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Gregory C. Keating*

Between absolutism and efficiency

Reply to Professors Geistfeld, Grady, and Priel

The author develops two lines of argument. One line responds to specific objections advanced by my critics and seeks to show that these objections do not undermine the claim that the safety and feasibility standards are rationally justifiable alternatives to cost-justification. This Reply leads, however, with a second line of argument. We are all—consequentialists and non-consequentialists, philosophers and economists—imprisoned in the grip of the debate between utilitarianism and its critics that dominated political philosophy in the latter half of the 20th century. Classical utilitarianism fell into disfavor because its commitment to maximizing utility may justify depriving minorities of basic rights whenever such restrictions promote the greatest net happiness. The cure for this fault is to make some basic rights "absolute"— to rule out some trade-offs entirely. The legacy of this debate is the conclusion that we must choose between "absolutism" and "efficiency". Unattractive as "efficient" trade-offs may be, the absolute prohibition of trade-offs is untenable when risks of physical harm are at issue. The safety and feasibility standards must fail because they are unacceptably absolutist. Once we shake ourselves free of this philosophical legacy we can see that these standards are standards for *making* trade-offs not for forbidding them and that the trade-offs they prescribe are plausible.

Keywords: absolutism, utility, rights, efficiency, negligence, trade-offs, precaution, risk, safety, responsibility, welfare, cost-benefit analysis, priority of avoiding harm

In their thoughtful comments, Professors, Geistfeld, Grady, and Priel raise many important challenges to the arguments that I advance in *Principles of risk imposition and the priority of avoiding harm*.[1] I am grateful to them for engaging with my work and regret that I will not be able to respond to all of their criticisms and comments. I want to begin my response, however, by addressing a submerged assumption that, I think, exerts a powerful gravitational pull over their explicit arguments. The unstated belief that, when risks of harm are at issue, we must choose between efficiency and absolutism shapes how they interpret and criticize my argument.[2] This latent framing of the basic issue supposes that we must choose between forbidding trade-offs whenever loss of life is risked—because life is sacred and its value is beyond all price—or think about risk in utilitarian or economic terms. The only alternative to insisting on the ab-

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1 Keating 2018.

2 In his chapter "Safety" the philosopher Jonathan Wolff (2011: 83–108) epitomizes the conflict between utilitarian and deontological approaches to risk in these terms.

solute priority of safety is to trade safety off against every other good in pursuit of the greatest net social benefit.

Professor Priel's excellent comment—*Do societies prioritize harm prevention?*[3]—displays this assumption in its last footnote, where it cites a paper by Robert J. MacCoun which reports that

> '[m]any [of his] students roll their eyes, shake their heads, or scowl' when confronted with 'expert analyses of the economic valuation of human life' ... [but] 'when asked to explain, they struggle to verbalize their feelings; they find it distasteful to place a value on human life, but they can't say why, and most acknowledge the need for policy analysts to do so.[4]

On the one hand, MacCoun's students recoil at the idea that people's lives are just another consumer good which must be priced implicitly, if not explicitly, and traded off against all other goods in market fashion. Life seems especially important and the market model denies this specialness. On the model of the price system, persons have no value at all; value is imposed upon persons by the valuings that the price system measures. The price(s) that persons and others place on their lives *are* the value of those lives. This mode of valuation flies in the face of a conviction that most, and perhaps all, of Professor MacCoun's students share—namely, that persons *are* intrinsically valuable—and important too.

On the other hand, Professor MacCoun's students do not know how to justify their visceral aversion to cost-benefit analysis of human life, much less how to articulate a practicable alternative to measuring life by a market metric. The alternative implicit in their aversion seems to be "no trade-offs at all". On the face of the matter, forbidding trade-offs is an untenable position. Professor Priel shares this conclusion and, consequently, spends considerable time explaining the attractions of absolutism in terms of the psychological vulnerability of our "moral judgments ... to factors of questionable moral significance."[5] Our inclination to overvalue "identified lives" and undervalue "statistical ones" is one case in point. Our attraction to standards of precaution other than cost-justification is an irrational one.

Professor Grady's thoughtful paper—*Justice luck in negligence law*[6]—reveals its assumption that all trade-offs are cost-benefit type trade-offs when it explains the decision in *Cooley v. Public Service Co.*[7] Plaintiff Cooley was injured when a loud noise came across the telephone line on which she was speaking, to traumatic effect. The noise was caused by the power company's high-voltage line snapping in a storm and making contact with a telephone wire. Plaintiff

3 Priel 2019: 127.
4 Priel 2019: 127 (quoting MacCoun 2000: 1825).
5 Priel 2019: 141.
6 Grady 2019.
7 10 A.H.2d 673 (N.H. 1940).

alleged that the defendant was negligent in failing to either insulate the line or place a mesh basket underneath the uninsulated line, so that if the line broke it would not come in contact with a telephone wire strung beneath it. Grady describes the Court's decision as follows:

> The New Hampshire Supreme Court rejected both untaken precautions under a cost--benefit analysis. The court reasoned ... that both precautions would have increased the risk of electrocution to pedestrians underneath the power lines because they would have tended to keep the power lines live after they had been breached so that a pedestrian would more likely become the ground that would break the circuit and cut off the electricity. Since the increased risk of electrocution would have been greater than the reduction in the risk from noise trauma neither precaution was cost-beneficial and was therefore rejected.[8]

Professor Grady's conclusion that neither of plaintiff's proposed precautions were cost-justified is probably correct. What's striking, though, is not his conclusion but his characterization of the court's reasoning. As he correctly describes the opinion, it compares *risks of harm* and comes to the conclusion that taking either precaution proposed by the plaintiff would risk greater harm. Because either of the plaintiff's proposed untaken precautions would have made the power line *more*, not less, dangerous the defendant's failure to adopt those proposed precautions was justified. The court's reasoning takes safety as its touchstone and concludes that the defendant was not negligent because what it did was safer than what the plaintiff said it should have done.

