ("[V]irtues are in general beneficial characteristics, and indeed ones that a human being needs to have, for his own sake and that of his fellows."); IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 78 (1971) ("Ethics should not be merely an analysis of ordinary mediocre conduct, it should be a hypothesis about good conduct and about how this can be achieved. How can we make ourselves better? is a question moral philosophers should attempt to answer."); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 212 (D. D. Raphael & A. L. Macfie eds., 1976) ("When we consider the character of any individual, we naturally view it under two different aspects; first, as it may affect his own happiness; and secondly, as it may affect that of other people.").

relevant to deciding social policy. Virtue ethics has a more expansive conception of morality and public welfare than any of these other, later traditions. Virtue ethics expands morality to cover many kinds of value that figure in human life, treating as relevant to both individual and social decisionmaking whatever enhances or diminishes the overall quality of human lives. This leads virtue ethicists to an interest in what lends worth to human lives and, therefore, to an interest in the full range of human interests, needs, desires, aspirations, and activities.[8]

This naturalistic humanism separates virtue ethics from Kantianism. According to Kant, if a person acts from desire, need, or want, that person acts heteronomously or instrumentally, in accord with a merely hypothetical imperative; and such action does not qualify as moral.[9] In less technical terms, Kant's point was that human needs, wants, and desires vary from person to person and even from time to time for a single person. Thus, acts motivated by need, desire, or want are contingent upon the existence and content of the need, desire, or want. Kant argued that this sort of contingency has no place in morality.[10] According to him, moral law obtains universally and categorically.[11] It extends to all rational agents, regardless of their needs, wants, and desires; and it cannot be identified by consulting these natural human characteristics. Therefore, according to Kant, action directed toward satisfying human needs, wants, and desires is not moral action.[12] Indeed for Kant morality sits in opposition to what is most natural about humans. Since the satisfaction of human needs, wants, and desires

8. *See* MURDOCH, *supra* note 7, at 78 ("Moral philosophy is the examination of the most important of all human activities .... The examination should be realistic. Human nature, as opposed to the natures of other hypothetical spiritual beings, has certain discoverable attributes, and these should be suitably considered in any discussion of morality.").

9. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 46 (James W. Ellington trans., 3d ed. 1993). Kant describes actions as heteronymous and therefore nonmoral if they rest on principles "drawn from ... happiness." *Id.* Kant regards these as empirical or contingent and therefore not derived from principles of pure reason, the proper basis for moral actions:

> Empirical principles are wholly unsuited to serve as the foundation for moral laws. For the universality with which such laws ought to hold for all rational beings without exception (the unconditioned practical necessity imposed by moral laws upon such beings) is lost if the basis of these laws is taken from the particular constitution of human nature or from the accidental circumstances in which such nature is placed.

Id.

10. *Id.* at 22–23, 34.

11. *Id.* at 30.

12. *Id.* at 13. According to Kant, such purposive action lacks moral worth because it aims to fulfill desire rather than spring from duty arising from respect for moral law. *Id.* at 12–13.

plays an important role in human flourishing, the ideal central to virtue ethics, Kant's moral theory simply does not speak to what matters most from the virtue ethics perspective.

Classical utilitarianism differs from Kantianism in that it makes certain sensations experienced by human beings central to the project of morality. This means that utilitarianism is naturalistic. But in its singular focus on pleasure and pain, utilitarianism is not really humanistic: it does not take seriously the idea of each individual's potential to achieve a rich, full life, the sort of multifaceted flourishing important in virtue ethics. In classical utilitarianism, pleasure is the single good, and morality requires us to act so as to increase pleasure and decrease pain. Human needs, wants, and desires matter to utilitarians because their satisfaction or disappointment influences the total amount of pleasure or pain in the world. But by focusing morality solely on the production of pleasure and the diminishment of pain, utilitarianism shifts our attention to the overall state of the world at any given moment—to how much pleasure or pain it contains at time T1, T2, T3 . . . . For the utilitarian, morality does not require attention to discrete individuals and the total quality of their lives. Our lives are simply vehicles for experiencing pleasure and pain and our individual actions morally significant only as triggers of pleasure and pain.

Virtue ethics, in contrast to both Kantianism and utilitarianism, regards the entirety of each individual's life as the locus of value. Ethical value does not reside in specific acts that conform to a nonnaturalistic moral law, nor does it reside exclusively in the production or diminishment of pleasure and pain. The good life encompasses many things, including projects, skills, talents, activities, relationships, and sensations. Virtue ethicists approach the question of what makes for a good life by identifying examples of good lives, and then examining the character traits of the individuals who have had them.

Character traits are psychological features of people that dispose them to regularly act in certain ways. They do this by guiding both our perception of and our response to the world around us. Depending upon the character traits a person has, different features of the world stand out to her; and, therefore, the world calls for certain responses from her.[13] In other words, a person's character

13. The contemporary ethicists John McDowell and David Wiggins both discuss the relationship between our characters, how the world strikes us, and how we respond to those

traits define her evaluative perspective on the world, making some things matter more than others and inducing her to perform certain actions rather than others. For example, a funny person appreciates or sees the humor in a situation, and this moves her to crack a clever joke about it. To take another trait, a gentle person who sees or appreciates another person's need to be treated tenderly and quietly offers a soothing comment or a reassuring touch.

Just as funny or gentle people do, prudent or duly careful people see situations in a particular light and find certain actions natural or called for in those situations. A prudent person sees opportunities for betterment or gain and ways to realize those opportunities. A duly careful person notices his own and others' vulnerability to injury that he might inadvertently cause, and takes steps to reduce that vulnerability. A person who is both prudent and duly careful is simultaneously sensitive to opportunities for gain and to reducing the risk of injury to others and himself.

II. PRUDENCE, CAREFULNESS, AND NEGLIGENCE

The qualities of prudence and care, both singled out in the negligence standard, have received attention from virtue ethicists. Both of these qualities go directly to the central concern of virtue ethics: the characteristics that make people's lives better or worse. Acting prudently involves making good judgments about what ends one should have and the most appropriate and effective ways to achieve those ends; acting carefully involves reflecting upon how one's conduct may imperil other people's safety, a prerequisite to their well-being. While virtue ethicists have specifically cited the quality of prudence as a virtue, they have generally referred to benevolence rather than care as the virtue that disposes us to care

features of the world we find striking. Both authors argue that the possession of certain traits and attitudes leads us to appreciate features of the world that might otherwise be unavailable to our perception, and that some of those features present themselves as inescapable reasons for acting. *See* DAVID WIGGINS, *A Sensible Subjectivism?*, *in* NEEDS, VALUES, TRUTH 185, 194-202 (3d ed. 1998).

> If a property and an attitude are made for one another, it will be strange for one to use the term for the property if he is in no way party to the attitude and there is simply no chance of his finding that the item in question has the property. But if he is no stranger to the attitude and the attitude is favourable [sic], it will be the most natural thing in the world if he regards it as a matter of keen argument what it takes for a thing to count as having the property that the attitude is paired with.

Id. at 199; *see also* John McDowell, *Are Moral Requirements Hypothetical Imperatives? Part I*, *in* 52 THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUME 13, 14 (1978) ("To a virtuous person, certain actions are presented as practically necessary . . . by his view of certain situations in which he finds himself.").

about other people's flourishing. In this instance, I think the law outruns virtue ethical theory by taxonomizing concern for others in a more fine-grained way. Due care or consideration for other people's safety is a species of benevolence, part of caring about other people generally. Other legal spheres pertain to other species of benevolence. Family law, for example, takes the best interests of the child as the basic test for settling custody disputes. This test calls for concern for the well-being of children rather than interested adults, and, like due regard for the safety of others, this is a species of a more general concern for others, benevolence. The law of fiduciary duties regulates the conduct of those who handle other people's money (or other financial assets), and this topic focuses on yet another species of benevolence, the concern a trusted or powerful agent must show for others' financial well-being. Precisely because the law governs a variety of particular relationships between individuals across a range of settings, it has developed nuanced species of benevolence, the more general virtue historically discussed in virtue ethics.

