Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?

Tsachi Keren-Paz[*]

The two leading theoretical approaches to tort law — economic analysis and corrective justice — are blind to distributive considerations. Moreover, even the main distributive approaches to tort law — loss-spreading and fairness — fail to emphasize egalitarianism as a distributive consideration. This article argues that egalitarianism should influence the normative evaluation of one's conduct as negligent or not. It first explains why normatively negligence law should be sensitive to the egalitarian concern, suggesting three different accounts for this claim, based on needs, equality, and desert as criteria for distribution. Second, it argues that egalitarianism is commensurate with the basic understanding of negligence law as reflecting corrective justice and notions of fault. The notion of fault is, therefore, reformulated from within, in order to accommodate egalitarianism. Third, I maintain that in order for egalitarianism to accommodate notions of corrective justice, egalitarian concerns should matter also at the stage of the standard of care. While the egalitarian concern can and should be integrated into the duty stage, I argue that such integration is insufficient. A correct and full understanding of the egalitarian concern and the tort of negligence requires a

* Lecturer, The College of Management, School of Law, Israel, tsachikp@colman.ac.il.
I would like to thank Ariel Porat and Marie-Andree Jacob for useful comments on previous drafts of this article, Shai Lavi and Barak Medina for valuable discussions, and Shlomi Hadar for his research assistance.

conclusion that the normative evaluation of one's action as negligent or not cannot be separated from the distributive results that this action entails. The egalitarian concern works at the duty stage as an excuse for not imposing liability for wrongful activity. In contrast, at the standard stage, it works as a justification that turns an otherwise wrongful activity into a legitimate one. My claim is that morally we should usually expect more care from the better-off than from the disadvantaged. Findings of negligence are based on the failure to balance properly between one's interests and those of another. In deciding to what extent the defendant should burden herself in order to prevent a loss to potential victims, one morally relevant criterion is the relative ability of the injurer and victim to bear precaution costs and expected accident loss, respectively.

INTRODUCTION

A theoretical account of tort law usually revolves around one or more of the following three themes: corrective justice, aiming at amending the plaintiff's loss caused by a wrongful act by the defendant;[1] economic analysis of law, aiming at preventing all and only accidents worth preventing and at achieving allocational efficiency;[2] and distributive justice, aiming at fairly distributing burdens and benefits in society.[3] A common understanding of tort law views it as moving away from notions of fault (imposing liability on the defendant for her wrongful actions) toward notions of fair allocation of costs of activities

---

1 *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972); Richard Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973); Ernest J. Weinrib, The Idea of Private Law (1995).

2 *See, e.g.*, Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. (1972); William Landes & Richard Posner, The Economic Structure of Tort Law (1987); Steven Shavell, Economic Analysis of Accident Law (1987).

3 *See, e.g.*, Gregory Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. Cal. L. Rev. 193 (2000); Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 Sw. U. L. Rev. 577 (1998); Guido Calabresi, The Costs of Accidents 27-28, 39-67 (1970). For pluralist approaches, see Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801 (1997); Izhak Englard, The Philosophy of Tort Law (1993); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 Yale L.J. 1055 (1972); Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. Legal Stud. 585 (1985); Ariel Porat & Alex Stein, Tort Liability Under Certainty (2001).

that are inherently desirable. The increasing shift from negligence to strict liability reflects this tendency toward fair allocation of costs.[4]

Distributive considerations in tort law are usually one of two kinds. The one kind, which, following Keating, I refer to as "fairness," is based on the idea that those who benefit from a given activity should bear its costs.[5] The other consideration, which I refer to as "loss-spreading," is based on the idea that it is better to spread losses across many individuals and across time.[6] A third consideration, "egalitarianism" or "the egalitarian concern," promotes equality in society and is more controversial and less widely-accepted than the other two, though it does have its day in court as well.[7]

Most scholars who support a distributive agenda in general and an egalitarian agenda in particular have shown a preference either for dispensing with tort law altogether and moving into alternative compensation schemes[8] or else for at least moving away from the negligence rule toward a strict liability rule.[9] Negligence law, it seems, has remained a fortress of notions of corrective justice and/or economic efficiency, hostile to distributive notions. While tentatively in favor of such shifts, I will attempt in this article to show why and how the egalitarian concern should be included in the tort

---

4 *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985); Calabresi & Hirschoff, *supra* note 3; John G. Fleming, *The Role of Negligence in Modern Tort Law*, 53 Va. L. Rev. 815 (1967). For a different view, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. (1992).

5 *See* Keating, *supra* note 3.

6 *See* Calabresi, *supra* note 3, at 39-45. Calabresi views this consideration as constituting part of efficiency. It is, indeed, supported also by reasons of efficiency, namely, the fear of over-deterrence. Regardless, it does have a justice component to it.

7 *See, e.g.*, Dobson v. Dobson, [1999] 2 S.C.R. 753; Ken Cooper-Stephenson, *Corrective Justice, Substantive Equality and Tort Law, in* Tort Theory 48 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Ken Cooper-Stephenson, *Economic Analysis, Substantive Equality and Tort Law, in* Tort Theory, *supra*, at 131. I recently defended the worthiness of this consideration in tort law and advocated its incorporation into tort doctrine. Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness*, 16 Can. J.L. & Jur. 91 (2003) [hereinafter Keren-Paz, *Randomness*]. *See also* Tsachi Keren-Paz, The Limits of Private Law: Tort Law And Distributive Justice (2000) (unpublished D. Jur. dissertation, York University) (on file with the York University Library) [hereinafter Keren-Paz, Limits of Private Law].

8 *See, e.g.*, Richard L. Abel, *A Critique of Torts*, 37 UCLA L. Rev. 785 (1990); Allan C. Hutchinson, *Beyond Non-Fault*, 73 Cal. L. Rev. 755 (1985).

9 *See, e.g.*, Keating, *supra* note 3, at 219-21.

of negligence. First, I explain why normatively, negligence law should be sensitive to the egalitarian concern. I suggest three different accounts for this claim, based on needs, equality, and desert, respectively, as criteria for distribution. Second, I argue that, quite surprisingly, egalitarianism fits well with the basic understanding of negligence law as reflecting *corrective* justice and notions of *fault*, when fault is reformulated to accommodate egalitarianism. Third, I maintain that for egalitarianism to fit well with notions of corrective justice, the egalitarian concern should be integrated not only into the duty of care analysis[10] but also into the standard of care analysis. Integrating egalitarian concerns only into the former, despite its importance, would be insufficient: a correct and full understanding of the egalitarian concern, as well as of the tort of negligence, mandates that the normative evaluation of an action as negligent cannot be separated from the distributive results that this action entails. The egalitarian concern works at the duty stage as an excuse for not imposing liability for wrongful activity. In contrast, at the standard stage, it works as a justification for legitimizing otherwise wrongful activity. My claim is that morally, we should usually hold the better-off to a higher standard of care that we do the disadvantaged. Findings of negligence are based on the failure to balance properly between one's own interests and those of another. In deciding to what extent the defendant should burden herself in order to prevent a loss to potential victims, *one* morally relevant criterion is the parties' relative abilities to bear precaution costs and *expected* accident loss. I show how the egalitarian concern can be used to reformulate the standard of care analysis and suggest guidelines for incorporating egalitarian sensitivity into the standard of care, given my pluralist understanding of tort law. I examine the ways to detect the dictates of egalitarianism, given the conceptual and practical problems of measuring disutility, and I examine the practical usefulness of sensitivity to egalitarianism in standard of care analysis. Finally, I respond to some challenges against the approach advocated for in this article.

I. INSIGHTS FROM OTHER APPROACHES

My approach to tort law is pluralist. While stressing the importance of

---

10 *See* Tsachi Keren-Paz, Slicing Pies Carefully: A Suggested Model for Incorporating Distributive-Egalitarian Sensitivity into the Tort of Negligence (2001) (unpublished manuscript, on file with author); Keren-Paz, Limits of Private Law, *supra* note 7, chs. 5, 6.

incorporating egalitarianism into tort law, I by no means underestimate the other goals that tort law should promote. Moreover, I argue that in inserting egalitarianism into the tort of negligence, there are lessons to be learned from other theoretical approaches to tort law. In this Part, I extract some insights from the following four approaches: corrective justice, economic analysis of law, a loss-spreading approach, and a fairness approach. From corrective justice, I adopt the insight that establishing that an act was wrongful is a necessary element for a finding of negligence. From economic analysis, I adopt the insight that for the purposes of negligence law, the consequences of the activity and of the legal rule are necessary for the evaluation of the wrongfulness of the activity and the desirability of the legal rule, respectively. From the loss-spreading approach, I adopt the idea that the needs of the parties (namely, the effects of the loss from the accidents on their respective well-being) are a relevant and important consideration; from the fairness perspective, I apply the insight that the distributive effects of the legal rule are important and that individuals have a fairness-based claim for equal treatment. These insights will help me defend, in Part II, the purpose and method of incorporating egalitarianism into the tort of negligence.

A. Corrective Justice

Upon first glance, corrective justice approaches are most inimical to the inclusion of distributive considerations into the tort of negligence. Corrective justice theoreticians as divergent as Fletcher, Epstein, Weinrib, and Coleman assert that a tort regime that is based on corrective justice should ignore distributive consequences and motives, including egalitarianism.[11] Indeed, corrective justice operates, according to conventional wisdom, against the background of and based on the assumed desirability of initial distribution.[12]

Advocates of corrective justice offer different versions of corrective justice. The main controversy pertains to the basis of what makes an activity wrongful and triggers a duty to rectify the wrong.[13] For example,

---

11 Fletcher, *supra* note 1, at 547 n.40; Richard Epstein, *Intentional Harms*, 4 J. Legal Stud. 391, 441 (1975); Weinrib, *supra* note 1, at 36-37, 74-75; Jules L. Coleman, Risks and Wrongs 350-54 (1992). However, in a recent co-authored article, Coleman has shown the similarity between the questions tort law deals with and those dealt with by distributive justice. Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 McGill L.J. 91 (1995).