Professor Grady equates an analysis which proceeds by asking which of three possible precautions produces the most safety with one which takes net benefit all things considered as its criterion of justified precaution. The two analyses are very different.[9] Evaluating precautions by asking which produces the most safety is one way of articulating the priority of avoiding harm. The court's way of proceeding assumes that harm is to be minimized and safety is to be maximized. Evaluating precautions by asking which one is most beneficial, all things considered, is one

8 Grady 2019: 110–11. The assumption that courts are doing cost-benefit analysis whenever they make trade-offs also seems to inform Professor Grady's analysis of Cardozo's opinion in *Adams v. Bullock* at pp. 15–16 of his paper. I find it hard to say whether Cardozo regards insulating the trolley lines as inefficient or infeasible. Neither standard is endogenous to the common law of negligence. If I had to epitomize Cardozo's argument for students, I would say something along the lines of "Cardozo thinks the precaution of insulating the lines would be disproportionately expensive compared to the additional safety that it would supply."

9 The point is nicely illustrated by *Tedla v. Ellman*, 280 N.Y. 124 (1920) and the "emergency rule" of statutory negligence analysis in American law. See, *e.g.*, *Walker v. Missouri Pacific Railway*, 95 Kan. 702 (1915). Both the case and the rule authorize people to depart from statutorily prescribed precautions which otherwise fix the precaution owed when the departures produce *more safety*. They do not authorize departures under a "net benefit" standard. If they did, little would be left of the rule of statutory negligence to which *Tedla* and the emergency doctrine are exceptions. Every statutorily prescribed precaution could be examined to determine if it struck the optimal balance between all costs and all benefits.

way of denying that the avoidance or harm takes priority over the pursuit of ordinary goods. This way of proceeding assumes that all costs and all benefits are fungible at some ration of exchange and that wealth (presumably as a proxy for welfare) is to be maximized. Professor Grady's assimilation of the court's harm-harm comparison to plenary cost-benefit analysis is tenable only on the assumption that cost-benefit analysis is the only plausible framework for making trade-offs. All talk of trade-offs therefore engages in cost-benefit analysis, like it or not.

For its part, *Cost-benefit analysis outside of welfarism*[10], Professor Geistfeld's learned and sophisticated contribution to this Symposium, explicitly detaches cost-benefit analysis from welfarism, but then proceeds to measure the value of precautions and their avoidance in terms of willingness-to-pay and willingness-to-accept. These are market-mimicking metrics. To choose among the safety standard, the feasibility standard, and the standard of cost-justified precaution, we must indeed make judgments about the values of activities and precautions but there is little reason to think that we should make those judgments in market terms and good reason to think that we should not. Willingness-to-pay and willingness-to-accept measure subjective preferences. The feasibility and safety standards call for objective evaluations of the significance of various risks and activities. The fit between the market-mimicking methodology and the normative judgement required by the standards is poor.

In his morally sensitive treatment of "safety"[11] as a problem for the philosophy of public policy, Jonathan Wolff describes the phenomenon that Professor MacCoun noted among his students as a conflict "between two moral standpoints."[12] We feel the pull of both standpoints, and struggle to reconcile them.[13] One standpoint—deontology—pushes us, Wolff thinks, towards an "absolutist" positon on safety. The other—utilitarianism—pushes us towards efficient trade-offs. Insofar as we understand our predicament in these terms, we are on the horns of a dilemma. "The problem with utilitarianism," Wolff writes, is "that, in principle, it can allow the sacrifice of some individuals for the sake of others, and even more tellingly, it can require a very large sacrifice of a small number for the sake of small benefits for the many."[14] The problem with absolut-

10 Geistfeld 2019.

11 Wolff 2011: 83–108.

12 Wolff 2011: 90.

13 "[T]he idea of two sides fighting each other gets things wrong. The struggle is inside each of us. It seems that most people will find themselves torn between both standpoints—flipping over one to the other as aspects come into view. There is ... a very serious moral problem here." Wolff 2011: 93–94. If we extend this observation to "society" it implies that "societies" are torn between these two outlooks. That seems correct to me. Consequently, I agree with Professor Priel that societies don't prioritize harm prevention. They are torn between believing that they should and believing that they shouldn't.

14 Wolff 2011: 91.

ism is that we cannot comfortably embrace it when *risk* of physical harm is at issue—even if the harm risked is death. When it comes to intentional wrongs like rape and murder, "absolutism" has considerable traction. It is perfectly sensible to say that no one should rape or murder anyone else even if it is implausible to assert that *society* should prevent all rapes and murders. But when risk is at stake absolutism seems untenable. If we really thought that no one should put anyone else's life at risk of death or serious harm we would forbid driving, cycling, and perhaps even walking around. So efficiency it must be. There is no third way.

Wolff's framing of our predicament illuminates Professor Priel's conviction that the pull of non-economic approaches to risk is not rationally defensible and must be explained by our psychological predisposition to be misled by factors of "questionable moral significance."[15] Professor Geistfeld's inclination to cash non-welfarist values out through a methodology devised to measure welfare effects also seems to reflect the pull of this unstated framing of the problem. Professor Grady's assimilation of a legal opinion which (as he explains it) takes the minimization of risk of harm as its criterion of justified precaution to the criterion of net benefit economically conceived suggests a set of assumptions which do not permit trade-offs to be made in any other way. We are all drawn to this way of thinking. As Jonathan Wolff shows, both philosophers and economists tend to see the circumstance of risk imposition as one which pits a morally attractive but wholly impractical absolutism against a morally repugnant but workable pursuit of net benefit.

Principles of risk imposition and the priority of avoiding harm is an effort to show that extant legal practices—standards of precaution entrenched in federal law of the United States of America for fifty years now—actually transcend this predicament. Our ability to theorize our own practices, however, may be blocked by what we think theory has shown to be true. Consequently, it may be useful to say more than I did in my original piece about the philosophical background within which this dilemma is embedded and why we might, in fact, be able to move beyond it.