A. Prudence: In Virtue Ethics and in the Law of Negligence

From early in the tradition, virtue ethicists have singled out as a virtue a trait that involves good judgment in the choice and pursuit of one's ends. Aristotle discusses *phronesis*, sometimes translated as practical wisdom[14] and sometimes as intelligence.[15] Aristotle explains,

> Now it is thought to be the mark of a man of practical wisdom to be able to deliberate well about what is good and expedient for himself, not in some particular respect, e.g., about what sorts of thing conduce to health or to strength, but about what sorts of thing conduce to the good life in general.[16]

Practical wisdom "is a true and reasoned state or capacity to act with regard to the things that are good or bad for man."[17] Later virtue ethicists refer explicitly to prudence. In the medieval period, Thomas Aquinas discussed *prudentia*, which he describes as the "right reason

14. ARISTOTLE, THE BASIC WORKS OF ARISTOTLE 1026 (Richard McKeon ed., 1941).

15. ARISTOTLE, *supra* note 7, at 155.

16. ARISTOTLE, *supra* note 14, at 1026 (lines 1140a25-30). In the Irwin translation, this passage reads: "It seems proper, then, to an intelligent person to be able to deliberate finely about what is good and beneficial for himself, not about some restricted area—e.g. about what promotes health or strength—but about what promotes living well in general." ARISTOTLE, *supra* note 7, at 153 (lines 1140a25-30).

17. ARISTOTLE, *supra* note 14, at 1026 (lines 1140b4-6). Irwin translates this passage as follows. "[I]ntelligence is a state grasping the truth, involving reason, concerned with action about what is good or bad for a human being." ARISTOTLE, *supra* note 7, at 154 (lines 1140b4-6).

of things to be done."[18] Adam Smith, a virtue ethicist of the Enlightenment period, regarded prudence as the foundational virtue for achieving one's own well-being.[19] Smith wrote, "The care of the health, of the fortune, or the rank and reputation of the individual, the objects upon which his comfort and happiness in this life are supposed principally to depend, is considered as the proper business of that virtue which is commonly called Prudence."[20] Philippa Foot, a contemporary virtue ethicist, calls Aristotelian *phronesis* "wisdom" and writes: "Wisdom, as I see it, has two parts. In the first place the wise man knows the means to certain good ends; and secondly he knows how much particular ends are worth."[21]

While philosophical discussion of good ends and practical wisdom or prudence and right reason might sound lofty and highblown relative to the stuff of tort law—everyday activity that can lead to injury—virtue ethicists themselves have regarded practical wisdom or prudence as a trait called for in everyday life. Aristotle considers such worldly objects as prosperity, friendship, and political power important to flourishing.[22] Since prudence enables us to deliberate about the nature of and means to flourishing,[23] it follows that the Aristotelian conception of prudence includes deliberation about things like prosperity and how to achieve it. Aquinas specifically argues that the body is necessary to achieve human happiness.[24] He goes on to argue that the body requires external goods such as food, drink, and wealth, which serve "as instruments to happiness."[25] Remarks such as these demonstrate that virtue ethicists associate practical wisdom or prudence with the identification and efficacious pursuit of ordinary goals such as wealth or prosperity, convenience, and saving time—the sort of goals that animate our everyday acts, acts which can create more or less risk of injury to other people depending upon how carefully we pursue these goals.

Tort scholars of the early twentieth century undertook the task of giving the doctrinal use of negligence an intellectually coherent

18. 2 SAINT THOMAS AQUINAS, THE SUMMA THEOLOGICA 38 (Fathers of the English Dominican Province trans., 1952).

19. SMITH, *supra* note 7, at 213.

20. *Id.*

21. FOOT, *supra* note 7, at 5.

22. ARISTOTLE, *supra* note 7, at 21 (line 1099b1).

23. *See id.* at 153 (line 1140a28).

24. 1 SAINT THOMAS AQUINAS, THE SUMMA THEOLOGICA 632 (Fathers of the English Dominican Province trans., 1952).

25. *Id.* at 635.

interpretation, and their work emphasized the role identifying and pursuing worthwhile ends plays in the concept.[26] In 1915, Professor Henry T. Terry published a list of factors relevant to deciding whether conduct constitutes negligence.

> (1) The magnitude of the risk. A risk is more likely to be unreasonable the greater it is.
>
> (2) The value or importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principal object. The reasonableness of a risk means its reasonableness with respect to the principal object.
>
> (3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct,—is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.
>
> (4) The probability that the collateral object will be attained by the conduct which involves risk to the principal; the utility of the risk.
>
> (5) The probability that the collateral object would not have been attained without taking the risk; the necessity of the risk.[27]

While tort scholars have construed Terry's mention of utility and probabilities as indications that he was groping toward a cost-benefit model of negligence,[28] the text as a whole does not support this interpretation. By citing the importance of the "collateral object"—the actor's own chosen end—and the need to take a risk to achieve that, Terry is describing factors relevant to a person of prudence, somebody who is spotting opportunities and figuring out which conduct would realize them effectively. Terry's list suggests that

26. The concept of tortious negligence is a relatively young one, not really solidified doctrinally until the middle to late nineteenth century. *See* Roscoe Pound, *Foreword*, *in* SELECTED ESSAYS ON THE LAW OF TORTS iii (1924). Pound explains that the first efforts by treatise and textbook authors to cover tort law, undertaken between 1859 and 1874, tended to be itemized surveys of specific causes of action. Not until Wigmore's *Cases on Torts*, published in 1911, does a commentator provide a completely "generalized systematic treatment" of negligence law. Pound, *supra*, at iii.

27. Henry T. Terry, *Negligence*, *in* SELECTED ESSAYS ON THE LAW OF TORTS, *supra* note 26, at 261, 263-64.

28. *See, e.g.*, RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 193-95 (6th ed. 1995). Epstein includes Terry's list in a section with cases on the "Calculus of Risk." *Id.* at 189-210. This section leads up to the presentation of *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947), the case in which Judge Learned Hand described negligence in "algebraic terms" and claimed that the defendant's actions constituted negligence if the burden of taking adequate precautions against an accident was less than the probability of injury without taking those precautions. *Id.* at 172. Richard Posner famously claimed that in *Carroll Towing* "Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence." Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972).

acting nonnegligently involves noticing which ends are worthwhile from a social perspective and which from a personal one, balancing the importance of each, and taking effective means to achieve this balance. This process differs from economic cost-benefit analysis in a number of ways. It does not characterize the worth of ends in terms of preference-satisfaction; it does not suggest that maximal preference satisfaction is always the appropriate balance; and it does not mandate that the balance always be achieved in the most economically efficient fashion.

Another famous tort scholar of the first half of the twentieth century, Professor Warren A. Seavey, claimed that tort law imposes upon people "a duty not to permit [their] activities . . . to create an undue risk of harm to any protected interest of another." Seavey explained that tort law seeks to reconcile "competing interests" when assessing whether risk is undue:

> Persons who act necessarily create risks to others, and unless activity is to be entirely at the risk of the actor it is only where the risk becomes excessive that liability is imposed. Since the public is interested in having activities conducted, the law recognizes a privilege for a person who acts in the advancement of his own interests, the interests of a third person, or those of the public, to create risks of harm to third persons which are not disproportionate to the interests sought to be advanced or protected.[29]

Like Terry's, Seavey's understanding of undue risk contemplates a balancing of ends, including the ends of advancing one's own and others' interests in being free from physical harm as well as a variety of other interests, some more personal than others. He does not suggest that this balancing is identical to welfare or utility maximization nor that cost-benefit analysis is the way to judge the appropriate balance. Rather, he writes that the standard qualities relevant to judging this balance are "such knowledge, intelligence, and consideration for the interests of others as is possessed by the normal person in the community."[30] Seavey's emphasis on knowledge and intelligence intimates that the virtue Aristotle called *phronesis*, Aquinas called *prudentia*, Smith called prudence, and Foot calls practical wisdom—the virtue of deliberating wisely about what ends contribute to human flourishing and how to achieve them—is a trait valorized in American negligence law.

29. Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 89 (1942).
30. *Id.* at 88.

B. *Benevolence and Care: In Virtue Ethics and in Tort Law*

Both Terry and Seavey discuss a general regard for others' interests as well as one's own when they interpret the meaning of negligence. In contrast, early virtue ethicists did not delineate a virtue of caring generally about others' welfare, although Aquinas did introduce to Aristotelian ethics the virtue of beneficence, a disposition to give to others, particularly those connected to oneself.[31] The idea of a more general disposition to care about others' well-being, even if not to always actively promote it, enters virtue ethics through the British moral tradition, especially in the work of David Hume and Adam Smith. These philosophers also expressly understood one's character traits to shape one's particular evaluative perspective on the world, both framing how one views any given situation and how one responds to it, especially on an emotional level.

Hume attributed to people sympathy, a psychological tendency to share, literally, other people's feelings.[32] In a Humean moral psychology, sympathy functions as the engine of benevolence. If we literally feel other people's feelings, we will be disposed to care about how they feel because our own feelings vary accordingly. Thus, we will be disposed to act to promote good feelings in others so that we may, through the mechanism of sympathy, enjoy good feelings ourselves. As in Hume's theory, sympathy is foundational to Adam Smith's account of the moral. Smith begins his treatise *The Theory of Moral Sentiments* by noting our tendencies toward sympathy and benevolence: "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it."[33]

31. Aristotle delineated other-regarding virtues (generosity, magnificence, mildness, friendliness, truthfulness, and wit), but apparently did not recognize a disposition to care about humankind in general. Aristotelian other-regarding virtues pertain to dispositions relevant to the treatment of acquaintances and friends, those with whom one comes into direct contact. Aquinas identifies a virtue of beneficence, a disposition to affirmatively bestow benefits on others. AQUINAS, *supra* note 18, at 538. Although Aquinas held that beneficence sometimes calls for "succour[ing]" a stranger, *id.*, he thought beneficence is usually directed toward those with whom one is connected, by ties of family, citizenship, or faith. *Id.* Aquinas seems to hold that under certain circumstances beneficence disposes us to affirmatively give to or aid strangers, but that these circumstances are rare. "[B]eneficence follows on love.... [B]eneficence also should extend to all, but according as time and place require; for all acts of virtue must be modified with a view to their due circumstances." *Id.* at 537.

32. DAVID HUME, A TREATISE OF HUMAN NATURE 316 (L. A. Selby-Bigge & P. H. Nidditch eds., 2d ed. 1978) (1888).

33. SMITH, *supra* note 7, at 9.

Unlike Hume, though, Smith does not think that we care about the happiness of others because we actually share directly their feelings. "As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation."[34]

Smithean sympathy operates because we can conceive of ourselves in the situation of another and then appreciate how he would feel. "Sympathy, therefore, does not arise so much from the view of the passion, as from that of the situation which excites it."[35] Sympathy leads us to put our own interests and feelings into a broader social perspective.

> [A]s nature teaches the spectators to assume the circumstances of the person principally concerned, so she teaches this last in some measure to assume those of the spectators. As they are continually placing themselves in his situation, and thence conceiving emotions similar to what he feels; so he is constantly placing himself in theirs, and thence conceiving some degree of that coolness about his own fortune, with which he is sensible that they will view it. As they are constantly considering what they themselves would feel, if they actually were the sufferers, so he is as constantly led to imagine in what manner he would be affected if he was only one of the spectators of his own situation. As their sympathy makes them look at it, in some measure, with his eyes, so his sympathy makes him look at it, in some measure, with theirs, especially when in their presence and acting under their observation: and as the reflected passion, which he thus conceives, is much weaker than the original one, it necessarily abates the violence of what he felt before he came into their presence, before he began to recollect in what manner they would be affected by it, and to view his situation in this candid and impartial light.[36]

Sympathy sets the stage for benevolence by inspiring people to conceive of other people's feelings and to efface their conceptions of their own feelings. Benevolence tempers the prudential disposition to promote our own flourishing exclusively rather than aid the flourishing of others.

While Smith, like Hume, thinks that sympathy operates most powerfully with regard to those whom we directly and regularly encounter, he does not preclude its extension to strangers. Not only does Smith think we sympathize with fellow members of our society

34. *Id.*
35. *Id.* at 12.
36. *Id.* at 22.

whom we do not personally know, but he also believes "our good-will is circumscribed by no boundary, but may embrace the immensity of the universe."[37] He claims that, via our imagination, our benevolence extends potentially universally. "We cannot form the idea of any innocent and sensible being, whose happiness we should not desire, or to whose misery, when distinctly brought home to the imagination, we should not have some degree of aversion."[38] This desire for others' happiness and aversion to their misery disposes us to act benevolently toward strangers, to those whose emotions we do not directly observe—so long as we "form an idea" of them.

III. JUDGMENTS OF NEGLIGENCE: THOUGHT EXPERIMENTS IN PRUDENCE AND DUE CARE

Virtue ethicists recognize that we do not always act in accord with the virtues available to us. But according to virtue ethics, we naturally have the capacity to see what these traits ask of us. We can take up the perspective of a virtuous person to see how she would conduct herself in a particular situation. The more naturally certain virtues come to us, the more easily we can inhabit the perspective they define. In the previous section I discussed two traits that virtue ethicists have thought particularly amenable to human beings: prudence and benevolence. I noted that expositors of the civil negligence standard seem to presuppose that actions arising from or in accord with these traits are not negligent. In this section I discuss how jurors can take up the evaluative perspective defined by prudence and benevolence to ascertain the particular actions to be expected from a person of these virtues.

In a civil negligence trial, the judge instructs the jury on the nature of negligence, using definitions such as the following. Note especially that these instructions make no mention of cost-benefit or risk utility analysis[39] nor any sort of Kantian measure according to

37. *Id.* at 235.

38. *Id.*

39. Stephen Gilles has explored the significance of the divergence between commentators' commitment to a Learned Hand cost-benefit approach to negligence and the actual instructions given to jurors in negligence cases. Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994). Gilles argues that, if courts are committed to a cost-benefit approach to evaluating negligence, they should modify jury instructions to explicitly direct the jury to perform this sort of analysis, calling the Hand Formula "an unjustifiably underenforced norm." *Id.* at 1020. I reject this conclusion since I take the persistence of jury instructions such as those quoted in the text as evidence that the Hand Formula is not the norm that governs negligence law.

which nonnegligent action would be action whose underlying maxim could be universalized to all rational beings.

> Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.[40]

> Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.[41]

> Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of agencies under one's control.[42]

These instructions typify those given throughout American jurisdictions.[43] According to such instructions, to decide whether a defendant acted negligently, jurors must compare his or her conduct to the

40. 1A COMMITTEE ON PATTERN JURY INSTRUCTIONS ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL NO. 2:10 (3d ed. 1999).

41. 1 CALIFORNIA JURY INSTRUCTIONS CIVIL NO. 3.10 (8th ed. 1994).