12 Coleman, *supra* note 11.

13 For some of the controversies, see Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbor*, 77 Iowa L. Rev. 403 (1991).

Fletcher claims this basis to be the imposition of non-reciprocal risk; Epstein — the causation of the harm; and Weinrib — the imposition of significant risk on others.[14] Still, both structurally and substantively, there is much common ground to corrective justice approaches. According to conventional wisdom, corrective justice approaches are all based on the correlativity between the doer's duty and the sufferer's right; they are all agency-dependent; and they all impose liability based on the activity that caused the interaction between the parties, rather than on the prior respective statuses of the parties.[15] For my purposes, the last two features are of the most importance. First, liability should be dependent on the tortfeasor's action. Second, the gist of corrective justice is that this action should be classified as morally wrong. The wrongfulness of the tortfeasor's action singles out some, but not other, actions as creating a duty to compensate the victim. Now, one might dispute the justification of these requirements as general preconditions to tort liability, and one might dispute (as I do) the disregard of the parties' prior statuses for purposes of determining whether to impose liability or not. However, in the context of the tort of negligence, I do endorse the idea that *the identification of a given action by the tortfeasor-agent as morally wrong is a necessary condition for the imposition of liability under the tort of negligence.* The tort of negligence includes an important moral and evaluative component. Negligent activities are wrong and should not occur. Some activities are appropriate, and some are not. Imposing liability in negligence should target *only* activities we deem wrongful. As will be explained below, the tort of negligence should not impose liability on all wrongful activities. However it should impose liability *only* for wrongful activities. To the extent that society would like to impose liability on non-wrongful activities, the basis for such liability should differ from the basis for a finding of negligence. It follows, then, that normatively, a finding of negligence has a symbolic as well as practical outcome: it does not extract a price for legitimate activity; rather, it imposes a sanction for illegitimate activity.[16] It says that the negligent activity is wrongful and should not be carried on.

---

14 Fletcher, *supra* note 1; Weinrib, *supra* note 1, at 149-51; Epstein, *supra* note 1. Epstein's approach was construed as reflecting the significant risk test manifested in *Bolton v. Stone*, 1951 A.C. 850 (appeal taken from H.C.). *See* Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 Can. J.L. & Juris. 147, 170 (1988).

15 *Cf.* Porat & Stein, *supra* note 3, at 12; Keating, *supra* note 3, at 197.

16 *See* Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1984).

B. Efficiency

The law and economics tradition places a different hurdle on the incorporation of egalitarianism into the tort of negligence. According to the dominant Kaldor-Hicks criterion of efficiency, the goal of legal rules should be to maximize wealth and this goal should be pursued in disregard of the rules' distributive effects.[17] Indeed, beyond the inherent obliviousness to distributive considerations shown by any aggregative approach, wealth-maximization is especially regressive in that its criterion for allocation — willingness to pay — is itself influenced by unequal underlying distributions of wealth, a fact that blatantly favors the rich.[18] Notwithstanding these fallacies, a law and economics approach has an important lesson for us in the context of negligence: the moral relevance of consequences. As the leading instrumentalist theory in legal academia, law and economics teaches us a lesson that is forgotten by many other theories: that in evaluating whether an activity is negligent or not, the costs of precautions (i.e., the benefits of the activity that harmed the victim) should be compared with the costs of accidents (the costs of bearing the accidents). The basic law and economics formula for the standard of care in negligence — the Hand formula — engages in cost-benefit analysis: it measures the benefits of the activity against its costs and imposes liability if, and only if, the costs of the activity outweigh its benefits.[19] It does so by comparing accident costs with precaution costs. Note that on its face, the activity's benefits do not seem to be calculated at all. However, they are included in the calculation of the precaution costs. True, it is well known that courts do not take into account activity levels when determining negligence (and, hence, they seemingly disregard the opportunity costs of foregoing an activity that is alternative to the risk-creating one).[20] However, variations of the Hand formula that were adopted in England and Israel, as well as by the Restatement (Second) of Torts, do consider the social value of the risk-creating activity.[21] The social value prong inserts into the cost-benefit analysis the opportunity cost of not foregoing the risk-creating

---

17 *See, e.g.*, Richard Posner, The Economics of Justice 48-115 (1981); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994).

18 *See* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191, 199-200 (1980).

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

20 *See, e.g.*, Shavell, *supra* note 2, at 25.

21 *See, e.g.*, Watt v. Hertfordshire County Council, [1954] 2 All E.R. 368, 371; Dabron v. Bath Tramways Ltd., [1946] 2 All E.R. 333, 336; C.A. 343/74, Groobner v. Municipality of Haifa, 30(1) P.D. 141, 158; Restatement (Second) of Torts § 292(a) (1965). *See also id.* § 293(a) (social value of the interests under risk from the actor's

activity as part of the precaution costs of the accident. At times, the only way to prevent an accident will be to cease from engaging in the risk-creating activity. If the benefits from the activity outweigh its accident costs, refraining from the activity becomes the cost of precaution. When the activity is cost-justified (that is, when its benefits outweigh its costs), engaging in that activity is not considered negligent. While economic analysis is inadequate in that it ignores distributive results and attempts to aggregate wealth, its basic consequentialist insight is valid, namely, that in order to evaluate the desirability of an activity, both its costs and benefits should be given weight and compared.

Corrective justice, despite its appeal as a non-cost-justified definition of negligence, misses a very important (and intuitive) point. It is unreasonable to evaluate the reasonableness of a given activity without comparing what the actor sought to achieve and at what cost he did so. Looking only at one side of the equation — the risk imposed on others — would not be sufficient without evaluating why the risk was imposed. Shooting a gun in the middle of the street creates a huge hazard to passersby and therefore would usually constitute negligence. However, if the shooting is by a police officer attempting to stop a person on a shooting rampage, it will not, and should not, be considered a negligent action.[22] In such cases, corrective justice approaches run into trouble. Under corrective justice, the injured innocent bystander should not be subject to such a risk, regardless of the fact that the police officer's shooting advanced a legitimate (cost-justified) action. Under corrective justice approaches, or at least some versions thereof, such a shooting is wrong.

I submit, however, that a duty to compensate the innocent bystander is desirable, based on notions of distributive, and not corrective, justice. It is fairer to spread the loss from an activity that benefits the general public across the public by imposing liability on the police, rather than placing the burden on the shoulders of the innocent victim. However, if proponents of corrective justice insist that liability in negligence necessarily connotes that the actor has acted wrongfully, such a conclusion is problematic on the facts of the example. What the officer did was desirable and commendable, not negligent and wrongful. We would like any officer to act in the same manner under similar circumstances. Economic analysis, unlike corrective justice, captures the intuition that the officer's action was not wrongful. However,

---

activity as a factor in determining the magnitude of risk from such activity); Meyers v. Robb, 267 N.W.2d 450, 452 (Mich. Ct. App. 1978).

22 *Cf.* Hatfield v. Gracen, 567 P.2d 546 (Or. 1977); *see also Watt*, [1954] 2 All E.R. 368; Restatement (Second) of Torts § 296.

economic analysis, due to its obtuseness to distributive considerations, fails to see the case for compensating the innocent bystander. Under the Hand formula, as long as the officer's action produced more aggregate benefit than cost, the officer should not have to compensate those harmed from his activity.

Thus far I have tried to show that both the law and economics approach and corrective justice yield unsatisfactory results due to their disregard for the distributive results of legal rules. The following two approaches, loss-spreading and fairness, do reveal sensitivity to particular distributive considerations. In turning to these approaches, I would like to take with us the following insight derived from law and economics: *in the evaluation of the wrongfulness (or reasonableness) of an activity, the costs and benefits of alternative courses of action should be considered as well.*

C. Loss-Spreading

Guido Calabresi has argued that one of the goals of tort law should be to reduce the negative effects of accident losses on those who bear them (secondary accident costs in his terminology), rather than reducing merely the absolute figures of these losses (primary accident costs in his terminology).[23] Indeed, if society is concerned not merely with deterrence but also with compensation, with meeting the needs of individuals, the questions of who bears the loss and what are the effects of bearing the loss upon those who bear it become crucial. One of the critiques of law and economics is relevant in this context. Measuring efficiency in absolute figures ignores the diminishing marginal utility of money and hence is unsuitable if what we are concerned about is individual (or even aggregated individual) well-being. The morality concern underlying loss-spreading is that all other things being equal, the disutility from bearing a small and predictable loss over time is much smaller than the disutility from bearing a considerable abrupt loss. Therefore, all things being equal, accident losses should be spread across many bearers. The idea of spreading *accident* losses (as distinguished from precaution costs) is quite openly accepted by many courts and serves as a hidden persuader in other jurisdictions in which its legitimacy is formally disputed.[24] Of course, from an egalitarian perspective, the underlying initial distribution of wealth is crucial if our goal is to reduce disutility. Therefore, a deep-pockets policy might be preferable to a loss-spreading mechanism. The lesson taken from a

23 Calabresi, *supra* note 3, at 26-27.

24 *See infra* Part V.A.2. and *infra* notes 123-26 and accompanying text.

loss-spreading morality is this: *meeting the needs of individuals and reducing the negative effects of losses they bear are worthy goals.*

D. Fairness

A fairness approach maintains that those who benefit from a given activity should bear its costs and risks. It is important to note that a distinction can be made between fairness as a distributive criterion in tort law and fairness as a guideline in a corrective justice approach to determining what kinds of activities are negligent.[25] One way to look at this difference is as the distinction between the *ex post* distribution of harm and the *ex ante* distribution of risk, respectively. When a defendant's activity, examined *ex ante*, is going to allocate the benefits from the activity to the defendant and the risks, or costs, to the plaintiff, the activity might create a duty to compensate the victim as a matter of corrective justice.[26] When the defendant's activity, viewed *ex ante*, should benefit many people, including the defendant, and imposes an equal risk on all, but the risk materializes randomly and is borne only by some of its beneficiaries, imposing a duty to compensate can be explained as a matter of distributive justice.