1 THE ALLURE AND IMPOSSIBILITY OF ABSOLUTE RIGHTS

The conflict between "absolutism" and "efficiency" in the domain of safety is an echo of a larger, more famous conflict in philosophy. That larger conflict has to do with slavery, rights, and the defects of utilitarianism. Under the influence of John Rawls' work, moral and political philosophy underwent a seismic shift away from utilitarianism in the latter half of the twentieth century. For

15 Priel 2019: 141. The argument is developed at 141–45.

Rawls, the fact that utilitarianism might allow for "slavery and serfdom, and for other infractions of liberty" was a fatal defect. Importantly, Rawls thought this fatal defect was rooted in the way that utilitarianism made the matter depend on "[whether actuarial calculations show [that slavery, serfdom, and other restrictions of basic rights for a minority] yield a higher balance of happiness."[16] Rawls' emphasis on the role that "actuarial calculations" play in utilitarianism's capacity to justify a grave injustice like slavery was deeply considered and important. In its classical form, utilitarianism is committed to the commensurability of all values. All value reduces to welfare and welfare reduces to pleasure and pain. Consequently, every value, every interest, every pleasure can be "expressed as an arithmetical function of every other, since all can be reduced to a single metric of satisfaction."[17] Classical utilitarianism thus combines three features. First, it is committed to maximizing utility across persons so that social welfare is maximized. In summing utility across persons in this way, "[u]tilitarianism does not take seriously the distinction between persons."[18] Second, it embraces a theory of value in which there is single metric of value. Third, that metric of value yields "a doctrine of the quantitative commensurability of all values." Utilitarianism is therefore committed to a very distinctive conception of trade-offs. Trade-offs are to be made by "actuarial calculations" summing up gains and losses in utility across persons and the criterion of maximizing utility determines which trade-offs should be made.

Conceptually, there is a strong resemblance between utilitarian ideas that we should make trade-offs by summing up gains and losses in utility across persons in this way and the summing up of costs and benefits across persons in orthodox cost-benefit analysis. Slightly rewriting the sentence at the end of the last paragraph summarizing the sins of utilitarianism as Rawls saw them produces a decent one sentence summary of what it is that cost-benefit analysis sets out to do. According to orthodox cost-benefit analysis, trade-offs are to be made by "actuarial calculations" summing up costs and benefits across persons and the criterion of wealth-maximization determines which trade-offs should be made. Cost-benefit analysis thus appears to reproduce the sins of utilitarianism as Rawls saw them. But this is too quick.

The resemblance is real enough. For classical utilitarianism there is an amount of utility great enough to justify keeping an underclass in a condition of slavery, serfdom, or utter deprivation. Because every interest or good is commensurable with every other, the utility sufficient to inflict such suffering may be nothing more urgent than the enjoyable luxuries of a large enough group of people. The methodology of orthodox cost-benefit analysis parallels classical

16 Rawls 1999: 137.

17 Waldron 1989: 509.

18 Rawls 1999: 24.

utilitarianism in that there is an amount of wealth which is great enough to justify the cost of someone's life. In both cases, urgent and fundamental individual claims may end up being sacrificed to claims and considerations that are trivial simply because of the numbers involved. "A minority's interest in political freedom may be traded off against the satisfaction of the desires of a majority to be free from discomfort and irritation. Or a person's life may be sacrificed in the circus for the sake of a momentary thrill enjoyed by millions."[19] The first possibility has attracted more attention from philosophers, but the second possibility comes closer to capturing the sense in which cost-benefit analysis appears to license unacceptable trade-offs. Closer still to capturing the problem as it manifests itself when risks of harm are at stake is Scanlon's example of the television technician who must suffer the agonizing pain of being trapped by a fallen transmission tower so that millions of television viewers may enjoy the uninterrupted broadcast of World Cup soccer match.[20]

As Jeremy Waldron, Ronald Dworkin, and others, have emphasized, these cases are not exotic puzzles conjured up by clever non-consequentialist philosophers to embarrass utilitarians and economists. "They are direct consequences of the feature of utilitarian theory on which its proponents most pride themselves: that it is a monistic theory of value, with a single metric and a unified decision procedure, and that it gives no interest or value qualitative precedence over any other."[21] Cost-benefit analysis is likewise praised for its capacity to price every good and bad, conceptually if not practically, and to compare everything to everything else simply by tallying costs and benefits.[22] Its determination not to draw qualitative distinctions is central to its capacity to trade everything off against everything else mathematically. Because the basic methodology of cost-benefit analysis does not discriminate between urgent and trivial interests, lesser and greater values, it licenses unacceptable trade-offs. All that is required is for the numbers on the side of the trivial consideration to be sufficiently great.

In the latter part of the 20th century, non-utilitarian philosophers responded to this weakness of utilitarianism by invoking conceptions of justice and rights. Rawls wrote that

19 Rawls 1999: 24.

20 Discussed in Keating 2018: 34.

21 Waldron 1989: 509.

22 See e.g., Kaplow & Shavell 2002: 32 n. 34: "[A] common aspect of the economic approach is to express all costs and benefits in terms of a common denominator. In law and economics writing, this denominator is usually money ... any logically consistent and complete system for evaluating legal rules is, in fact, equivalent to expressing everything, including factors sometimes viewed as incommensurable, in terms of a common denominator." And Kaplow & Shavell 2002: 450: "[F]inding a common denominator is a prerequisite to coherent policy assessment."

> [e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on few are outweighed by the larger sum of advantages enjoyed by many.[23]

Ronald Dworkin described "rights as political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for imposing some loss or injury on them."[24] Dworkin's metaphor captured the basic idea brilliantly. Rights protect our fundamental interests and give us veto power over policies that sacrifice our lives to the general good. When the injustices that we are contemplating are slavery and serfdom this strategy is both attractive and practical. We can simply rule out trade-offs that might lead to these institutions. The institutions are unacceptable, *tout court*.

Matters are different when risks of harm are involved. We cannot rule out their imposition *tout court* unless we are willing to bring social life itself grinding to a halt. And that would be perverse. What, then, are we to do? Critics of utilitarianism seem to have backed themselves into a corner. Some unacceptable trade-offs can be banned entirely by recognizing rights. Those rights protect fundamental interests and forbid trade-offs when those interests are at stake. Our interest in life is a fundamental one. Must we then say that the life of the television technician is protected by a trumping right—founded on justice and the inviolability of persons—which absolutely forbids trade-offs? Such a response would parallel the response that Rawls makes to the problems of slavery and serfdom and would instantiate Dworkin's idea of a right as veto on considerations of the general good which, un-vetoed, would lead to grotesque sacrifices of individuals. But it is infeasible. We cannot live well, and perhaps not at all, in a world where we are unable to impose any risks of serious harm on each other.