42. FEDERAL JURY PRACTICE & INSTRUCTION § 80.03 (5th ed. forthcoming 2000).

43. *See, e.g.*, PATTERN CIVIL JURY INSTRUCTION COMM., ALASKA PATTERN CIVIL JURY INSTRUCTIONS 3.03A (1988) ("Negligence may consist of doing something which a reasonably prudent person would not do, or it may consist of failing to do something which a reasonably prudent person would do."); ARKANSAS SUPREME COURT COMM. ON JURY INSTRUCTIONS—CIVIL, ARKANSAS MODEL JURY INSTRUCTIONS: CIVIL NO. 301 (4th ed. 1999) ("[Negligence is] the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do . . . ."); ILLINOIS SUPREME COURT COMM. ON JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS NO. 10.01, at 10-7 (3d ed. 1993) (Negligence is failing to do what "a reasonably careful person would do," or doing what such a person would not do.); 1 SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTIONS NO. 2.1 (1970) (Negligence is "the failure to do something which a reasonably prudent person, guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do; or the doing of something which such a person, under such circumstances, would not do."); WASHINGTON SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL NO. 10.01 (3d ed. 1989) (Negligence is "the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.").

exemplar formulated in tort doctrine. Jurors must engage in a thought experiment of a kind: they must ascertain the conduct of a fictional person possessed of particular ethical traits in circumstances like those the actual defendant faced when he or she[44] acted in a way that ultimately caused injury to another person. This thought experiment produces something akin to a prediction of an actual person's behavior in situations where his or her conduct has the potential to injure other people. The completion of the thought experiment yields, I argue below, a politically legitimate, normative expectation that proscribes or permits that particular conduct in similar situations.

Philosophers of mind have advanced two theories about how people might conduct the sort of thought experiment called for by the jury instructions given in negligence actions—that is, how people might cognize in order to predict other people's actions. The older theory, folk psychology, claims that people assume that other people have contentful attitudes that cause them to act in specific ways.[45] That is, when we anticipate another person's actions, we attribute to them certain beliefs, desires, and other attitudes that then move them to act one way or another. When we interpret an action somebody has already taken, we do so by assuming that particular beliefs, desires, and attitudes moved them to act in that particular way. Either way, we view the other person more or less independently of our own beliefs, desires, and attitudes, arriving at predictions and interpretations by making definite hypotheses about the content of their beliefs, desires, and attitudes and postulating a causal role for them.

An alternative theory, simulation theory,[46] accords more closely with Smith and Hume's understanding of how people relate to one another, and, therefore, may accord more readily with a virtue ethics approach to predicting and understanding how a virtuous person acts.

44. For the moment I set aside the matter of a corporate defendant, which would be neither a he nor a she but an it.

45. *See* HENRY PLOTKIN, EVOLUTION IN MIND: AN INTRODUCTION TO EVOLUTIONARY PSYCHOLOGY 200-06 (1998) (discussing our skills as "natural psychologists" and advancing an evolutionary explanation for the emergence of such a talent in humans); STEPHEN P. STICH, DECONSTRUCTING THE MIND 115-31 (1996) (explaining the conventional, philosophical account of folk psychology).

46. For good discussions of simulation theory, see Alvin I. Goldman, *Empathy, Mind, and Morals*, *in* MENTAL SIMULATION: EVALUATIONS AND APPLICATIONS 185, 185-99, (Martin Davies & Tony Stone eds., 1995), and Robert M. Gordon, *Folk Psychology as Simulation*, *in* FOLK PSYCHOLOGY: THE THEORY OF MIND DEBATE 60 (Martin Davies & Tony Stone eds., 1995).

Simulation theorists claim that people interpret and predict another person's actions by imaginatively projecting themselves into the other person's position, imaginatively assuming his traits and feelings. Rather than going through a process of hypothesizing that person's beliefs, desires, and attitudes, we assume his evaluative, emotional outlook and then see how we would act.[47] We imaginatively run our own cognitive capacities from the perspective inhabited by the person we aim to interpret or predict, and thereby reach a conclusion about his or her likely conduct.

Empirically, people may combine the two methods.[48] It might be that, in order to assign beliefs, desires, and attitudes to somebody else in a way that enables successful prediction of her actions, we might first have to imaginatively simulate facing her situation with her traits and feelings. Likewise, it might not be possible to perform this imaginative feat without attributing at least some beliefs, desires, and attitudes to the person one is attempting to simulate. Grant that people folk-psychologize, simulate, or combine the two methods in order to interpret and predict one another's actions. These theories from philosophy of mind suggest how jurors might handle the cognitive demand placed on them by instructions that ask them to meaningfully ascertain the actions of a fictional exemplar of reasonableness, prudence, and due care for the safety of others. The instructions themselves inform the jurors of the relevant characteristics of the person they must imagine. A trial gives jurors information about the specific circumstances they should assume the exemplar faces as well as information about the beliefs, desires, and goals the defendant had when she was in those circumstances. Then, via folk psychology, simulation, or both, jurors arrive at conclusions about how a reasonably prudent, duly careful person would have acted in those circumstances.

A jury verdict in a negligence action constitutes a communal

47. Gary Klein and his associates have researched the role of mental simulation in predicting events other than human actions. GARY KLEIN, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS 45-109 (1998). Klein argues that in crises, successful decisionmakers rely on mental simulation to predict the different outcomes that would follow from different decisions. *Id.* at 45, 51, 89. He also argues that mental simulation results in better decisions than following rational choice strategies, at least for experienced decisionmakers. *Id.* at 96, 102-03.

48. Psychological research may confirm one or the other models advanced by philosophers of the mind, or it may inspire them to devise new models. *See* PLOTKIN, *supra* note 45, at 214 (concluding that contemporary research in developmental psychology tends to confirm that we have a "theory of mind mechanism," a domain-specific module for understanding and predicting the actions of other human beings). Note that such a mechanism could involve the attribution of intentional attitudes to others, simulation, or a combination of the two.

normative expectation based on the counterfactual prediction the jury made in applying the negligence standard. Whenever we predict one another's behavior, we develop expectations based on those predictions, expectations that may be met or disappointed. This gives expectations normative force, the capacity to guide others to act in accordance with them. The expectation of conduct embodied in a judgment of negligence or nonnegligence clearly has legally normative force: it informs members of the society of what sorts of conduct will generate a legally enforceable requirement that an injurer compensate a victim. What gives ethical normative force to the expectation implied by a jury's judgment of negligence is that this expectation arises from a counterfactual prediction of the conduct of how a person with specifically ethical traits—ordinary prudence and due carefulness—would behave.

Viewing the jury as performing a particular epistemic and political function when it conducts a thought experiment about how a person possessed of particular virtues would act in certain circumstances also bolsters virtue ethics as a moral theory. Within moral philosophy, virtue ethics has been vulnerable to the complaint that it lacks definitive prescriptivity because virtue ethics requires an interpreter—generally the virtuous person—to translate virtuous dispositions into specific actions. This has led some philosophers to argue that virtue ethics cannot supply a complete moral theory since a moral theory must not only tell us what character traits to have but also what actions to take. The law's treatment of the virtue-based negligence standard, however, provides virtue ethicists with a response to this criticism. Virtue ethics can arrive at prescriptivity when it is operationalized. Even if there is no formulaic way to deduce appropriate actions from definitions of the virtues, tort law's thought-experiment procedure for inferring specific prescriptions based on the possession of particular virtues in particular situations shows that virtue-based evaluative inquiry can yield specific prescriptions for or against particular acts.

IV. ACCOUNTING FOR THE ABSENCE OF VIRTUE ETHICS IN CONTEMPORARY TORT THEORY

Perhaps tort theory of the past fifty years has overlooked virtue theory because many tort theorists appear to think of negligence law as fundamentally concerned with either furthering justice or efficiency. Actually, that statement oversimplifies the current

landscape of American tort law scholarship. Some tort scholars have not attempted such univocal interpretations.[49] Others accept that tort law serves a variety of purposes, but highlight one particularly.[50] Still others claim that although it may seem that tort law concerns itself with multiple objectives—for example, justice and efficiency—these apparently different goals actually collapse into one.[51] Nevertheless, the basic claim stands: issues of justice and efficiency have dominated tort theory of the late twentieth century, with the result that tort theorists have not attended to the virtues of prudence and due care for other people's safety, the virtues specified in the tort law's actual negligence standard.[52]

Tort theorists of the 1960s and 1970s picked up on then-current developments in political philosophy and economics. To appreciate this era of tort law scholarship, it helps to examine more closely the state of political philosophy and economics in the late 1960s and early 1970s. The centerpiece of this study is John Rawls' landmark book, *A Theory of Justice*, published in 1971.[53] In this work, Rawls compiled

49. *See, e.g.*, Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 930-31 (1981) (rejecting either an exclusively economic or exclusively moral interpretation of tort law's "fault" principle); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1819-24 (1997) (arguing that both economic and ethical considerations underwrite tort law's liability standards); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 607 (1992) ("In light of all the tensions that are possible between ethical and economic approaches to tort law, what is distinctive about the negligence standard is that it achieves a certain synthesis of fairness and deterrence values.").

50. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24-26 (1970) (claiming that accident law should serve both justice and economic efficiency, but delaying discussion of justice in favor of focusing on the reduction of the costs of accidents); JULES L. COLEMAN, RISKS AND WRONGS 198 (1992) (claiming that corrective justice is the core purpose of tort law, although not its only purpose).

51. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1983). In chapters three and four, Posner argues that the traditional concerns animating justice, such as autonomy and equality, can best be vindicated by law that aims for wealth maximization. *Id.* at 48-115. Posner relies on a theory of hypothetical consent to support this claim, arguing that uninjured people would agree to law that maximizes wealth and that negligence law achieves this aim. Therefore, Posner concludes that those who are actually injured do not suffer a loss of autonomy if they go uncompensated under a negligence regime. *Id.* at 88-101, 103-06.

52. Richard Epstein's early tort scholarship provides a counterexample. There, Epstein attempted a tort theory premised on formal ideas of Aristotelian corrective justice. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). In his later work, however, he has been increasingly influenced by the idea of tort law as a tool for efficient welfare maximization. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 97 (1995) ("Efforts to refine and apply strong moral intuitions often lead to inquiries with a distinct economic cast . . . ."). According to Epstein, economic welfare militates in favor of strict liability in tort. *Id.*

53. JOHN RAWLS, A THEORY OF JUSTICE (1971). *A Theory of Justice* exerted influence over legal theorists outside of tort scholarship. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 151-83 (1977); Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500

ideas he had been exploring in publications that appeared throughout the 1950s and 1960s. Finally, in *A Theory of Justice*, Rawls presented both a decision procedure for selecting principles of distributive justice for the basic structure of society and two substantive principles, which he argued would emerge from applying this procedure.[54] Rawls explicitly fashioned the proposed decision procedure to vindicate and guarantee commitments to a Kantian conception of personhood, with its emphasis on autonomy and rational agency. The principles Rawls claims would be chosen by his Kantian decision procedure place principles of liberty and equality above considerations of efficient utility or welfare maximization. Rawls' theory of justice, therefore, rivals both utilitarian and economic approaches to social policy.

Both in *A Theory of Justice* and in his subsequent writings, Rawls has insisted that neither the Kantian decision procedure nor the two principles of justice apply beyond the basic structure of society. Whether common law doctrines fall within the basic structure is a difficult question, one Rawls himself does not address.[55] In any event, in 1972, torts scholar George Fletcher published *Fairness and Utility in Tort Theory*,[56] a piece with a decidedly Rawlsian flavor. Fletcher introduces "the paradigm of reciprocity,"[57] which he summarizes as a "principle of fairness": "all individuals in society have the right to roughly the same degree of security from risk."[58] Fletcher then overtly places this principle in relation to Rawls:

> By analogy to John Rawls' first principle of justice, the principle might read: we all have the right to the maximum amount of security compatible with a like security for everyone else. This means that we are subject to harm, without compensation, from background risks, but that no one may suffer harm from additional risks without recourse for damages against the risk-creator. Compensation is a surrogate for the individual's right to the same

(1973); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

54. These are well-known, and I will simply restate them here. The first, lexically prior principle is the equality principle, which requires equality in the assignment of basic rights and duties. The second is the difference principle, which allows social and economic inequalities only if they improve the situation of the least well-off. Justice as fairness, Rawls' substantive theory of justice, requires that the basic structure of society conform to these principles. *See* JOHN RAWLS, POLITICAL LIBERALISM 273 (1993).

55. *See* Heidi Li Feldman, *Rawls' Political Constructivism as a Judicial Heuristic: A Response to Professor Allen*, 51 FLA. L. REV. 67, 76-78 (1999) (analyzing when, if ever, common law falls within the basic structure of society on a Rawlsian view of the basic structure).

56. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

57. *Id.* at 543.

58. *Id.* at 550.

> security as enjoyed by others. But the violation of the right to equal security does not mean that one should be able to enjoin the risk-creating activity or impose criminal penalties against the risk-creator. The interests of society may often require a disproportionate distribution of risk. Yet, according to the paradigm of reciprocity, the interests of the individual require us to grant compensation whenever this disproportionate distribution of risk injures someone subject to more than his fair share of risk.[59]

Fletcher's label—the paradigm of reciprocity—can be a bit confusing because Rawls himself considers his first principle of justice a principle of reasonableness. Nonetheless, Fletcher, like Rawls, means to contrast a principle of fairness with principles of utility or welfare maximization. Fletcher's paradigm of reciprocity opposes the paradigm of reasonableness, which he regards as a fundamentally utilitarian framework.

According to Fletcher, the paradigm of reasonableness in tort law emerged in the nineteenth century.

> The new paradigm challenged the assumption that the issue of liability could be decided on grounds of fairness to both victim and defendant without considering the impact of the decisions on the society at large. It further challenged the assumption that victim's right to recovery was distinguishable from the defendant's duty to pay.
>
> . . . .
>
> The core of this revolutionary change was a shift in the meaning of the word "fault." . . . Recasting fault . . . into an inquiry about the reasonableness of risk-taking laid the foundation for the new paradigm of liability. It provided the medium for tying the determination of liability to maximization of social utility, and it led to the conceptual connection between the issue of fault and the victim's right to recover.[60]

Fletcher concludes that the reasonable person standard is a vehicle for utilitarian social policy.

> The reasonable man became a central, almost indispensable figure in the paradigm of reasonableness. By asking what a reasonable man would do under the circumstances, judges could assay the issues both of justifying and excusing risks. Reasonable men, presumably, seek to maximize utility; therefore, to ask what a reasonable man would do is to inquire into the justifiability of the risk.[61]

I reject Fletcher's conclusory connection between the reasonable

59. *Id.* at 550-51.
60. *Id.* at 556-57.
61. *Id.* at 560.

person standard and utilitarianism. Grant that the reasonable person of ordinary prudence who acts with due care for the safety of others emerged as the negligence regime's central standard during the nineteenth century. As I noted at the outset of this Article, the full language of the standard does not invoke utilitarianism, and we need not automatically substitute the neoclassical economically rational actor for the reasonable person represented in tort law. Nothing compels tort theory to include neoclassical economics' controversial conception of rationality, according to which acting rationally just amounts to efficiently maximizing preference satisfaction.[62] In a sense, Fletcher realizes this, attempting to advance a nonutilitarian theory of negligence law. But his effort seems blindered. *Fairness and Utility in Tort Theory* reads as if a Rawlsian interpretation of negligence law was the only conceivable alternative to a utilitarian approach. Had Fletcher paid attention to the full doctrinal representation of the reasonable person, which depicts her as not only reasonable but also prudential and concerned for the safety of others, Fletcher might have noticed that negligence law invites attention to certain virtues and hence to virtue ethics.

Fletcher was not alone in his neglect of the full doctrinal representation, however. He was presenting his theory to rival the burgeoning law and economics movement in tort theory, a movement whose central and primary expositor, Richard Posner, did cast the reasonable person standard in neoclassical economic terms, and hence in the utilitarian tradition. In 1972, Posner published *A Theory of Negligence*,[63] another landmark in tort theory. A progenitor of the law and economics interpretation of American tort law, Posner argued that the "dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety."[64] He summarized his theory as follows.