Under either understanding of fairness (fairness as a distributive criterion or fairness as a guideline to corrective justice), the fairness approach is hostile to the notion of subsidy and therefore seems at odds with an egalitarian approach favoring a *progressive* subsidizing. Fairness and egalitarianism seem to be merely two competing criteria for distribution of costs and risks in society. However, the relationship between fairness and egalitarianism is, in fact, more complex than that. First, egalitarianism shares with the fairness approach (or at least with its distributive branch) the idea that *the distributive effects of a legal rule, including the effects on third parties, are relevant for the judgment regarding the rule's desirability.* Thus, both approaches take issue with both corrective justice and economic analysis of law. Second, it is worth noting that these two criteria for distribution will not always conflict with one another. At times, liability will be justified on grounds of both prevention of subsidization (the fairness approach) and of

---

25 *Compare* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. Rev. 249, 256-57 (1996) (fairness as corrective justice), *with* Keating, *supra* note 3, at 201 (fairness as distributive justice).

26 I have doubts whether fairness is sufficient as a criterion for measuring wrongful activity. A new market participant, for example, who competes fairly engages in activity that benefits her and imposes losses on her competitors. Yet, her conduct is legitimate.

regressive distributive effect (egalitarianism). This will happen when the subsidy given by uncompensated victims to the tortfeasors' activities that harmed them is regressive.

More importantly, *I take from the fairness approach a commitment to equality*. Fairness and egalitarianism differ, however, with respect to the definition of the desired equality. For example, Gregory Keating's justification of the fairness approach is Rawlsian and, as such, committed to a particular type of equality. To Keating, the meaning of a fairness approach in tort law is to equalize burdens (including risks and their materialization) and benefits across society's members.[27] In essence, his claim is that *individuals have a fairness-based claim for equal treatment.* Imposing the risks of a given activity that benefits all members of a given group only on specific members of this group amounts to unequal treatment of those members.

The difference between fairness and egalitarianism is that the former is interested in equalizing the absolute value of the risks and losses, whereas egalitarianism is interested in equalizing the negative effects created by such losses, an examination that mandates consideration of the parties' prior holdings. I would equate a fairness approach with formal equality and egalitarianism with substantive equality. By failing to take into account the parties' prior holdings for purposes of equating the burdens imposed by tort law, a fairness approach reflects formal equality.

As for the conflict between the two approaches with respect to the worthiness of progressive subsidization, I find a great deal of appeal in the anti-subsidy sentiment. In many cases, we tend to feel it to be fair that those who benefit from a given activity pay its costs. But this notwithstanding, the anti-subsidy sentiment does have its limits. In many circumstances, we feel that subsidy is warranted. The predominant tax-and-transfer system in modern society is progressive and, as such, is founded upon a subsidy regime. Patrons of public transportation on central lines subsidize those in the periphery. Indeed, the most fundamental social structure, the parent-child relationship, is all about subsidization.[28] I argue that since subsidization is not necessarily bad in general, it is not necessarily bad specifically in the tort law arena. Therefore, to the extent that distributive considerations should play a part in tort law (a theme underlying the fairness approach itself), egalitarianism

---

27 Keating, *supra* note 3, at 202-07.

28 For a similar critique of the labor-desert justification for copyright, see Wendy J. Gordon, *On Owing Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149, 170 (1992).

is but one more such legitimate and relevant distributive consideration to take into account.

II. NORMATIVE DEFENSE

This Part defends the inclusion of egalitarian sensitivity into the tort of negligence from a normative perspective. It begins by presenting the intuitive understanding of reasonableness, according to which the context in which an activity has taken place cannot be ignored in the process of the normative evaluation of the activity's desirability. It then offers three theoretical explanations for this intuition. The first explanation is based on the rationale of fulfilling the individual's needs, which underlies the goal of loss-spreading, namely, that if we seek to decrease the negative effects of losses for those who bear them, we must take into account not only the burden created by bearing the costs of the accidents, but also the burden created by bearing the costs of their prevention. Since both kinds of costs are influenced by existing distributions of wealth, such distribution should matter for purposes of deciding the level of precaution the defendant is required to take. The second explanation for the intuition comes from a fairness perspective. Fairness requires that the burden imposed on individuals be equal. Preferring a yardstick of substantive, rather than formal, equality, I argue that the burden to take precautions should take into account the existing distribution of wealth and goods. The third explanation comes from a corrective justice perspective, which is based on the notions of moral agency and the evaluation of the worthiness of an actor's conduct. From this perspective, the sufficiency of the precautions taken by the defendant should be evaluated against the background of the existing distribution of wealth and power since such distribution bears on the actor's agency. The enormity of the burden imposed by a requirement to act in a certain way should affect the moral evaluation of non-compliance with the requirement. One can be required to forego only a certain amount of liberty in order to preserve another's security. The magnitude of both the plaintiff's security and the defendant's liberty cannot be evaluated without regard to their respective statuses in society.

A. The Intuition

Consider the following example:

Example 1. George is Elaine's neighbor. To heat his house, George uses a cheap kind of coal, which costs him $200 per month. George is very poor,

and his monthly income is $1000, from which he has to feed his sick and hungry daughter. The cheap coal causes pollution that costs Elaine $900 per month. Elaine's monthly income is $18,000. Had George used a more expensive coal, which costs $800, the pollution would have been prevented.

Under the Hand formula, George is negligent. He could have prevented a loss of $900 by spending another $600. Not doing so is negligent. George, as a rational actor, would have to spend 60% of his monthly income in order to prevent a loss of 5% of Elaine's monthly income. As a result, his daughter might not get adequate nutrition, proper clothing, adequate school supplies, or simply a treat. In contrast, if Elaine is not compensated for her loss, no major negative effect on well-being or life plan will result. Under these circumstances, can we really say that if George has decided not to buy the more expensive coal, he has acted *negligently*?

Example 2. Elaine and George have the same income as in the previous example, respectively. Elaine uses the cheap coal, which causes George a loss of $600 per month. Elaine can prevent this loss by using a more expensive coal, which would cost her an extra $900 per month.

Under the Hand formula Elaine is not negligent for not using the more expensive coal. She is not required to spend $900 in order to prevent a $600 loss to George. The fact that the burden that she would be required to shoulder would amount to only 5% of her monthly income whereas the loss to George amounts to 60% of his monthly income is irrelevant.

I argue that in both examples, the moral intuition of many will lead us to the opposite conclusion to that reached using the Hand calculus. The intuition is especially strong in the first example. I argue that George should not be considered negligent for opting not to spend $600 in order to prevent a $900 loss to Elaine. I further argue that our moral evaluation is (and should be) that George has not acted improperly by reaching this decision. Furthermore, I argue that *we do not think* that George should be absolved from liability, despite the fact that he acted wrongfully (for reasons of compassion or deriving from a need-based argument that overrides the instinct to hold him liable due to his faulty decision); *rather, we think* that he is not liable since he acted reasonably and since his decision was justified.

Similarly, I argue (although I concede that the moral intuition is less obvious) that in Example 2, Elaine should be considered negligent for not preventing the loss to George. True, Elaine's decision is cost-justified. Yet the combination of fairness and egalitarianism leads us to believe that the fact that George is forced to provide regressive subsidization for Elaine's heating activity (by not being compensated for his loss, which is created by Elaine's activity) makes Elaine's decision not to use the more expensive heating method negligent. In the next section, I will seek to defend this

intuition based on notions of needs, equality, and desert as criteria for distribution.

B. Justifications

Tort law can be viewed as a mechanism for distributing burdens and benefits across members of society. Under the Aristotelian understanding of distributive justice that I endorse, the subjects of distribution (those to whom the goods are distributed) should receive their share in the object(s) of distribution relative to the extent to which they meet the relevant criterion *or criteria* for distribution such as desert, needs, status, etc. If Hardy weighs twice as much as Laurel and weight is the appropriate criterion for the distribution of pies, Hardy should get twice as many pies as Laurel.[29] I maintain that there are at least three relevant criteria for distribution of the burdens allocated by tort law: needs, equality, and negative desert. The criterion of needs maintains that losses should be distributed in a way that minimizes the negative effects of the loss for its bearers. The criterion of equality maintains that the burdens that society imposes on the liberty of its members for the sake of the security of others should be substantively equal, so that the less advantaged will not be burdened disproportionately. Finally, the criterion of negative desert maintains that those who acted unacceptably should bear the losses created by their unacceptable behavior. In this section, I argue that all three criteria support the incorporation of egalitarianism into tort doctrine. They all support the conclusion that the distributive effects of liability under negligence should affect the decision of whether liability should be imposed. Moreover, I argue that at least the equality and negative desert criteria support the conclusion that the distributive effects of liability under negligence are relevant in the moral assessment of the defendant's activity as blameworthy (negligent) or not.

1. Needs

I argue that one criterion for the distribution of burdens (both risks and losses) by tort law should be the allocation of burdens to those who can bear them with the least disutility. The rationale behind such a criterion is that losses are a bad thing and we would like to minimize their bad effects for those who have to bear them.[30] More fundamentally, such an approach is based on a commitment to fulfill the basic needs of individuals. Under this

---

29 *See* Keren-Paz, Limits of Private Law, *supra* note 7, at 25-34.

30 *Cf.* Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 Emory L.J. 153, 177 (1996) ("harms are bad things which the system should

view, individuals should be assured a minimum set of material conditions in order to be able to fulfill those needs.[31] Losses, including losses caused by human agency, can jeopardize the agent's ability to fulfill her basic needs. Therefore, a relevant criterion for distributing tortious losses is who could better bear the loss with the least disutility. The phenomenon of diminishing marginal utility clearly suggests that the parties' prior holdings are relevant for purposes of determining loss-bearing capacity. Thus, note that a tension might exist between the policies of loss-spreading and egalitarianism,[32] and in many cases, in order to stay true to the rationale of fulfilling the individual's needs, priority should be given to egalitarianism.