The flip side of this coin is that the philosophers who promoted rights and justice as solutions to the defects of utilitarianism did not contemplate that everything would be a matter of right. They imagined that some interests were not especially urgent and did not warrant the protection of rights. These interests might be legitimately subjected to a utilitarian calculus, or governed by other considerations sounding in the general good. We might, for example, suppose that the avoidance of harm has a priority over ordinary interests whereas the avoidance of loss does not. Following the framework of the theorists who championed rights and justice against utilitarianism we might think that ordinary losses are properly traded-off against one another through a utilitarian or economic calculus. Dworkin himself, when he grappled with the problems of tort law, embraced an interpretation of the Hand Formula which might be inter-

23 Rawls 1999: 3.

24 Dworkin 1978: xi.

preted as essentially economic in operation, if not in justification.[25] The larger point here is that it is not just utilitarians and economists who have conceived of trade-offs in terms of a single metric of value, summing across persons, and the pursuit of net social benefit. Philosophers of right and justice have framed the choice as one between rights which forbid trade-offs and trade-offs made in utilitarian or economic terms.[26] This framework implies that, if we cannot deploy rights and forbid trade-offs, then we must proceed as utilitarians and economists say and make trade-offs in their terms. Rights theorists rarely say so—because "some of the trade-offs that can be based on utilitarian commensurability seem simply obscene"[27]—but they seem to leave us with no alternative to such obscenity.

The grip that this framing of the alternatives available to us has on our thinking about risk is shown in the ways that Professors Geistfeld, Grady, and Priel, implicitly fall back upon it. They assume that there is no extant alternative to cost-benefit analysis even when they are explicating one, as Professor Grady does. This is entirely understandable, but it results in a kind of unstated misunderstanding of the project of *Principles of risk imposition and the priority of avoiding harm*. The project is not to defend either an absolutist approach to risks of harm, or a utilitarian approach. The project is to show that our extant standards of risk regulation have latent within them the outlines of a third approach. A bit of repetition may help to orient the discussion. Standards which prescribe more than efficient precaution against physical harm and health injury are commonplace in American environmental, health and safety regulation. The safe level standard requires the elimination of all significant risk, and the feasibility standard requires the elimination of significant risks to the extent that can be done without impairing the long run survival of the activities which give rise to the risks. These standards require trade-offs but the tradeoffs that they require are qualitative ones, not quantitative ones. To determine whether an activity should be governed by one of these two standards, or by the standard of cost-justified precaution, we must determine whether the activity inflicts harms or losses. Losses are property governed by the standard of cost-justified precaution; harms, by either the safety or feasibility standard. The "safe-level" standard is the first-best standard. Ideally, we would live in a world where people can expect to live out normal lifespans without the Sword of Damocles of significant risks of death and disability hanging over their heads. We would move from the safety standard to the feasibility standard when an activity's risks cannot be re-

25 See Dworkin 1978: 98–99; Dworkin 1986: 312 (arguing that we should understand the economic rhetoric of the Hand Formula to be a concrete way of reconciling competing abstract rights to equal concern and respect).

26 But not everyone. See Waldron 1989.

27 Waldron 1989: 509.

duced to the "safe" level and when the activity is valuable enough that we should permit it to persist even though it imposes significant risks of serious harm.

The safety and feasibility standards are explained and justified not by the value of welfare which undergirds cost-benefit analysis but by the value of autonomy. Autonomy explains why our ordinary moral thinking and our law recognize a harm-benefit asymmetry. There is nothing special about harm from an efficiency perspective; harms are simply costs and all costs are comparable at some ratio of exchange. Harm's special, negative, significance makes sense only within a framework which takes our separateness and independence as persons to be fundamental, and which understands us as agents who have a fundamental interest in authoring our own lives. Physical harms—death, disability, disease, and the like—compromise a foundational condition of effective human agency. Impairing basic powers of human agency cripples the pursuit of a wide range of human ends and aspirations, and denies normal human lives to those whose powers are impaired. The imposition of physical harm is bad for those harmed, no matter what particular aspirations and commitments they happen to have. Very few benefits, by contrast, are comparably essential conditions of effective agency. Benefit, like happiness, is mostly for each of us to pursue as best we can.

The asymmetry of harm and benefit lends general support to standards which impose stringent obligations to avoid harm. The safety and feasibility standards are plausible expressions of that priority in the domains to which they apply. Safety-based risk regulation is justified when eliminating significant risks of devastating injury does not compromise in a comparable way a condition of human agency which is as important as health or physical integrity. For instance, requiring pesticide residue on foods to be reduced to the point where it poses no significant health risks is justified when doing so does not depress agricultural productivity to the point where a need as urgent as health—say, adequate nutrition—is jeopardized. Feasibility-based risk regulation is justified when the elimination of all significant risk would require shutting down basic productive activities such as milling cotton and refining petroleum. These are activities which we cannot live without and their elimination would do more harm to the workers whose health we are trying to protect than tolerating their significant risks.

These standards are, almost surely, imperfect attempts to register the significance of physical harm in a normatively appropriate way. They are, however, a third way of sorts. They escape the polar positions of absolutism and trade-offs as utilitarianism and economics conceive them. We do ourselves a disservice when we dismiss them by assimilating them to the polar predicament that has stopped forward progress in our thinking about risk and precaution for the past few decades.

2 DO SOCIETIES PRIORITIZE HARM PREVENTION?

I am grateful to Professor Priel for such a rich and stimulating comment. Unfortunately, space permits me to respond to only some of what he says. Professor Priel's engaging discussion of driving is a case in point. As he notes, our practices are complex and admit of diverse interpretations. This seems especially true of driving. The activity of driving has a formidable number of moving parts and legal regimes. Federal regulation applies to motor vehicle safety, product liability applies to vehicles in diverse ways, the common law of torts in fifty different state incarnations applies to the conduct of drivers and the condition of vehicles, and the application of the common law of torts intensely entangled with statutes. And then there are state and federal laws pertaining to roadways, interstate commerce, trucking regulation, and so on. Let me therefore simply say several things in the hope of revealing my own orientation and leave the matter for another day. First, insofar as it is possible to conceive of driving as a single activity covered by a single overarching norm (and I'm not sure that it is) the standard of precaution that would govern it would be the feasibility standard. One the one hand, the harms involved are irreparable; cost-justification is therefore the wrong standard. On the other hand, we do not know how to make the activity safe yet we cannot simply forego it. Consequently, the activity falls into the domain of the feasibility norm.