> Under this view, damages are assessed against the defendant as a way of measuring the costs of accidents, and the damages so

62. I have argued this point elsewhere. *See* Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567 (1997). Many philosophers and some economists have criticized the neoclassical economic conception of rationality. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 201-02 (1993); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, *in* BEYOND SELF-INTEREST 25, 42-43 (Jane J. Mansbridge ed., 1990). Legal scholars have also offered critiques. *See* Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

63. Posner, *supra* note 28.

64. *Id.* at 33.

> assessed are paid over to the plaintiff (to be divided with his lawyer) as the price of enlisting their participation in the operation of the system. Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case where in which the cost of prevention would have exceeded the cost of the accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.
>
> If indignation has its roots in inefficiency, we do not have to decide whether regulation, or compensation, or retribution, or some mixture of these best describes the dominant purpose of negligence law. In any case, the judgment of liability depends ultimately on a weighing of costs and benefits.[65]

In this synopsis, Posner advances an economic interpretation of the negligence regime. Then, in an effort to connect this interpretation to the moral dimension of tort law, Posner claims that inefficient actions provoke moral indignation.

Posner may have been following J. S. Mill's lead, suggesting that our usual moral sentiments, which we generally do not consciously consider to be driven by utilitarian or economic concerns, are in fact driven by such concerns.[66] Or, as Posner himself argued in later work, he may have been associating our supposed moral indignation over inefficiency with a quasi-Kantian concern that inefficient social policy interferes with every citizen's autonomy.[67] Posner may even be a latent virtue theorist, claiming that parsimony, possibly a moral virtue, accounts for moral indignation over inefficiency.[68] Posner himself has never satisfactorily related his theory of American negligence law to any moral theory, so he has never delivered an

65. *Id.* at 33-34.

66. In chapter five of *Utilitarianism*, Mill addresses our feelings of justice and injustice, and argues that, despite appearance and intuitions to the contrary, these feelings spring from the utility of just action and the disutility of unjust ones. *See* JOHN STUART MILL, UTILITARIANISM 42 (Samuel Gorovitz ed., 1971) (1861).

67. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

68. Posner's commitment to virtue ethics may not be so latent. When defending wealth-maximization, an ethical goal, he writes, "[T]he wealth-maximization principle encourages and rewards the traditional 'Calvinist' or 'Protestant' virtues and capacities associated with economic progress." POSNER, *supra* note 51, at 68. Ultimately, however, Posner seems to maintain wealth-maximization as a moral good justifiable on grounds independent of any major philosophical tradition, including virtue ethics, Kantianism, and utilitarianism. *See id.* at 115 ("I have tried to develop a moral theory that goes beyond classical utilitarianism and holds that the criterion for judging whether acts and institutions are just or good is whether they maximize the wealth of society. This approach allows a reconciliation among utility, liberty, and even equality as competing ethical principles.").

adequate philosophical—or psychological—diagnosis for why we should experience moral indignation when faced with inefficient accidents. Whatever the connection between moral theory and Posner's economic interpretation of the negligence regime, Posner, like Fletcher, never discusses the virtues of prudence and regard for others' safety, traits specifically itemized in negligence law's distinctive standard of care. Posner characterizes his ambition as follows: to "formulate and test . . . a theory to explain the social function of the negligence concept and of the fault system of accident liability that is built upon it."[69] Along the way, though, Posner overlooks the exact doctrine at the heart of American negligence law.

Other scholars who associated tort law with economics moved even further away from the reasonable person standard. In 1970, Guido Calabresi published a path-breaking book, *The Cost of Accidents: A Legal and Economic Analysis*.[70] Calabresi asserted that "the principle goals of any system of accident law [are that] it must be just or fair [and] it must reduce the costs of accidents."[71] Unlike Posner, Calabresi did not equate or reduce the justness or fairness of tort law to economic efficiency: "An economically optimal system of reducing accident costs . . . might be totally or partially unacceptable because it strikes us as unfair, and no amount of discussion of the efficiency of the system would do much to save it. Justice must ultimately have its due."[72] But unlike Fletcher, Calabresi chose to set aside questions of distributive justice in pursuit of a prescription for an economically efficient accident law:

> But if the elusiveness of justice cannot justify ignoring the concept, it at least justifies delaying discussion of it. . . . Apart from the requirements of justice, I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.[73]

In somewhat simplified terms, here is Calabresi's view of how to achieve this goal: tort law should assign liability for the cost of an accident to the party who was in the best position to prevent the accident at the least expense, regardless of how carefully or carelessly that party acted at the time of the accident. Now, the reasonable person standard is a measure of care, so it plays no role in Calabresi's

69. Posner, *supra* note 28, at 29.
70. CALABRESI, *supra* note 50.
71. *Id.* at 24.
72. *Id.* at 25-26.
73. *Id.* at 26.

theory of accident law. So Calabresi cannot be properly criticized for neglecting to attend to the virtues assigned to the reasonable person in the American negligence regime. But his theory does support my claim that the tort theorists of the 1970s were concerned primarily with distributive justice or economic efficiency, with Calabresi representing the latter concern. In Rawlsian spirit—and like Fletcher—Calabresi conceived of tort law as furthering either economic efficiency or distributive justice. Framing the choice this way invites one to ignore the virtues highlighted in the reasonable person standard.

By the 1980s, some tort theorists—Jules Coleman and Ernest Weinrib in particular—noticed that the previous decade's focus on the distributive justice and economic efficiency of American tort law overlooked one quite distinctive feature of the system: traditional American tort litigation revolves around a particular victim seeking compensation from a particular injurer, a paradigmatic scenario of corrective justice. Scholars such as Coleman and Weinrib stressed the place of corrective justice in tort law and theory.

Weinrib quite explicitly combines "a Kantian content" with an "Aristotelian corrective justice structure" to develop "[a] moral conception of negligence in tort law."[74] Weinrib's emphasis on a Kantian content aligns him with the previous decade's primary expositor of a moral conception of negligence, George Fletcher, although Weinrib's theory differs from Fletcher's in a number of respects. Fletcher maintained that the reasonable person standard is primarily utilitarian, promoting wealth maximization at the expense of individual autonomy. Weinrib claims that the reasonableness element in the tort standard should be read as a reference to a Kantian conception of reason, according to which reason itself requires that we treat each other as equals in a kingdom of ends. In this setting, one who injures another disturbs the parity between equals who regard one another as ends in themselves, and this disturbance gives rise to an obligation on the part of the injurer to restore parity by compensating the injured.

Jules Coleman's views on corrective justice and its place in tort law defy easy characterization. Admirably, Coleman has continued to develop and refine his position since he first presented his own affirmative account of American tort law in the 1980s. Through

74. Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 37 (1983).

debate and exchange with fellow thinkers such as Posner, Fletcher, and Weinrib, Coleman has continuously sought to improve his own ideas. In this Article, I take the liberty of freezing Coleman's thoughts, based on his presentation of them in *The Mixed Conception of Corrective Justice*, a chapter in his 1992 book, *Risks and Wrongs*.[75]

Although Coleman differs from Weinrib in that he believes that accident law implements both economic and moral principles and policies, Coleman shares with Weinrib the belief that the structure of tort law embodies corrective justice, a noninstrumental dimension of American tort law. According to Coleman, "*Corrective justice imposes on wrongdoers the duty to repair the wrongful losses their conduct occasions, losses for which they are responsible.*"[76] He explains:

> Corrective justice has two dimensions. First, losses are the concern of corrective justice if they are wrongful. They are wrongful if they result from wrongs or wrongdoings. The wrong grounds the claim that the losses are wrongful (and thus within the ambit of corrective justice.) Secondly, the duty to repair those wrongful losses is grounded not in the fact that they are the result of wrongdoing, but in the fact that the losses are the injurer's responsibility, the result of his agency.[77]

As we can see from this passage—and as Coleman himself acknowledges—this theory of corrective justice cannot be complete unless augmented by an account of wrongfulness. In other words, Coleman must explain what makes a loss wrongful. In *Risks and Wrongs*, he pursued this task in the chapter immediately following *The Mixed Conception of Corrective Justice*, in a fascinating chapter titled *Wrongfulness*.[78]

For Coleman, corrective justice poses a problem: if corrective justice is neither a vehicle of distributive justice nor of economic efficiency, it must be grounded in a distinctive conception of wrongfulness, one that differs from the wrongfulness suggested by theories of distributive justice (inequity in distribution) or utilitarian economic theories (inefficiency in utility production).[79] To count as a distinct and legitimate form of justice, corrective justice must influence our substantive theory of wrongfulness; and, furthermore, this influence must differ from that exerted by distributive justice or

75. COLEMAN, *supra* note 50, at 303-28.
76. *Id.* at 325.
77. *Id.* at 326.
78. *Id.* at 329-60.
79. *Id.* at 350.

utilitarianism.