To be sure, needs are not the only, or the controlling, criterion for distribution. A competing criterion is negative desert, which maintains that those who wrongfully created losses should bear them. For my purposes, however, there is no need to decide how to balance the needs criterion with other criteria. All that is required is the acknowledgement of the following three propositions: one, that needs are one legitimate criterion for deciding where tortious losses should lie; two, that existing tort doctrine recognizes the validity of this concern; and three, that a proper application of this concern requires that courts take into account also the parties' relative ability to bear precaution costs and compare the parties' relative ability — based, amongst other things, on their prior holdings — to bear *either* accident or precaution costs. I will now turn to the defense of these three propositions.

Loss-spreading and deep-pockets considerations should and do play a role in tort law. These considerations convey the significance of fulfilling the individual's needs as a morally relevant criterion for distribution. They mandate that in deciding whether liability should be imposed or not, the effects of the relevant legal rule on the well-being of its addressees (or subjects) should be taken into account.[33] Some view needs-based

---

seek to discourage ... benefits are good things which the system should seek to encourage").

31 David Wiggins, *Claims of Need, in* Morality and Objectivity: A Tribute to J.L. Mackie 149 (Ted Honderich ed., 1985).

32 A loss-spreading approach advocates spreading the loss across as many loss-bearers as possible. An egalitarian approach advocates allocating losses to deep-pocket loss-bearers who would suffer little disutility from bearing the loss.

33 *See* Calabresi, *supra* note 3, at 27-28; Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 Mich. L. Rev. 95, 105-06, 139-41, 149, 151-52 (1991); John G. Fleming, The Law of Torts 11-13 (9th ed. 1998); *cf.* Peter Cane, Atiyah's Accidents, Compensation and the Law 354-57 (1993).

considerations (in some circumstances, at least) as subordinate to negative-desert-based considerations,[34] but this can be disputed. Indeed, as tort doctrine teaches us, needs-based considerations can serve as the basis for allocating the accident loss to the innocent victim rather than to the faulty tortfeasor. This is done by denying recognition of a duty of care and by curtailing liability via the doctrines of proximate cause and remoteness of damage. Doctrinally, needs-based considerations influence tort law in at least three ways. First, they support imposing liability if the defendant is likely to be a good loss-spreader by way of purchasing insurance or through other loss-spreading mechanisms.[35] Second, they support imposing liability on the basis of the defendant's deep pockets.[36] Third, they support an exemption from liability for negligent defendants on the ground that potential liability is too burdensome for potential defendants. This is done by denying recognition of a duty of care.[37] This denial can be regarded as a manifestation of the loss-spreading idea: it is preferable that potential victims remain uncompensated for their losses from certain negligent activities than that potential negligent tortfeasors are made to bear in full the losses created by their negligent behavior.

All three paradigms mentioned above draw on the moral imperative of fulfilling the individual's needs as a basis for allocating *accident* losses to either of the parties. The paradigms are based on the idea that the ability to bear the burden of the accident loss is morally relevant data for the decision regarding who should bear this loss. I maintain that equally morally relevant is the extent of the burden created by the requirement to incur *precaution costs*. From the point of view of the potential bearer of those costs, there is no distinction (under the assumption of full compensation) between accident costs and precaution costs. The loss is the same, and the burden is the same.[38] It should also be recalled that according to conventional economic wisdom, in some situations the potential victim can "bribe" the tortfeasor and thereby achieve the efficient result by bearing the cost-effective precaution

---

34 *See* Mautner, *supra* note 33, at 100, 116, 118.

35 *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944).

36 *See, e.g.*, Patrick S. Atiyah, Vicarious Liability in the Law of Torts 22 (1967).

37 *See, e.g.*, Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 (policy concerns surrounding indeterminate liability negate imposing a duty); Caparo Industries Plc. v. Dickman, [1990] 2 A.C. 605; Ultramares Corp'n v. Touche, 174 N.E. 441 (N.Y. 1931).

38 The fallacy of the assumption of full compensation — that accident losses can be compensated in full by awarding damages — complicates the discussion. However, conceding that the ideal of full compensation is unattainable does not weaken the argument provided in this article.

costs himself, instead of the tortfeasor. Needs-based considerations call our attention to the actor's ability to bear losses as a relevant factor in deciding how to allocate the losses. Since the accident loss and precaution costs should be treated as one and the same loss or cost, courts should allocate that loss/cost to the party who has the greater ability to bear it. Therefore, if the victim has the greater ability to bear the loss, liability should be denied; but if the victim has less ability to bear the loss, liability should be imposed on the tortfeasor.

Given the diminishing marginal utility of money, it is better that those with higher loss-bearing capability ("the rich") bear losses of higher absolute value than the poor bear losses of lower absolute value. For that matter, it is immaterial whether the loss is an accident loss or a precaution cost. This is justified from a needs-based perspective, since the disutility caused to the poor from bearing the loss (in either form) would be more significant than the disutility caused to the rich from bearing the loss (in either form), even if the loss suffered by the rich is higher in absolute value than that suffered by the poor.

The discussion so far has not suggested that the decision not to impose liability on the less able loss-bearer implies that the latter's activity (assuming she is the defendant) was not negligent. Rather, it suggests that for reasons of policy or justice, we would like to exempt her from liability, even if she were negligent. I turn now to defend the proposition that the agent's means are relevant for purposes of deciding whether her activity is negligent or not.

2. Equality

A fairness approach is based on the idea that burdens and benefits should be distributed in an equal way across members of society. There are, of course, competing conceptions of equality, and competing political theories are supported by their proponents in the name of equality.[39] I argue that those who endorse a substantive concept of equality, one that takes into account some measure of equality of results rather than equality of opportunity, should agree that the relevant burden should be measured against the prior holdings of parties. I support an approach to equality that is group-based, relational, intersectional, and asymmetrical, one that combines fair equality

---

39 For one typology, see Ronald Dworkin, Law's Empire 297-301 (1986) (reviewing libertarian, welfare-based conceptions of equality, material equality, and resource equality). *See also* Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality at chs. 11-119 (2000) [hereinafter: Dworkin, Sovereign Virtue].

of opportunity with a commitment to narrow (but not necessarily eliminate) gaps in end-result resource allocation.[40]

The question in essence is how should burdens and benefits be measured. Presumably, all those who support the basic fairness intuition agree that benefits and burdens should be borne equally across members of society, so the question boils down to one of what should constitute the guideline for measuring burdens and benefits. The prevalent view, based on economic analysis, compares burdens according to their absolute monetary value. Against this I argue that absolute value is a poor guideline for the real-life effect of bearing the burden (or enjoying the benefit). Put simply, I call for including the concept of diminishing marginal utility into the evaluation of the magnitude of the burden borne by different members of society.

Applied in the negligence arena, the argument goes as follows. Negligence law balances the competing claims for liberty by potential tortfeasors and for security by potential victims. The moral rationale behind such a balancing is that the actor is required to refrain from creating risk for another only to a certain degree: there comes a point when the requirement to protect the interests of others comes at a cost deemed too high to the actor's liberty. When this line is crossed, the actor is not required to prevent the risk to another simply because the burden of doing so is deemed excessive. Equality dictates that all actors be subject to the same burden when required to consider the interests of others. The Hand formula systematically subjects the poor to a higher burden than the rich bear, since they are required to spend the same amount of money as precaution costs, which imposes a greater burden on the poor than on the rich. Similarly, the burden the poor have to bear as potential victims under circumstances of unavoidable accidents is greater than the burden borne by the rich when the absolute value of the loss is the same.

My argument finds support in another approach emphasizing positive liberty. Obviously, tort law affects potential defendants' negative liberty by proscribing certain kinds of behavior. However, the distributive effects caused by the duty, or lack thereof, to compensate others for certain activities affects both parties' positive liberty. The individual's positive liberty — her ability to pursue her own goals and to have effective choice regarding her life plans — derives partially, yet significantly, from possessing financial resources.[41] If we strive to ensure for individuals an adequate and equal degree

---

40 *See* Keren-Paz, Limits of Private Law, *supra* note 7, at 34-42. The gist of the argument presented in this article, however, can be supported by competing understandings of substantive equality.

41 *See* Note, *Distributive Liberty: A Relational Model of Freedom, Coercion, and*

of positive liberty, we must take into account the distributive consequences of the relevant legal rule.

Below, I argue that the Hand formula has the result of a regressive distribution of wealth in society due to the systematic incentive it gives tortfeasors to harm the poor.[42] The analysis here adds the insight that even if we put aside this effect, the Hand formula brings about regressive results by ignoring the fact that equal losses (be it accident losses or prevention losses) have greater adverse effects on the poor than on the rich and result in greater disutility to the poor. Viewed this way, the problem seems one of horizontal equality and as more reflective of notions of distributive justice than corrective justice. The problem appears to be that across potential victims or tortfeasors, respectively, the poor are required to forego a greater amount of security or liberty in order to achieve the same degree of protection of the liberty or security of others. Unlike the needs-based argument, however, I believe that the equality criterion reveals the unfairness of holding the poor and the rich to the same moral assessment for not taking the same degree of precaution. This suggests that exempting the poor from liability in situations like Example 1 above is based on the idea that the poor individual's behavior was not negligent, not on the idea that despite his negligent behavior, it is unjust to hold him liable. While a needs-based rationale is derived from mercy and excuse, an equality-based rationale is derived from notions of rights and justification. If individuals do have a right to equal treatment and to expect to be subject to equal burdens in order to achieve the same goals, they are seemingly justified in not taking precautions that overly burden them.