I should add, however, that I doubt that driving can be treated as a single unified activity. We may need distinct regimes for individual drivers, for vehicles, for taxis, for Uber and Lyft, for firms that inflict fleets on the roads, for the coming onslaught of autonomous vehicles, and so on. These regimes will have to attend not just to precaution but also to loss-spreading, as Professor Priel rightly emphasizes. And driving is, as Professor Priel argues a prime example of the incompleteness of tort as a regime for regulating risk. From my perspective, two reasons for this are particularly salient. First, driving, even in its most basic form, requires coordinate precautions. The tort law of negligence has never really figured out how to address and articulate coordinate precautions.[28] Indeed, when tort law had to address the invention of cars as we now know them, it coped with the problem of coordinate precaution by assigning a central role first to custom and then to statutory codes. The capacity of statutory codes, in particular, to specify coordinate precautions far exceeds the capacity of negligence law to do so. The second reason why tort is ill-suited to be the sole legal regime governing the risks of driving is that tort is a reparation system and reparation systems are undone by irreparable injuries such as death and serious disability. Reparation systems rely on damages to exert deterrence pressure on actors to take the precautions that they should take. When harms cannot be repaired, adequate compensation is impossible and tort compensation often van-

28 See Harari 1962: 105–24; Epstein 1973: 156.

ishes entirely. Some other system—direct statutory or administrative regulation of risk, for instance, must at least supplement tort law.

I wish to focus my attention, however, on the normative side of Professor Priel's argument, not least because I think we disagree sharply over normative matters. Let me begin with a point of agreement. I, too, think that societies do not prioritize harm prevention. In my view, our legal and moral consciousness is divided between two outlooks. When it comes to risk and precaution, deontological moral theory accepts our intuitive view of the matter. "[O]ther things being equal, harms, harming events, and opportunities to harm are more important morally that benefits, benefitting events and opportunities to benefit."[29] Some examples of this harm-benefit asymmetry are vivid and clear. I can do things to you to avert harm that I cannot do to confer benefit. Even without your consent, I can break your arm to keep you from death by drowning, but without your consent I cannot break your arm in order to inject you with a serum that will give you the intellectual capacity of David Hume. However great a benefit that may be, I cannot harm you in its pursuit without your permission. In our legal system, the harm-benefit asymmetry manifests itself most vividly at a systemic level. In our public law, a striking feature of our Constitution is that it contains a takings clause but not a "givings" clause. And a striking feature of our private law is that the law of torts (whose principal dominion is responsibility for harm done) is large and robust in comparison with the law of unjust enrichment (whose domain is responsibility for benefit conferred without prior compensation). Deontology accepts this feature of our moral sensibilities and legal system. Utilitarian and economic views do not. They regard the asymmetry as irrational. We are, each of us and collectively, divided between these outlooks and our practices reflect this division. Practices that are justifiable from one perspective are, in many cases, wrongheaded by the lights of the other perspective.

Professor Priel and I disagree, I think, over a related but somewhat different matter, and this disagreement reflects the conflict between consequentialist and deontological moral outlooks. Perhaps it will help for me to put the basic argument of my Symposium paper this way: the argument is not that "society" prioritizes the avoidance of harm, but that standards of precaution that require more than cost-justified precaution are not irrational. In fact, they are rationally justifiable. The harm-benefit asymmetry is entrenched in our legal practices and moral convictions, and is shown to be justified by deontological moral arguments. The feasibility and safety standards are plausible ways of articulating this priority in the contexts to which they apply. To be sure, my arguments and my conclusions conflict with the arguments and conclusions of consequentialists, but disagreement is not irrationality. The disagreement that divides me and Professor Priel has to do with whether the safety and feasibility

29 Shiffrin 2012: 361.

standards are outcroppings of irrationality that are explained by psychological weaknesses which make people susceptible to "factors of questionable moral significance." Professor Priel notes that people's responses to risk are "inconsistent" and concludes that this inconsistency is best explained by "the way humans respond to abstract versus concrete risks and harms, to risks involving unidentified versus known victims, and to familiar versus unusual risks of harm."[30] The factors which explain people's responses do not justify them, thus showing that the responses are rationally unwarranted.

Professor Priel's charge of irrationality has both empirical and normative elements, and the two threads need to be disentangled. Empirically, there is good reason to believe that people have great difficulty evaluating small risks of grave harm, especially when entitlements are involved. Kahneman and Tversky's classic account of framing effects is now forty years old, and as compelling today as when it was new.[31] The "endowment effect"—the fact that I would demand more, say, to sell a coffee cup that I own than I would pay to buy it—may well be an irrationality, at least in some cases. Furthermore, all the evidence suggests that human beings are very bad at making rational decisions and drawing rational distinctions when very small probabilities of grave harm are involved.[32] When framing effects are combined with the inconsistent ways in which human subjects value mathematically equivalent risks of death, it is difficult to have much confidence in our capacity to value "statistical lives". The very benchmark of rational risk appraisal may elude us. And there is even less reason to think that our practices will conform to any consistent valuation of statistical lives. Normatively, however, there is relatively little reason for non-consequentialists to take much interest in "statistical lives". Unlike "identified lives", statistical lives don't exist. They are a theoretical construct. Coming up with a defensible monetary value for a statistical life is not only a difficult problem in its own right, it is also a project whose merit depends on the soundness of the theory which calls for its construction. And deontologists doubt the soundness of consequentialist theory.

From a deontological point of view, the concept of a statistical life is likely to be useful only when it allows us to sharpen our analysis of cases which can be framed in quite an ordinary way. Suppose, for example, we are considering whether or not to require all passenger vehicles sold in the United States to be equipped with backup cameras. So equipping cars will reduce a certain number of pedestrian fatalities. Imagine that we are also considering requiring that cars be equipped with accident avoidance systems which minimize the seriousness of many accidents by initiating automatic braking. Here, too, a certain number

30 Priel 2019: 141.

31 Kahneman & Tversky 1979: 237.

32 Beattie, Convey, Dolan *et al.* 1998 discussed in Wolff 2011: 100.

of lives may be saved. For whatever reason, we can only require one of these at the moment. If, for some reason, the concept of a "statistical life" allows us to figure out which safety device will save more lives it is useful. But it is useful only because it is a proxy for actual lives, similarly situated. The language of statistical lives summarizes the sound conclusion that one measure is preferable to the other because it will save more lives. And in the context at hand, there is reason to think that other considerations—such as pedestrian responsibility—are not significant.