Whereas distributive justice and social efficiency are global aims according to Coleman, corrective justice is justice between private parties, based on local norms.

> [These local norms are] informal conventions [that] typically arise within communities of individuals as ways of giving local expression and content to the prohibition against unreasonable risk taking. These conventions govern the behavior of local communities; members of the communities develop expectations about the behavior of others and internalize constraints regarding their own behavior. These conventions are local, not global. It is failure to comply with them that typically grounds duties in corrective justice.[80]
>
> . . . .
>
> *The core idea in the rule of negligence is that of a convention giving expression to a common understanding of reasonable behavior.*[81]

With this statement, Coleman aligns himself with his fellow tort theorists of the 1970s and 1980s. Like them, he focuses on the reasonableness element of the reasonable person standard: to the extent his account of negligence law incorporates a theory of corrective justice, this theory does not examine the place of the virtues of prudence and due care for the safety of others, character traits tort doctrine assigns to the reasonable person whose conduct sets the standard of care required of all members of the community.

Since corrective justice is a concept that originates with Aristotle, whom I have already noted as the central forefather of the virtue ethics tradition, some might conclude that torts scholars who have focused on corrective justice have indeed focused on virtue ethics. Yet Aristotle himself did not seriously connect his theory of corrective justice with his theory of virtue ethics. This perhaps accounts for the fact that modern-day advocates of a place for corrective justice in tort law and theory have not pursued virtue ethics.

In *Nichomachean Ethics*, Aristotle develops a quite complicated relationship between justice and the virtues. The complexity of this relationship is exacerbated by the complexity of Aristotle's conceptions of both justice and virtue. I am not a specialist in Aristotelian philosophy, nor would it be consistent with this Article's objectives to attempt a full exegesis of Aristotle's account of these

80. *Id.* at 358.

81. *Id.* at 359 (emphasis added).

matters. Instead, I will provide a more schematic explication in order to clarify my claim that attention to corrective justice does not necessarily coincide with attention to particular virtues or to the virtue ethics tradition.

Aristotle discusses justice in Book V of *Nichomachean Ethics*,[82] after his discussion of flourishing as the highest good for human beings (the subject of Book I) and his discussion of virtues of character (in Books II, III, and IV). When Aristotle turns to the topic of justice, he first distinguishes justice as lawfulness from justice as fairness.[83] He then immediately turns to fairness and claims that an unjust person is greedy, for he will always choose more goods to fewer without regard to equality in distribution.[84] Aristotle proceeds to outline justice as lawfulness, however, he quickly sets aside this sense of justice to return to a discussion of justice as fairness. It is in the course of this extended discussion of justice as fairness that Aristotle distinguishes distributive justice from rectificatory (corrective) justice.

> One species [of justice] is found in the distribution of honours or wealth or anything else that can be divided among members of a community who share in a political system; for here it is possible for one member to have a share equal or unequal to another's.
>
> Another species concerns rectification in transactions. This species has two parts, since one sort of transaction is voluntary, and one involuntary. Voluntary transactions include selling, buying, lending, pledging, renting, depositing, hiring out—these are called voluntary because the origin of these transactions is voluntary. Some involuntary ones are secret, e.g. theft, adultery, poisoning, pimping, slave-deception, murder by treachery, false witness; others are forcible, e.g. assault, imprisonment, murder, plunder, mutilation, slander, insult.[85]

After these passages, Aristotle elaborates on his views concerning distributive justice, and then turns to an explication of rectificatory justice.

The most central difference, according to Aristotle, between distributive justice and rectificatory justice is that the just distribution of common assets should accord with each individual's proportion of virtue, whereas rectificatory justice does not depend upon total character assessment.

82. ARISTOTLE, *supra* note 7, at 116-47 (lines 1129a-1138b10).
83. *Id.* at 117 (line 1129b).
84. *Id.* at 118 (line 1129b10).
85. *Id.* at 122 (lines 1131a1-1131a10).

> For here [in rectificatory justice] it does not matter if a decent person has taken from a base person, or a base person from a decent person, or if a decent or a base person has committed adultery. Rather, the law looks only at differences in the harm [inflicted], and treats the people involved as equals, when one does injustice while the other suffers it, and one has done the harm while the other has suffered it. Hence the judge tries to restore this unjust situation to equality, since it is unequal.[86]

This passage simultaneously sets the tone for the remainder of Aristotle's account of rectificatory justice and connects this account to his overall view of justice as a type of equality. He notes that rectificatory justice redresses not only theft but also other types of unfair taking, such as "when one is wounded and the other wounds him, or one kills and the other is killed."[87] In these situations "the action and the suffering are unequally divided [with profit for the offender and loss for the victim]; and the judge tries to restore the [profit and] loss to a position of equality, by subtraction from [the offender's] profit."[88] Aristotle himself notes that "profit" is not always "the proper word" to describe the wrongdoer's gain in situations calling for rectificatory justice, but he explains that he is using the term in a somewhat expansive sense: "At any rate, when what was suffered has been measured, one part is called the [victim's] loss, and the other the [offender's] profit."[89] The judge charged with accomplishing rectificatory justice must ensure that both the victim and the offender—or injurer, to use modern parlance—have the same amount of loss and gain, in relation to one another, that each had prior to the incident that created the rectificatory injustice. Rectificatory justice requires a return to the mean between the victim and the offender—a restoration in equality between the two. This equality is to be measured according to the bilateral status quo ante between victim and injurer, regardless of their specific character traits. Modern tort theorists who have concentrated on corrective justice have followed Aristotle's lead here. Ernest Weinrib and Jules Coleman have each assigned corrective justice a prominent role in tort theory. But, like Aristotle himself, neither have incorporated attention to the virtues into their accounts of the role of corrective justice in tort law.

86. *Id.* at 125 (lines 1132a3-1132a8).
87. *Id.* at 125-26 (lines 1132a8-1132a9).
88. *Id.* at 126 (lines 1132a9-1132a11).
89. *Id.*

CONCLUSION: JUDGES, JURIES, AND NEGLIGENCE

Ever since the substantive law of negligence emerged from the old common law forms of action, particularly trespass and trespass on the case, commentators have tried to make sense of the respective role of the judge and the jury in deciding negligence.[90] The current usual assignment of duties at trial, according to which the judge decides questions of law and the jury decides questions of fact,[91] does not fit neatly with the inquiry involved in assessing negligence. Usually, when we think of the jury as factfinder, we think of the jury deciding plain old facts—nonnormative empirical questions, such as whether the light was red or green when the defendant drove through the intersection, or whether or not a technological innovation was available to a product manufacturer when she created her product's design. The inquiry into negligence seems more pervasively evaluative because it requires the jury to apply a standard to facts, to use the standard to evaluate conduct as negligent or nonnegligent, and thereby decide whether the conduct is lawful or unlawful. On a model of division of labor in the legal system that reserves normative questions to the lawgiver—judge or legislature—assigning the question of defendant's negligence to the jury can seem anomalous at best and an evasion of official responsibility at worst.[92]

The virtue-ethical interpretation of the negligence standard conceives of jurors as executing a thought experiment and thereby seeing—or even discovering—how a certain sort of person would behave in a certain situation. The jury's performance of the relevant thought experiment yields a hypothetical but testable result. If we

90. *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., 1963) (1881); LEON GREEN, JUDGE AND JURY 395-417 (1930); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 424-39 (1999).