My final remark about equality is as follows. A fairness approach that demands placing equal burdens on actors might require that inequality in initial holdings of resources other than wealth (including personality traits) also be taken into account in determining the expected standard of care for each individual. This amounts to a shift toward a subjective standard of care. I do not explore here whether such a proposition is true or whether there are grounds to distinguish wealth and social power from other resources for purposes of standard of care analysis.

3. Desert

Notwithstanding the dictates of substantive equality, an approach advocating that the parties' respective statuses be taken into account for purposes of

---

Property Law, 107 Harv. L. Rev. 859, 859 (1994) ("changes in property rules redistribute liberty, as well as material well-being").

42 *See infra* Part IV.B.1.(d).

evaluating the reasonableness of the activity in question arguably misses an important feature of negligence law, related to corrective justice: that in order to support liability in negligence, the agent's activity should be considered as blameworthy vis-à-vis the victim. Seemingly, if, as a matter of negative desert, the agent's activity wrongfully risked or harmed the victim, the former should compensate the latter, irrespective of the equality criteria. Put differently, the advocate of corrective justice might argue that the apparently unequal burden is justified and in fact equal since it subjects all agents to an equal criterion of negative desert: those who harmed others wrongfully should compensate them. As should be clear from the discussion thus far, the crucial question is: What should be the standard for measuring "wrongful" or "negligent" activity? I argue that the concept of negative desert should be reformulated in an egalitarian-sensitive way, so that the magnitude of the burden created by the duty to take precautions or by the freedom of the other side not to take precautions will affect the moral assessment of the defendant's activity as negligent. To base this point, I turn to a discussion of desert as a criterion for distribution and the idea that negligent behavior is conduct that fails to balance properly between self-interest and other-regarding. The ensuing discussion will establish the claim that even as a matter of corrective justice, it is unjust to disregard the actual burden involved in bearing accident or precaution costs for purposes of morally evaluating a given activity as negligent or not.

Negative desert as a criterion for distribution is based on the idea that those who wrongfully harmed others should bear the resulting loss. As it is well accepted that mere causation is not a sufficient ground for liability, corrective justice theorists as well as others who support negative desert as a criterion for distribution have to define what will be considered as wrongful or negligent. As explained in Part I, I view the moral evaluation of a given activity as negligent as based on an improper balancing of costs and benefits (broadly defined) of the activity. For this reason, I reject definitions of negligence that ignore the purpose for which the activity was engaged in, the benefits it produces, and the way in which its benefits and burdens are distributed. Similarly, I reject the Hand formula for its inherent regressive effects and its disregard for distributive considerations and effects on the well-being and welfare of the affected individuals.

In defending this view, I combine three insights: an understanding of negligence law as balancing between competing claims of individuals for liberty and security; an understanding of negligence law as balancing the underlying tension between self-regard and altruism; and a progressive and somewhat materialistic understanding of desert and moral agency as influenced by the agent's *means* and *practical* ability to choose.

(a) Balancing security against liberty and self-interest against altruism. I submit that egalitarianism can *justify* a different moral evaluation of the same act committed by two different individuals based on their prior holdings. Such a conclusion can be supported by the understanding of negligence law as the arena in which the law balances between competing claims for security and liberty and prescribes the desired balance between altruism and self-interest. The crux of negligence law is in the balancing of potential victims' interest in security from harm against potential tortfeasors' interest in freedom of action.[43] Built into this analysis is the idea that the same restriction of liberty might be justified in order to further certain worthy goals (such as preventing a *significant* decrease in potential victims' security), but might be unjustified to further other goals (such as preventing an *insignificant* decrease in potential victims' security). Similarly, a certain reduction of potential victims' security can be justified if it serves some goal deemed worthy enough (primarily ensuring a certain minimal degree of liberty to potential injurers), but not if it serves less worthy goals (such as the prevention of an insignificant decrease in potential injurers' liberty).

But if liberty and security are what we should be concerned about, surely the extent to which the applicable legal rule will in fact affect security and liberty is relevant, if not crucial. I argue that our intuition in Example 1 and Example 2 (that George is not negligent for not spending $600 in order to prevent the loss to Elaine, whereas Elaine would be deemed negligent if the other way around) is precisely because we think that the burden that should be imposed on the two should be *substantively* equal. The law of negligence calls for a compromise between one's natural inclination toward self-regarding behavior and the requirement to take the interests of others into account. The moral judgment of a given course of action as negligent is due when the agent fails to take into account appropriately the interests of others.[44] The morality of negligence law, I submit is this: Individuals live in society and interact with each other. Some of these interactions result in harm to some people from the activities of moral agents. A balance must be struck between the agent's liberty and the security of others. The reality of coexistence entails that not all harms that individuals incur from moral agents

---

43 This proposition is often presented more broadly as reflecting the law of torts in general. *See, e.g.*, Keating, *supra* note 3, at 196-97, 202-03; Calnan, *supra* note 3, at 588; Note, *supra* note 41.

44 *See, e.g.*, Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, The Reasonable Person Standard, and the Jury*, 54 Vand. L. Rev. 813, 834 (2001); Richard W. Wright, *The Standards of Care in Negligence Law, in* Philosophical Foundations of Tort Law 249, 256 (David Owen ed., 1995).

should be compensated for. It also entails that moral agents have to take into account the interests of others while acting. Negligence law is the forum in which individuals are required to balance their self-interests with altruism. The moral evaluation of deviation from the acceptable standard of care is a determination that the agent failed to consider properly the interests of others. Since individuals should enjoy equal rights and equal treatment, they can expect that the assessment of their acts as negligent or not will respect their interests to the same extent that it respects the interests of others.

In the previous section, I explained this expectation as a matter of horizontal equality; here, I emphasize vertical equality. The determination of whether the agent's activity was negligent should be based on a balance of equities. A conclusion of negligence means that the agent has failed to accord enough weight to the interest of others. In order to reach such a conclusion, it is vital to see what burdens and benefits are created by the activity and what burdens and benefits are created by an alternative course of action. It is justified to impose risks on others if an alternative course of action (that prevents the risk) will excessively burden the agent. True, an agent is required to take into account the interests of others. Yet, he is also morally entitled to take into account his own interests. Since we seek equal treatment, the burdens and benefits of the activity should be compared. There is no dispute that individuals must bear a small loss from the activity of moral agents if requiring the agent to prevent the harm to others that would result from his activity would excessively impair his freedom. For this reason, those who choose to fly without taking their small children and even those who choose not to bring children into the world cannot prevent parents from flying with their children or get compensation for their loss of convenience. Parents who fly with their children are not considered negligent, since they did not fail in a balancing of the competing interests by according greater weight to their interest to fly with their children than to the interests of the other passengers to fly undisturbed.

The common-sense understanding of the reasonable person standard is that a reasonable person will take precautions when those precautions will prevent a significant loss to others and do not constrain the person's liberty excessively. Negligence law can be viewed as one manifestation of the golden rule "Do unto others as you would have them do unto you." A common justification of the Hand formula is that it treats individuals equally: individuals will prevent accidents to their own property only if it is cost-effective; therefore, they should be required to prevent losses to

others also only if it is cost-effective.[45] I term this claim "the single-owner test." But the fallacy in the argument is obvious. A person who does not prevent a loss of 600 to herself that can be prevented by her spending 900 in precautions is left with that loss of 600. A person who does not prevent a loss of 600 to her neighbor by not spending 900 is externalizing that loss to another rather than bearing it as she would under the single-owner test. It follows that when only the absolute monetary value is considered, a regime of strict liability, rather than negligence, better serves the logic of the single-owner test.[46] More importantly, the disregard shown by standard economic analysis for the diminishing marginal utility of money further undermines the cogency of the single-owner test. When the parties' extents of disutility from bearing the loss are compared, the result will often differ from the dictates of cost-effective analysis. Let us consider a single-owner test of the respective disutility of the two parties in Example 1. Let us assume that George will suffer the same degree of disutility Elaine suffers from the use of the cheap coal. This disutility is that created by the loss of 5% of one's *high* income (Elaine's in Example 1), and it is incurred in order to prevent the disutility resulting from a loss of 60% of one's *low* income (George's in Example 1). A single-owner test of utilities would lead George *not* to shift to the more expensive coal.

Again, a single-owner test suggests that on grounds of fairness, George should bear a disutility created by the loss of 5% of *his* income.[47] Were this approach adopted, George would have to compensate Elaine with a damage award of 50. Note the following two points: First, in these circumstances, egalitarianism and fairness prescribe different results. The former opposes even this kind of modified compensation, whereas the latter supports it. Second, and more importantly, if compensation is due, it is due based on grounds of distributive, rather than corrective, justice. George would have to compensate Elaine not because he was wrong to prefer his interests over hers, but because fairness (arguably) mandates that despite the fact that George acted in a justified manner, he still has to bear the costs of his justified decision. Grounds of responsibility, and not only the monetary result, are

---

45 *See* Stephen G. Gilles, *The Invisible Hand Formula*, 80 Va. L. Rev. 1015, 1034-35 (1994).

46 For a critique of the single-owner test, see John Rawls, A Theory of Justice 23-24 (rev. ed. 1999); Dworkin, *supra* note 18, at 200.

47 The analysis in the text should be refined. What matters for purposes of utility is wealth and not merely income. A loss of 5% from a high income creates less disutility than a loss of 5% from a low income. This, however, can be partially overcome by some reduction of the amount George would have to pay Elaine.

important here. Liability in negligence is based on the moral evaluation that the actor acted wrongfully. By contrast, other grounds of liability, mainly strict liability, are based on the idea that the agent has acted properly but should bear the costs of her justified activity.[48] Not only the fairer distribution of wealth but also the symbolic aspects of negligence liability strongly support including egalitarianism in the standard of care analysis.