Because they are creatures of a theory, however, statistical lives lend themselves to problematic flights of fancy. Professor Priel speaks, for instance, about whether "society" should invest "$500,000 in automobile accident prevention [or] $500,000 heart attack prevention."[33] Practically speaking, this is a peculiar choice. When I ask myself who might make such a choice, I conjure up some nonexistent research agency charged with spending its budget in the way which saves the most lives at the least cost. I'm not sure that any actual decision resembles the decision of that imaginary board. If, when I type these words on my keyboard, I ask myself if the social resources expended in my typing would be better spent curing cancer, I'm hard pressed to confidently answer "no". Yet surely that's not a decision that I or anyone else is ever in a position to think about making. A cure for cancer will be no closer if I quit typing and go to the movies. And whatever I do, I won't be furthering the cause of either heart attack prevention or automobile accident prevention. Moreover, if I do decide to put my pen down and abandon the writing of this response, I will be doing something blameworthy. I am uniquely responsible for responding to Professor Priel's thoughtful engagement with my Symposium argument and I am not uniquely responsible for curing cancer, preventing heart attacks, or generally spending my time in the way that will yield the greatest net social benefit.

Responsibility matters. In the law of torts especially, but also more generally, standards of precaution are ways of articulating our responsibilities to others. They are ways of articulating our responsibilities to persons whom we put at risk of harm. Manufacturers of protective medical equipment like latex gloves owe those who wear their gloves obligations to manufacture and sell a "safe" product because they put those users at risk of harm if their gloves are not safe. Employers owe their workers feasible safety precautions because they and their workers are engaged in a cooperative activity for mutual benefit which puts those workers at risk of harm. Mine owners owe their miners duties of rescue, and ship owners owe seamen duties of rescue, for the same kind of reason. Discussions of whether to rescue trapped miners or spend the money on automobile accident prevention or on heart attack prevention make two deeply questionable assumptions. First, they assume that we are always and everywhere subject to only one

33 Priel 2019: 139.

obligation, namely, to bring about the best possible state of affairs in the world at large. This assumption is profoundly out of sync with our conceptions of responsibility. It would be beyond bizarre for the manufacture in Green to respond to plaintiff's product liability claim by announcing that it was going to discharge its responsibilities by making a contribution to the American Cancer Society, because that would save more lives. Second, arguments of this kind assume that "society" is the responsible actor in all cases. "Society" spends rationally or irrationally on automobile accidents instead of on curing cancer or ending malnutrition. Whatever one thinks of curing cancer, reducing automobile accidents, and ending malnutrition, as relative social priorities it would be a dereliction of duty for my automobile insurer to send its insurance settlement money not to the person I wrongly injured in driving my care but to the Los Angeles Regional Food Bank—even if the money would do more good at the food bank.

The lesson here is this. Standards of precaution articulate responsibilities. They may be responsibilities owed by some to others (as with the manufacture and sale of defective products) or they may be responsibilities we all owe to each other, as with the provision of clean air and water. These standards of responsibility and the results that they countenance may well look wildly irrational if we judge them from a standpoint which assumes that the one and only responsibility we have is to produce end states of the world with as much value as possible. That standard, however, is deeply suspect. The monistic theory of value on which it rests fails to draw important qualitative distinctions among values and interests, and its commitment to summing costs and benefits across different lives licenses trade-offs which sacrifice the most urgent interests in the name of trivial gains to others. There is no reason to accept such a criterion as the master test of the rationality of our practices. And the point of view from which it is applied erases fundamental questions of responsibility.

3 LUCK IN NEGLIGENCE LAW

Professor Grady is surely correct to point out that the authority assigned to the jury in common law negligence adjudication in the United States confers on juries the power to reach final decisions that do not reflect the priority of avoiding harm as I conceive it. Juries are not bound to instantiate any substantive standard of reasonable care proposed by any theorist—my standard, or anyone else's. I am less persuaded, though, that "cost-benefit analysis is ... the most important general principle defining common law breach of duty."[34] Jury instructions rarely speak economically. Instead, they reference the standard of the

34 Grady 2019: 109.

"reasonable person".[35] Reasonableness is the master concept of negligence law whereas rationality is the master concept of cost-benefit analysis. The two concepts are markedly different. Reasonableness is an intrinsically moral concept whereas rationality is prudential. There is, moreover, evidence that negligence doctrine treats harm as having a special and negative moral significance. For one thing, as my Symposium paper notes, harm—not cost—is a necessary element of a negligence claim. Carelessly inflicting a cost on someone else is not, in itself, tortious. Carelessly harming them is, at least prima facie. For another, orthodox negligence doctrine holds that people are justified in departing from statutorily prescribed precautions when the precautions that they take produce more safety than the statutorily prescribed ones. The test here is more safety, less risk of harm—not net social benefit, all things considered. More generally, the use of the concept of reasonableness in negligence doctrine is consistent in important ways with an emphasis on the priority of avoiding harm. Or so I have argued.[36]

These issues take us well beyond the arguments of my Symposium paper. But even if we had more time and space, I doubt that it is possible to flatly rule out to everyone's satisfaction an economic interpretation of negligence doctrine. Negligence law is complex and inconsistent. Although I think Professor Grady's efforts to show that judges use cost-benefit analysis to determine when juries should not be allowed to find negligence are unconvincing, reasonable people might reasonably disagree. For example, if you think, as I do, that *Adams v. Bullocks* applies something which sounds more like a "feasibility" or "disproportion" standard[37] than cost-justification it does not follow that the ruling in the case is incompatible with cost-benefit analysis. Similarly, *Cooley's* rhetoric is the rhetoric of harm-minimization not cost-minimization but it may well be that cost-minimization would lead to the same conclusion as harm-minimization. So let me then remind the reader that the main argument of my Symposium paper is that the safety and feasibility standards are both extant in our law and defensible. I do not argue, and do not think, that they are the only standards of precaution extant in our law and defensible. Elsewhere, I have pursued the argument that negligence law can be given a powerful non-economic interpretation, which interpretation resonates with the priority of avoiding harm.[38] Even so, it would be chutzpah of a high order for me to claim that my arguments have conclusively ruled out all other interpretations.