91. *See* Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 126 (1985) ("Following the American Revolution, the view of the jury as finder of law gave way to the more contemporary view of the jury as finder of fact with the lawmaking function vested in the legislature, and, to a lesser extent, the judiciary.").

92. Oliver Wendell Holmes, Jr., predicted that gradually judges would supplant juries as the decisionmaker on the issue of breach of the negligence standard, a development he wholeheartedly endorsed:

> But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? . . . Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself.

HOLMES, *supra* note 90, at 98.

had available an actual person whose sole traits were reasonableness, prudence, and carefulness, we could, in principle, recreate the circumstances that the defendant faced to find out how this person acts in them. So, the jury's verdict has an empirical dimension, which may alleviate some of the concern that courts and legislatures abdicate their law-giving role by allowing juries to decide the question of negligence.

But the thought experiment performed by the jury essentially involves taking up an evaluative perspective. To the extent that taking up such a perspective involves interpreting the traits that define it—in this case reasonableness, prudence, and carefulness—the thought experiment in a negligence action differs from a more strictly scientific experiment, whether actually performed or performed only in thought.[93] Thus, there remains the issue of the appropriateness of the jury's normative power in a negligence action. An older generation of scholars regarded this assignment of power as an abdication of the lawmaking function of the courts,[94] itself a threat to

93. Scientists do use thought experiments as well as actual ones. One of the most famous ones is Galileo's imagined ball and plane apparatus, which he used to prove inertia. Galileo has us begin by picturing a ball rolling up and down in a U-shaped track resting on a level plane in a frictionless world. The Galilean experiment then asks us to mentally manipulate the apparatus. We fold down one side of the U, notch by notch, until it lies flat along the plane, extending into infinity. As we lower the track, we roll the ball from the high side to the low, until the final roll when one side of the track runs along the plane. Finally, we imaginatively observe the state of the device to see if it teaches us anything. We see that a ball rolled in the U will obey the law of equal heights, always reaching the same height from which it started before reversing course. In our final drop, a ball started from the high side of the former U will run along the side of the track that now is level. Since it will never reach the height from which it was initially dropped, it will continue rolling infinitely. The thought experiment has demonstrated the phenomenon of inertia. *See* ROY A. SORENSEN, THOUGHT EXPERIMENTS 8-9 (1992) (describing Galileo's experiment in detail). Galileo's experiment shows how scientific thought experiments start from a defined situation, have the experimenter mentally manipulate a particular variable, and imaginatively observe what happens to the other parts in the set-up. Both the designer of the thought experiment and others who perform it intend cognitive results. They mean to construct a scenario that others can use to gain information about a specific problem that the designer of the experiment also has in mind. I have been arguing that the reasonable person standard as presented to the jury asks them to solve a particular problem using their abilities to reason about how a certain kind of person would behave in a hypothetical situation, just as Galileo's argument asks us to solve a particular problem by reasoning about how a ball on a track would behave in a hypothetical situation.

94. Oliver Wendell Holmes, Jr., argued:

> [T]he featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances .... [I]t is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court.

HOLMES, *supra* note 90, at 89.

the rule of law.[95]

If we accept the basic principle of democratic self-governance, however, this worry seems rather peculiar. Ordinarily, the idea that responses to nonconstitutional normative questions are political and subject to revision through political processes in which citizens participate raises few eyebrows. If the people have ultimate authority over the law, and law is fundamentally normative, then a process in which ordinary citizens have normative authority seems both commonsensical and easily justifiable. Indeed, in other legal settings, scholars have wrestled to justify judicial lawmaking in light of concerns that it is fundamentally antidemocratic.[96]

In the contemporary academy, many who deride the reasonable person standard criticize it for its supposed indeterminacy, its failure to provide a sufficiently formulaic guide to conduct. These critics tend to prefer an economic interpretation of negligence on the assumption that cost-benefit analyses or social welfare functions are more determinate than the reasonable person standard and therefore can guide conduct more specifically and concretely. Those who make this sort of argument tend to use it to justify dispensing with the jury as the legal decisionmaker on the issue of negligence.[97] In this

95. *See* James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468-82 (1976). Although Henderson's primary target is not the reasonable person standard, he thinks that this approach to tort law is problematically "polycentric" or open-ended, a difficulty that is hidden by having juries apply the standard.

96. In constitutional law scholarship, resolving the "countermajoritarian" problem—the tension between judicial review and democracy—has been called "the central obsession of modern constitutional scholarship." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998). Alexander M. Bickel seems to have introduced the term "countermajoritarian" and articulated an influential encapsulation of the problem in the context of American law and government. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962).

> The root difficulty is that judicial review is a counter-majoritarian force in our system . . . [that] thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic.

Id. at 16-17.

97. *See* Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998).

> Thus we ask: Can the jury perform in a manner so that it serves as an effective societal risk manager? To avoid any pretense of suspense, we believe that this is an extremely difficult function that is often not performed effectively even by the best informed experts. The jury is ill-informed and poorly equipped to perform this function. In our view, effective risk identification and management often requires the application of technical, statistical, and scientific analytic tools that cannot be effectively communicated to the unschooled layperson through expert testimony in adversarial procedures. Furthermore, although an effective risk management policy is founded on the detailed analysis of individual cases (for example, accidents and non-accidents), it

Article, I have attempted to show that, if we emphasize the virtues specified in the negligence standard, we can see that, through repeated applications, jury verdicts provide actors with guideposts to the sort of conduct to be expected from reasonable persons who possess the traits of prudence and due carefulness for the safety of others. One way somebody might anticipate whether her actions conform to this standard is for her to cultivate the relevant traits. Another would be for an actor to at least learn how to take up the evaluative perspective defined by them. In other words, actors who seek to conform to the standard may attempt to do so by cultivating the virtues of prudence and carefulness or by exercising their own capacity to perform ex ante the sort of thought experiment a jury judging their conduct would perform ex post.

Interestingly, the entities perhaps least well-positioned to use these methods to conform their conduct to the negligence standard are corporate persons, who, some might argue, lack the sort of personhood necessary to cultivate character traits or learn to adopt an evaluative perspective informed by certain sentimental responses. For the sake of my final argument in this Article, I will make two assumptions, each of which merit further investigation: first, that corporations as currently structured can readily perform accurate cost-benefit analyses that take into account social costs and benefits as well as private ones; second, that corporations would have to institute different internal procedures and arrangements to conform their conduct to that called for by the evaluative perspective delineated by the negligence standard. Neither individually nor taken together do these premises command a shift from a negligence standard based on the evaluative perspective of natural persons to one based on the evaluative perspective of a corporate one. The law grants corporate persons their existence; the law also governs their actions. If democratic principles warrant the jury's authority to decide what behavior accords with the requirements of prudence and care, then the jury has the authority to demand that corporate persons conform their conduct to that of a reasonable, prudent, careful natural person. This may mean that in effect juries require corporate persons to set aside the objective of welfare maximization

> requires an omnibus consideration of the distribution of cases, probabilities, benefits, and costs. In contrast, the tort jury trial focuses on a single case, sampled from only one of the four cells of a hypothetical risk analysis matrix: the too-few-precautions, harmful outcome cell.

Id. at 902.

in the name of other values—as the Ford Pinto or McDonald's hot coffee juries arguably concluded those corporate defendants should have done. Unless one is precommitted to the view that the only legitimate way to define an appropriate balance between freedom and safety is to strike the balance that maximizes preference satisfaction or social utility, this possibility should seem entirely unthreatening. The law and the citizens who apply it may rightly expect corporate persons to adopt whatever internal procedures are necessary to ensure that their conduct matches the conduct we expect from the reasonable person of ordinary prudence who acts with due regard for the safety of others.