(b) Moral agency, means, and needs. My call to reformulate the concept of reasonableness to be egalitarian-sensitive is inspired by the view that the satisfaction of basic needs is a necessary condition for the individual's ability to develop and exercise agency. Accordingly, there is no room for any desert-based moral assessment of the agent's behavior if her basic needs have not been fulfilled, something that impairs her free will. As Wojciech Sadurski has stated, meeting basic needs should be a precondition to the operation of desert as a criterion for distribution, since the failure to satisfy those needs prevents the needy from becoming the subjects of other principles of justice: "[Q]uestions of desert do not even arise where basic needs are not satisfied."[49] A similar line of thought might call for giving priority to social rights over political rights[50] or to recognizing a criminal law defense based on underprivileged social background.[51] The logic behind such an approach is clear: agency is about the ability to choose, and in order to be able to choose, the agent's basic needs must be fulfilled.

My argument, however, seems to go beyond the approach represented by Sadurski. Presumably, once Sadurski's threshold for the desert criterion of fulfilling basic needs is met, the criterion operates without regard for egalitarian considerations. I take the logic of that approach one (significant) step further. Whenever we morally evaluate the worthiness of an agent's activity, the effects of that activity on the fulfillment of the basic needs of all relevant parties should be taken into account. For the purposes of deciding whether the activity is negligent or not, the disutility it causes to all affected parties is an important (although not a conclusive) factor.

It follows that even a corrective justice approach that is based on notions of negative desert should, when properly understood, take into account the

---

48 Cooter, *supra* note 16, at 1524; Keating, *supra* note 3, at 200-02.

49 Wojciech Sadurski, Giving Desert Its Due: Social Justice and Legal Theory 169 (1985).

50 *See, e.g.*, Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 Hum. Rts. Q. 467, 469 (1983).

51 Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 Law & Ineq. J. 9 (1985).

distributive effects of the relevant negligence rule and the parties' prior holdings in the moral evaluation of the worthiness of an agent's activity. At first glance, this conclusion is surprising given the distinction corrective justice theory mandates between action and status. Yet my approach conforms to the requirement that an agent's activity should dictate the moral evaluation of her duty to compensate the victim. Egalitarianism uses the parties' prior statuses not as an independent reason for redistributing wealth, but, rather, as a vital component in the moral evaluation of the activity itself. It paints the activity as negligent or not based on the extent to which the agent has balanced properly her self-interest against the interests of others. It does so by calling to our attention the consequences of burdening one side with precaution costs or the other side with accident costs for the well-being of the parties. It teaches us that we are entitled to expect a greater degree of altruism from the better-off than from the worse-off.[52] One is required to protect another's interests only up to a certain point, and in deciding where this point is, it is essential to take into account the consequences of alternative courses of action for both parties. These consequences hinge on the parties' prior holdings.

Arguably, the interests of all involved could be better served by requiring the potential tortfeasor to incur precaution costs when the expense is cost-justified and to reimburse him for his expense if he is needy. Such a solution, however, is not practical. Reimbursement from potential victims is impossible due to transaction costs. A more progressive tax and transfer system would fail to reimburse accurately due to administrative costs and is, in any event, not likely to arise due to public choice pressure. The Louis Kaplow and Steven Shavell claim that progressive redistribution would be achieved more efficiently by taxation than by changing the legal rules[53] is disputed for many reasons, including based on insights taken from behavioral law and economics[54] and a real-politics approach.[55] From a moral perspective, we are left with the truism that as long as society does not create an effective and just procedure to reimburse the needy who expend cost-effective precaution costs to prevent losses to others, society cannot hold those who fail

---

52 Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Colum. L. Rev. 1710, 1783-84 (1997).

53 Kaplow & Shavell, *supra* note 17.

54 Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 Vand. L. Rev. 1653 (1998).

55 Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies, in* 2 The New Palgrave Dictionary of Economics and the Law 465, 469 (Peter Newman ed., 1998)

to incur this cost as negligent, given the financial and symbolic consequences of holding such defendants negligent.

III. STANDARD OR DUTY?

The discussion in Part II showed that egalitarianism should be pursued by negligence law, that it can be interwoven with other goals that tort law should promote, and that it fits well with negligence law's morality and logic. Specifically, it demonstrated that contrary to common belief, incorporating egalitarianism into negligence law is supported by notions of corrective justice. It is yet to be determined at which stage egalitarianism should come into the picture: at the stage of determining the existence of a duty of care or at the stage of examining the standard of care. I argue that the desert-based and equality-based justifications of egalitarianism show a strong preference toward incorporating egalitarianism into the standard of care analysis. I defend the claim that in order to give full weight to both equality and notions of fault, the standard of care analysis should be reformulated to reflect egalitarian concerns and that this should be based on the distinction between excuses (operating at the duty stage) and justification (operating at the standard stage) as grounds for not imposing liability.

A common understanding of the duty of care element of the tort of negligence views it as a mechanism for restricting the potential liability of negligent actors. Under this understanding, the duty stage responds to the question of whether we should impose liability on a defendant, assuming she was negligent.[56] The existence of a duty is rejected when policy considerations weigh against imposing liability, even though the defendant was negligent. The reasons for denying a duty of care are diverse and include: the fear of over-deterrence of non-negligent activity by potential tortfeasors; the sense that liability might be too burdensome and, hence, unjust even when imposed on a negligent tortfeasor; and the concern that imposing a duty will have an adverse effect on potential plaintiffs, third parties, society as a whole, or on the courts.[57] The common denominator of these policy reasons is that they do not render the defendant's activity non-negligent. Indeed, as just explained, by definition, these policy considerations assume that the defendant

56 *See* Basil S. Markesinis & Simon F. Deakin, Tort Law 72 (4th ed. 1998).

57 *See, e.g.*, Richard A. Buckley, The Modern Law of Negligence 15-26 (3d ed. 1999); Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menus, in* The Law of Obligations 59 (Peter Cane & Jane Stapleton eds., 1998).

was negligent. Thus, the duty of care serves as a reason to excuse the defendant from liability.

Philosophers distinguish between excuses and justifications as different types of reasons for absolving individuals from liability.[58] While this dichotomy works usually at the level of defenses (which negate liability that is otherwise established), it is not limited to that realm alone. More broadly, the dichotomy connotes a distinction between wrongful actions and legitimate actions. Quite simply a justified action is one that is not wrongful and therefore is legitimate. Society (or whoever is making the relevant moral judgment about the activity in question) would not seek to prohibit such an action and would even sometimes seek to encourage it. The agent's course of action is, hence, justified. A classic example of justification in tort is the defense of necessity. The starving mountain-climber is encouraged to break into the cabin and take refuge from the storm, despite his activity's violation of the sanctity of private property. Criminal law likewise recognizes situations of necessity and self-defense as justified and legitimate activities. By contrast, excuses are based on the idea that the defendant's action was wrongful. Society would rather the action not occur. Nonetheless, liability is not imposed, because we think that it would be unfair to hold the agent liable for his wrongful action. The classic example in criminal law of excuse is the defense of duress.[59] In tort, the "defense" of *novus actus interveniens* works similarly as an excuse: the intervention of a third party does not make the defendant's activity legitimate, rather it provides an excuse for not being held accountable for what she did.

Seen through this prism, there are two different grounds for not imposing liability on a defendant in negligence litigation. The defendant might be released from any liability simply because she was not negligent. In such a case, her activity is legitimate and therefore justified. As noted in Part I, the purpose of the standard of care is to distinguish between activities deemed wrongful and those deemed legitimate by society. By contrast, negligent behavior, which is wrongful, might not trigger liability if the activity is excused, through non-recognition of the existence of a duty of care based on policy considerations.

Doubtless it is possible to adhere to a standard of care that is indifferent to egalitarianism and yet still release the defendant from liability based on egalitarian considerations at the duty stage. However, such a strategy misses

---

58 *See, e.g.*, J.L. Austin, *A Plea for Excuses, in* Philosophical Papers 175 (James O. Urmson & Geoffrey J. Warnock eds., 2d ed. 1970).

59 *See* George P. Fletcher, Rethinking Criminal Law § 10.4.2 (1978).

the moral intuition presented and defended in Part II. If, indeed, the standard of care strikes a balance between the interest of potential defendants in liberty and the interest of potential plaintiffs in security and if, indeed, the burdens of taking precautions and of bearing the accident costs are influenced by the prior holdings of the parties, it follows that the same failure to take precautions might be viewed as wrongful in certain circumstances but legitimate in others. As explained in Part II, we should really not expect from a defendant to expend all of her meager wealth to prevent a small loss to the well-off. For the reasons explained above, such a failure simply is not faulty or wrongful. If one accepts this view, one should support, both analytically and morally, the incorporation of egalitarianism into the stage of standard of care analysis: analytically, because the standard stage is the correct one for dealing with activities we deem legitimate, and morally, because it is unfair to tarnish the defendant with the label of negligent activity, even though we release her from liability. Symbolically, there is a difference between the proposition "You acted rightly and hence bear no liability" and the proposition "Despite your wrongful action we do not hold you liable." In addition to being more correct and just, the former proposition is more empowering: rejecting liability at the duty stage can be interpreted as an act of mercy or charity on the part of society toward the disadvantaged. In contrast, determining that there was no deviation from the expected standard of care interprets the denial of liability as a matter of the right of the disadvantaged to equal treatment and respect and to share in society's basic goods.[60]

IV. REFORMULATING THE STANDARD OF CARE

In this Part, I will outline the role of egalitarian considerations in the standard of care analysis. Section A will explain the relationship between egalitarianism and other criteria for conduct evaluation. It will give an overview of the way courts should approach determinations about negligence and will emphasize the limited (though important) role of egalitarian considerations in such determinations and how the weight to be given to egalitarian considerations changes with the context. Section B will examine how determinations about the dictates of the egalitarian concern should be made both in general and given the conceptual and methodological difficulties in identifying, measuring, and comparing disutility. I suggest that

60 Egalitarianism should play a role also at the duty-of-care analysis stage. An examination of this proposition exceeds the scope of this article's discussion.

courts should make intuitive determinations regarding disutility, offering some guidelines or proxies to assess disutility and defending the claim that the correct comparison is that between the disutility of the actual defendant and the average disutility of the typical (as opposed to actual) victim. Furthermore, I identify problems from an egalitarian perspective that would exist even given an egalitarian-sensitive standard of care and suggest solutions to these problems. Finally, Section C shows how the approach I propose can work in practice, by analyzing a series of examples drawn in part from the case law, involving both active creation of risk and failure to prevent harm to the victim by third parties.