Professor Grady's main point, though, is about juries, not judges and doctrine. Juries and judges are, of course, very different. Juries are not required to articulate the reasons for their decisions; their decisions are not precedential;

35 See Keating 1996: 362 n. 173.

36 Keating 1996: esp. 341-82.

37 See supra note 8, and accompanying text.

38 E.g., Keating 1996; Esper & Keating 2006: 268–70.

and jury decisions are not required to cohere with one another in the way that judicial decisions are supposed to.[39] One way to summarize the import of these aspects of jury decision is to say, as Professor Grady does, that "on the breach of duty issue a jury is practically as free as a legislature." I am not inclined to disagree strongly. For reasons that I shall explain briefly, my view of how jury adjudication operates in negligence law differs from Professor Grady's (and from Oliver Wendell Holmes, too). Our differences on this score do not, however, lead me to disagree sharply with his conclusion about the extent of what he describes as unchecked jury discretion. Where we disagree is over whether the scope of jury decision-making authority poses problems for my argument that the safety and feasibility standards reflect in justifiable ways the priority of avoiding harm.

4 JURY ADJUDICATION AND THE STANDARD OF REASONABLE CARE

The standard of reasonable care in negligence law is a legal standard, perhaps even *the* quintessential legal standard. The normal distinction between a rule and a standard holds that "a rule may be defined as a legal direction which requires for its application nothing more than the determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*." By contrast, a "standard may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of these happenings ..."[40]

Standards thus raise mixed questions of law and fact.[41] Applying a legal standard to a particular circumstance involves the exercise of evaluative judgment as well as the finding of fact. The fact-finder must work out a highly particular "rule" for the case at hand. When juries are the law-applying institution (as they are in American negligence law) the fact that the application of a standard requires the exercise of evaluative judgment is a reason which favors assigning juries a relatively large authority. Applying law is entangled with making law. American negligence law follows this logic. When reasonable people might disagree as to whether or not the defendant exercised reasonable care in light of the particular facts at hand, it is the proper role of juries—not judges—to deter-

39 Grady 2019: 98.

40 Hart, Jr. & Sacks 1994: 139–40 (citing the "idea of the common law that no person should drive 'at an unreasonable rate of speed'" as a canonical example of a standard). Thus the application of a legal standard involves evaluative judgment as well as fact-finding. Applying a legal standard to a case involves working out a highly circumstantial "rule" applicable to the particular facts at hand.

41 See Bohlen 1924: 112.

mine what reasonableness requires.[42] The edge on the rule here is identified by Mark Gergen:

> Where there is only normative doubt about what is reasonable conduct, a judge could decide the issue without intruding on the role of the jury as fact-finder. This possibility most clearly arises in a case where the facts are undisputed but breach is contested. In negligence law, the issue of breach goes to the jury in such a case.[43]

The division of labor between judge and jury under this rule gives more scope and more authority to the jury than the usual rule which divides labor of judge and jury by assigning questions of law to judges and questions of fact to juries. The scope and finality of jury determinations in negligence cases is substantial—enough so that it is possible to say, as Professor Grady does, that they "possess the power to forgive obvious breaches of duty ..."[44]

Adjusting for our somewhat different views of the relative roles of law-articulation and law-application in negligence cases, I agree with Professor Grady on this point. Where I disagree is with Professor Grady's apparent conclusion that this poses a problem for the argument of my Symposium paper. That conclusion is, I think, a non sequitur, for two reasons. First, it is anything but clear that the decisions that Professor Grady regards as mistaken (on either his view of negligence or mine, I believe) tell us anything one way or the other about whether or not juries prioritize the avoidance of harm. Jury decisions are black boxes. Juries do not explain and justify their decisions. When we have nothing more than the decisions themselves, we can only speculate as to the reasons—normative and empirical—that led juries to those decisions. We can judge them wrong or mistaken from our own points of view, but absent more information we can only guess as to why the juries in question decided them wrongly.

Second, the argument that we are justified in requiring more than cost-justified precaution when significant risks of physical harm are at issue does not address the question of institutional design which is at the heart of the choice between judge and jury. In part, this is a question about which procedure—trial by judge or by jury—will lead to a more accurate application. But it is also, in part, a question about which institution has the requisite legitimacy. The authority of judges is the authority to say what the law is. When saying what the law is also requires saying what the facts were, the question of law articulation enters the zone of jury authority. Whether or not judges or juries should be assigned the task of applying negligence is, then, a determination which may be affected by how we understand the norm of reasonable care, but it isn't a question whose

42 This is discussed further in Esper & Keating 2006: 268–70.

43 Gergen 1999: 434. This is a longstanding rule of American negligence law. It is embraced, for example, by the majority opinion in *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (Mass. 1898), over a vigorous dissent by Oliver Wendell Holmes.

44 Grady 2019: 99.

answer is settled entirely, or even primarily, by our understanding of what reasonable care comes to as a normative concept. The judgment required is a judgment about comparative institutional competence *and* comparative legitimacy and it must be made on the basis of multiple considerations. The risk that juries will make substantive mistakes in applying negligence law is surely one of those considerations, but even here the question is comparative. Will they make more "mistakes" than judges? It is not obvious that judges would make fewer errors in applying negligence law. They might just make different ones.

5 RECONCILING LIBERTY AND SECURITY

Professor Geistfeld and I are in deep agreement on many matters. Most importantly, we both understand the interpersonal imposition of risks of physical harm to present a conflict between two dimensions of individual freedom—namely, liberty and security. Where Professor Geistfeld and I disagree is over the role of cost-benefit analysis in specifying permissible risk impositions within such a framework. I think that conventional "cost-benefit analysis has its home in a framework which supposes that welfare is ultimate or master value and that promoting welfare is the proper end of legal and political institutions."[45] In my view, cost-justification is the correct standard of precaution when (and only when) the injuries risked are ones that can be adequately repaired by the payment of money damages. When that is the case there is no need to take more than cost-justified precaution to protect against harms which are serious and beyond adequate repair, and questions about the fair distribution costs of harm inflicted can be addressed by compensation after the fact, or other monetary transfers.[46] Professor Geistfeld points out that welfare economics can be divorced from welfarism (defined as "the principle that the goodness of a social state is an increasing function of individual welfare and does not depend on anything else"[47]) and that cost-benefit analysis has a "robust role" to play in specifying permissible risk impositions. I am persuaded that Professor Geistfeld is correct about his first point. Formally, anyway, welfare economics can be detached from "welfarism as a principle of substantive equality."[48] But

45 Keating 2018: 9.

46 Professor Priel (2019) rightly emphasizes the importance of loss-spreading considerations within a consequentialist framework. They manifest themselves in the non-consequentialist framework that I am articulating as questions of interpersonal fairness. They recede from view when the question is the correct level of precaution against risks of serious and irreparable physical harm but they take on prominence when the questions have to do with responsibility for harm which should not avoided. The fact that a loss should not be avoided does not mean that it should lie on the party on whom it falls.

47 Geistfeld 2019: 115.

48 Geistfeld 2019: 116.

I remain skeptical that—when risks of serious and irreparable physical harm at issue—the conflicting claims of liberty and security should be reconciled by deploying the apparatus of cost-benefit analysis.

When Professor Geistfeld speaks of a role for cost-benefit analysis, he is speaking first of a conceptual apparatus. That apparatus proposes to reconcile the competing claims of liberty and security by asking two questions. The first part of that analysis calls for assigning an entitlement: either the potential victim is entitled to be free from some risk of physical harm, or the potential injurer is entitled to impose that risk of harm. If potential victims are assigned entitlements to be free of risks of physical harm, then potential injurers must purchase from them the right to impose risks upon them. The "willingness-to-accept" (WTA) measure of the value of safety falls out of this assignment of entitlement. The value of safety is the minimum sum that the victim would have to be paid to bear risks from which she has the right to be free. If, conversely, the injurer is assigned the right to impose risks, then the victim must purchase the right to be free of risks imposed by the injurer from the injurer. The value of safety is the maximum sum that that the victim would pay to be free of risks imposed by the injurer (that the injurer would accept). This is the "willingness-to-pay" (WTP) measure of the value of safety.

The divergence between WTA and WTP has been a source of considerable consternation in the value of life literature because that divergence seems to introduce a radical instability into our efforts to come up with credible value of life figures.[49] The value that people place on their lives turns out to be heavily dependent on the initial assignment of entitlement, and that assignment itself seems arbitrary. An important part of Professor Geistfeld's work is to develop a framework for thinking about how to assign such entitlements on a rational basis. Within this framework, the methodology of cost-benefit analysis is deployed to make the comparisons necessary to reconcile liberty and security. "The entitlement or right to physical security", for example, "relies on the compensatory WTA measure for quantifying injury costs."[50] Conceptually, the measure is divorced from welfare but not from money as the metric of value. Quantitative comparison is the tool for sorting out the relative claims of liberty and security.

From my perspective, the use of this methodology to reconcile competing claims of liberty and security with respect to risks of physical harm is problematic. First, the framework requires that there be a price at which a victim would be willing-to-accept a risk. Implicitly, the framework requires objectively adequate compensation. Just why the framework would yield objective prices

49 See Kahneman & Tversky 1979: 237 and Beattie, Convey, Dolan *et al.* 1998, discussed in Wolff 2011: 100.

50 Geistfeld 2019: 117.

is unclear to me. The WTP and WTA measures invite subjective valuation. It is natural to apply them by asking "what would I accept?" If the decision is mine, I have the right to set my price as high (or as low) as I wish. When a plurality of persons are involved, that might lead to wildly different prices, not an objective measure of fair compensation. Moreover, if I have a right that risks not be imposed on me I am presumably entitled to stand on my right and refuse to sell at any price. After all, I can do that with any personal or real property that I own. A right to free of risk imposition does not seem to be a different *kind* of entitlement. If my refusal to sell brings the world to a stop so be it.

Ways out of the predicament posed by supposing that WTA and WTP are actual prices reached through actual contracts can be imagined. For instance, the rights might be interpreted not as rights to enter into actual contracts at whatever prices one can obtain, but through the device of a hypothetical contract. I might be bound to accept the compensation that a properly constructed hypothetical contract would yield. This is one plausible response to the problem that actual contracts might fail—because of transaction costs, holdout problems and the power of each right-holder to fix their own price—would scuttle them. It is not clear, though, that it is what Professor Geistfeld is driving at and, if it isn't, just what he has in mind. The move to an objective measure, and the measure's construction, need more explanation than they receive.

The fact that Professor Geistfeld's use of cost-benefit analysis contemplates quantitative comparison is also troubling. Orthodox utilitarianism and cost-benefit analysis are problematic in part because they embrace single metric of value. Methodologically, Professor Geistfeld seems committed to quantitative comparison where the metric of money is used to compare all goods. Philosophically, he may not be committed to "a doctrine of the quantitative commensurability of all values"[51] but what he renounces in theory he appears to adopt in practice. Operationally, trade-offs appear to be made by "actuarial calculations" summing up gains and losses in dollars across persons. This methodology erases qualitative differences. Harms and benefits, though, are qualitatively different. They impact our autonomy and our wills differently. Interpersonal comparisons must be, in important part, qualitative and they must be made in terms of "urgency" not "preference".[52] The right question to ask about children who wish to operate powerboats and cars—not paddle boats and bicycles—is whether they have an urgent need to do so, not whether they would pay hand-

51 See supra note 17, and accompanying text.

52 See Scanlon 1975: 668 (arguing that comparing the strength of competing claims of well-being on the basis of their "urgency" is superior to comparing the subjective intensity with which those claims are held because it represents "the best available standard of justification that is mutually acceptable to people whose preferences diverge").

somely for the privilege.[53] The common law of negligence makes relatively fine-grained interpersonal comparisons of burdens to liberty and security in this way.

The division of labor among standards of safe, feasible, and cost-justified precaution likewise rests on comparisons of this sort. The move from a "safety" standard to a "feasibility" standard should be made when, and only when, we conclude that we cannot make an activity "safe" but that it plays such an important role in our social world that we cannot give it up either. The move to a standard of cost-justification should be made when the interests at stake are fungible in dollar terms, harm done can be adequately repaired, and questions of fair distribution can be addressed after harm has been inflicted. Such evaluative judgments are necessary to avoid the cardinal sin of utilitarianism—sacrificing the urgent interests of a few for the trivial gains of many because the quantity of the trivial gains sums up a number larger than devastating harm to a few does.

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53 For discussion of this example, and the ways in which negligence law treats interpersonal comparison "objectively," see Keating 1996: 364–79.

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