A. The Role of Egalitarianism in Standard of Care Analysis

1. The Analysis in General

I believe that a finding of negligence is based on a *rough* and *broad* cost-benefit analysis. The analysis is *rough* in the sense that neither the actor nor the court conducts the cost-benefit analysis rigorously and instead do it intuitively most of the time. This means that technical rules, a rigorous model, and exact valuation and interpersonal quantification of utility or welfare levels are neither required nor assumed to be feasible. Rather, the courts should take into account rough evaluations of disutility that are based in part on the affected parties' holdings and status in society, insofar as these can be assessed by the courts.

The analysis is *broad* in that it weighs-in many factors, both welfare-based and non-welfare-based, in the evaluation. It is also *consequential*, in that the normative evaluation is based, to a large extent (but not solely), on the consequences of the activity. The test respects *moral agency* in that the evaluation of the actor's behavior derives from the actor's choice regarding how to act based on knowledge available to her prior to taking her course of action. In evaluating whether the imposition of risk by the defendant was negligent or not, the court must assess the cogency of the reasons for expecting the defendant to bear the burden of taking precautions as opposed to the cogency of the reasons for potential victims bearing the burden of not being compensated for their losses.

2. The General Role of the Egalitarian Concern in Standard of Care Analysis

I argue that one relevant (yet not conclusive) consideration in this assessment is the parties' relative abilities to bear these losses. There should be less expectation of a defendant with meager means than a well-off defendant to incur big expenses to prevent harms to others if those expected to be harmed are less likely to suffer greater negative consequences from the

loss. Similarly, there should be greater expectation of an affluent defendant as opposed to a poor defendant to take precautions to protect others from harm, since his disutility from the burden would be small and the loss to others would create significant disutility if no compensation is awarded to the victim. In estimating disutility, the absolute magnitude of the losses and their proportion to the respective holdings of the parties (both before and after the loss is borne) should be taken into account. By considering the proportion of the loss to the parties' states prior to bearing the loss, weight is given to disutility due to the endowment effect.[61] I maintain that greater weight should be accorded to disutility caused by diminishing marginal utility, which is determined by the parties' *remaining* holdings. When the identities of potential victims is known in advance, *their* expected disutility should be taken into account by the defendant and by the courts. When the victim's identity is unknown in advance, the average disutility from bearing the loss should be compared with the actual defendant's disutility.[62]

3. Egalitarian Considerations Are Neither Exclusive Nor Conclusive[63]

Courts' determinations regarding whether the defendant should be expected to bear precaution costs should not rest solely on the egalitarian consideration. First, courts should also consider efficiency. In comparing between two alternative rules, one rule's small deficiency in egalitarian terms might be outbalanced by its much better results in efficiency terms. For example, a rule that results in a distribution of (15,50) might be inferior overall to a rule that results in a distribution of (14,100). Second, courts should evaluate the legitimacy of the risk imposed by the defendant according to other considerations, some distributive and some not, for example, in light of the fairness consideration: who stood to benefit from the risk-creating activity is an important factor in the evaluation of reasonableness of the risk created. The social value of the activity and the actor's motives should also be taken into account. No rule of thumb can be given to resolve the question of the relative weight that the egalitarian consideration should be given in relation to other considerations. It is also likely that the relative weight that should be given to the competing considerations changes with the context.

4. Egalitarian Considerations Should Not Serve Merely as a Veto

Contrary to some suggestions raised in the literature,[64] I do not believe

---

61 *See infra* Section B.1.(a).

62 *See infra* Section B.

63 The remaining comments in this Section are based on Keren-Paz, *supra* note 10.

64 Calabresi, *supra* note 3, at 32-33. In subsequent writings, Calabresi leaves more

that distributive considerations in general and egalitarian considerations in particular should serve merely as a veto. A veto approach is binary. As long as the deficiency of the distributive result does not go beyond a certain limit, the distributive deficiency should not be taken into account. In contrast, I believe that the egalitarian concern would be almost always[65] relevant but seldom,[66] if at all, conclusive. In essence, the question is one of weight, not of relevance. The weight will vary with context — according to the significance of the distributive result, the extent to which the attainment of other goals is compromised by trading them off for attaining better egalitarian results, and possibly by the varying intrinsic value of promoting equality in different settings.[67]

5. The Multifaceted and Contradictory Nature of the Egalitarian Concern

While egalitarian considerations should always be taken into account by courts, not always can the courts take them into account. The proper implementation of these considerations involves difficult and contested value choices. One problem that arises is the lack of sufficient information about the distributive effects of the given legal rule. Another problem is the difficulty sometimes encountered in making determinations of relative degree of disadvantage. The more egalitarianism is concerned with issues of power and status that defy monetary valuation, the thornier the determination becomes. (For example, who is more disadvantaged in Western societies — women or people of color?) Since these difficulties are not unique to standard of care issues, I will not explore them in depth here. I will merely make the following comments: First, with respect to standard of care analysis, due to the inherently relative, narrow, and contextual nature of litigation, these difficulties are easier to deal with than, for example, duty of care issues. Second, the more courts stick to narrow conceptions of welfare (which are more wealth-oriented) in standard of care analysis, the less acute these problems. Third, although at times the egalitarian consideration can have no effect in courts' determinations of negligence, it does not follow from this that courts should not take egalitarian considerations into account when this is possible. Fourth, I am well aware of the fact that many determinations of relative disadvantage are value-laden and contested. However, this should not prevent courts from making such determinations. This issue relates to

---

room for distributive considerations; *see* Calabresi & Hirschoff, *supra* note 3, at 1083-84; Calabresi & Klevorick, *supra* note 3.

65 For a possible exception, see *infra* text accompanying note 103.

66 For such a possibility, see Keren-Paz, *supra* note 10, at 31-32.

67 *Id.* at 19-29.

the question of judicial accountability, a topic that is beyond the scope of this article.[68]

6. The Roles of Egalitarian Considerations outside Standard of Care Analysis
In circumstances in which the risk imposition was deemed to be reasonable *ex ante* (based also on average disutility) but resulted, in fact, in a loss to the plaintiff whose disutility is greater than the defendant's disutility in bearing precaution costs, egalitarian considerations might justify imposing a duty to compensate the victim.[69] However, such a duty cannot be grounded in a finding of negligence since when the risk-creating activity is examined, as it should be, *ex ante*, the defendant did not impose an unreasonable risk. Similarly, non-egalitarian results that are produced by compensation rules might have to be repaired by changing the compensation rules. This question, however, exceeds the matter of the proper delineation of the standard of care analysis.

To conclude, I believe that egalitarian considerations should serve as one in a range of considerations in reasonableness determinations. This consideration is (almost) always relevant but (seldom) conclusive. The weight that should be accorded to it varies with the context, as does the extent to which it can guide courts. The parties' respective abilities to bear the loss should be one consideration in deciding who should bear that loss and an important one in evaluating the morality of the actor's behavior.

B. Comparing Disutility: The Difficulties and Guidelines for Courts

The reformulation I support of standard of care analysis advocates a comparison of the parties' respective extents of disutility from bearing the loss as one, albeit not conclusive, consideration in evaluating whether the defendant's activity was negligent. I argue that the disutility of the actual defendant from bearing the loss should be compared with the average disutility of the typical victim. This test raises two difficulties. First, measuring utility and disutility is impossible. Therefore, an egalitarian-oriented court should develop some guidelines, or proxies, for measuring disutility. Second, it is necessary to explain why the test takes into account the disutility of the average victim (as opposed to that of the actual victim

68 I discuss judicial accountability in Keren-Paz, Limits of Private Law, *supra* note 7, at 208-30.

69 Such a result might also be supported by non-egalitarian considerations such as fairness.

or as opposed to the below-average victim), but the disutility of the actual defendant. This is related to the distinction between liability rules and compensation rules as sources of non-egalitarian results.

1. Proxies for Disutility

(a) In general. Loss causes disutility. The absolute magnitude of the loss can serve as a proxy for ensuing disutility; however, absolute magnitude cannot act as the sole proxy for that disutility. Diminishing marginal utility suggests that the individual's remaining wealth after bearing the loss is relevant as a proxy for disutility. The endowment effect, according to which individuals give added value to endowments they posses simply by virtue of possessing them,[70] suggests that one's holdings prior to the loss affect one's disutility from the loss. This suggests that one's holdings prior to the loss and the proportion of the loss are relevant as proxies for the disutility. What is important to understand is that no one proxy in itself is sufficient.

(b) Proportion. Seemingly, a good proxy for disutility would be a comparison of the proportions of the losses of the parties (measured in dollars) to their respective wealth prior to the loss. The sum of the precaution costs should be divided by the total assets of the defendant. The plaintiff's expected loss should be divided by his total assets. A finding of negligence should follow if the former figure is lower than the latter one. The appeal of this test is that in theory it is simple, easy to apply, and enjoys a "scientific" pedigree. It leads to clear results and is rigorous and seems to exclude judicial discretion and bias. It also seems to respond well and in a comprehensive manner to the underlying difficulty of the regressive nature of a cost-benefit analysis that compares losses of wealth. Such a rule, however, leads to undesirable results from an egalitarian perspective, since it does not reflect accurately enough the disutility caused by diminishing marginal utility. A proportional comparison does not solve (it merely alleviates) the problem of unequal burdens caused by diminishing marginal utility of money. The reason is that a larger proportional loss of one's wealth might still inflict a lesser burden on the bearer's well-being, given the magnitude of her remaining wealth. For example, a billionaire who loses 90% of her wealth would still fare better than a person with an average income who loses 50% of his wealth. The latter might fare better than the poor person who loses 10% of her wealth. It seems, then, that if we are concerned with the

---

70 *See, e.g.*, Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 Wash. U. L.Q. 59 (1993).

magnitude of the burden that the loss causes to the bearer thereof, what should interest us is not the percentage of the loss relative to one's prior holdings, but, rather, the effect of the loss on the remaining wealth of the parties.[71]

(c) Remaining wealth. Given the inability of the proportions test to solve the problem of diminishing marginal utility of money, one might opt for a rule that allocates the loss to the more affluent party. Such a rule would disregard proportion and would instead compare the parties' absolute wealth after the tortious loss has been taken into account. The outcome would deny a victim compensation if, after the loss, his wealth were to exceed the defendant's wealth. Adopting remaining wealth as the only proxy for disutility, however, would not suffice, since it ignores the endowment effect as a source of disutility. What matters to people is not only how much they have presently, but also how much they have in comparison to what they had in the past, how much they lost, and how abrupt the loss was. Abrupt loss of wealth imposes two kinds of disutility. One resulting disutility is due to the *temporal aspect of the loss.* Abrupt losses negatively affect one's ability to plan one's life. They are harmful to stability and predictability. The other kind of disutility derives from the *magnitude of the loss.* Individuals have subjective and relative concepts of welfare. They get used to living at a certain level of welfare and compare what they have with what they had and lost. Therefore, *A*, who is left with more than what *B* has, might still suffer more disutility if her loss is much greater than *B*'s loss. For this reason, ignoring initial wealth altogether is problematic. It is too burdensome on the rich and is morally doubtful. Under a remaining-wealth test, a defendant with an average income would not be required to spend even one dollar, even if by spending this she could prevent a loss of millions of dollars to the plaintiff, provided the plaintiff would be left with more money than the defendant after bearing the loss.

(d) Pecuniary loss of the average victim. This test compares, as does the traditional application of the Hand formula, the marginal costs and benefits of the activity *measured in dollars.* The test differs from the Hand formula in that it calculates the expected loss of the activity according to the loss of the average victim, even if the typical potential victim is likely to be below average. Note that average figures are already calculated by both potential

---

71 Economists face similar problems when trying to determine the appropriate distributive weighting factor to account for different income levels. For a suggestion to consider what I call the "diminishing marginal utility of utility," see David Pearce & Christopher Nash, The Social Appraisal of Projects 33 (1981).

tortfeasors and courts[72] whenever the identity of typical victims cannot be assessed in advance. The difference is that even when the victim's identity can be assessed in advance, potential tortfeasors will have to take into account the expected loss to the average, rather than to the actual below-average, victim. This will reduce (but not eliminate) the incentive to channel risks to the poor and will at least reduce the regressive effect that compensation rules create.

Consider the following example:

Example 3. J.R. has to decide where to build a refinery. The choices are Poortown and Richtown. A given safety device would cost $800,000 and would decrease the probability of an explosion by half (from 0.2 to 0.1). An explosion would cause damage of $7 million in Poortown, but $10 million in Richtown. (The difference in the expected loss is due to both the value of the property and future lost earnings.) The cost of prevention is $800,000; the savings in expected loss from installing the device are $700,000 in Poortown, but $1 million in Richtown.[73]

According to the average-loss test, the court would determine the expected loss of the accident to be $850,000 (the average of the expected losses in Richtown ($1 million) and Poortown ($0.7 million)). Therefore, J.R. would be considered negligent if he did not spend $800,000 in precaution costs. Under the assumption that compensation law still adheres to the principle of full compensation, J.R. would prefer to build the refinery in Poortown, bear the expected loss of $0.7 million, and not incur the $0.8 million precaution costs. However, if the risk materializes, J.R. will have to compensate the victims for their losses.[74] Note that under this outcome, the efficient result has been achieved. J.R. did not prevent a loss of $0.7 million by spending $0.8 million in precaution costs. The difference is distributive. J.R., rather than the victims, bears the costs of this unavoidable accident. In this respect, the effect of the rule is akin to that achieved under a strict liability regime.

However, the loss-of-the-average-victim test will not be always sufficient for protecting the interests of the poor. Let us change the numbers in the

---

72 Assuming courts make any use at all in practice of the Hand formula, either rigorously or intuitively.

73 The first three examples are analyzed under a rule of negligence, despite the fact that they might give rise to a nuisance cause of action.

74 By contrast, under the traditional version of the Hand formula, J.R. would be considered negligent if he were to build the refinery in Richtown without investing in loss reduction, but not if he were to build the refinery in Poortown without such an investment. He would build the refinery in Poortown, and its residents would become even poorer, in the amount of their increased expected loss ($700,000), which would not be compensated for.

previous example, so that the expected loss in Poortown is $0.2 million rather than $0.7 million. In this case, the expected loss that courts would take into account would be $0.6 million (the average of the expected loss in Richtown ($1 million) and Poortown ($0.2 million)). Assuming precaution costs remain at $0.8 million, J.R. would not be negligent if he avoids incurring those costs. Assuming the principle of full compensation, J.R. would build the refinery and would not have to pay for the loss caused if the risk were to materialize. While in theory, J.R. might decide to build the refinery in Richtown (and, in such a case, the result of not investing in precautions is also inefficient), we have reason to believe that it would still be built in Poortown.[75] In this case, J.R. would not invest in precaution costs and the residents of Poortown would not be compensated for their losses. A rule awarding average loss (rather than actual loss) in the event that liability is established would not be relevant here, since compensation requires a finding of liability and J.R. is not negligent under these figures.[76] The discussion so far has demonstrated that the loss-of-the-average-victim test, although reducing the regressive effects entailed by the Hand formula, does not reduce them enough. It has also demonstrated a difficult result from a distributive perspective: the more disadvantaged the potential victim, the less she is protected by such a test.

(e) Pecuniary loss of a victim with the same status as the particular defendant. Under such a test, which I will term the same-status-victim test, the precaution costs measured in dollars should be compared to the expected loss as measured in dollars of a same-status victim. To better understand the test and its limits, let us consider the following example.

Example 4. Installing a special device in the defendants' cars reduces by 1% the incidence of skidding accidents that result in a total loss of the plaintiffs' cars. There are five types of drivers, who are both potential plaintiffs and potential defendants:

---

75 Among the reasons supporting such a conclusion are: the political power of Richtown residents to prevent the building of a refinery there; their ability to bribe J.R.; J.R.'s fear that courts might err and impose liability on him; and the fact that it is better to build the refinery in Poortown, due to economic incentives external to tort law such as cheaper labor.

76 This analysis implies that in order to prevent completely regressive results, tort law must move to a strict liability regime as well as provide, as accompaniment to such a regime, equalization of the awards given as compensation.

Type of victim	Magnitude of loss if accident happens (car's value)	Adjusted accident cost per type of plaintiff (1% of car's value)	Proportion of type of car from overall cars	Expected loss per group (assuming there are 100 cars)	Overall expected accident cost per group
Very Rich	300,000	3,000	0.1	30,000	300
Rich	100,000	1,000	0.2	20,000	200
Average	30,000	300	0.5	15,000	150
Poor	10,000	100	0.15	1,500	15
Very Poor	4,000	40	0.05	200	2
IN SUM	—	—	1	66,700	667

Under the traditional application of the Hand formula, the accident cost would be calculated as 667. Bear in mind that the main part of this amount is to be attributed to the cars of the rich and very rich. Under the traditional application of the Hand formula, all potential tortfeasors would be treated alike. If, for example, precaution costs (the price of installing this device) are 500, all drivers will be considered negligent if they do not install it, both the owners of cars worth 4000 and those with cars worth 300,000. Conversely, if the precaution costs are 800, no driver will be considered negligent if he or she did not install the device.

Under the adjusted-accident-cost rule, the expected cost of the accident is determined on the basis of the defendant's status. It would be calculated under the assumption that all drivers own cars with the same value as that of the defendant. Hence, each driver's accident cost is simply 1% of the value of his or her car. Accordingly, if precaution costs are 500 or 800, only the rich and the very rich drivers will be considered negligent if they do not install the device.

There are two problems with this solution, however. First, it might not afford enough protection to the interests of the very poor. Assume that the defendant is the average-status driver, whose accident costs are 300. If precaution costs are 350, the shift from the traditional Hand formula to the adjusted one would result in a reduction of the driver's liability. It is true that he would not be liable toward the rich and very rich; however, he

would also not be liable toward the poor and the very poor. The second problem is that the adjusted rule might seem too harsh toward the better-off. Recall that a finding of negligence entails not only a duty to compensate, but also a condemning moral evaluation of the actor's behavior. The adjusted rule miscalculates the risk the actor created to be more significant than it really is. The real risk he created is lower than that calculated: in reality, not all cars are worth 300,000; most of them are worth much less. On the other hand, the phenomenon of the declining marginal utility of money lends support to such a calculation, for two reasons. First, the burden the better-off have to bear is not so heavy given their holdings. Second, the small financial loss that the better-off injurers impose on the poor victims might bring about greater disutility than would a great financial loss borne by better-off victims. For example, the very poor might not be able to insure their cars, and of course, the less money one has, the greater the relative disutility from small losses.

This test has several advantages. To begin with, it reflects well egalitarian morality: the rich are required to spend more in precaution costs than the poor. Note, however, that given the anonymity of the potential victims, the test does not reflect the flip-side of the egalitarian morality, namely, that one should spend more in precaution in order to prevent a loss to the poor rather than to the rich (given the larger ensuing disutility from the loss to the poor). All potential victims, poor and rich, enjoy greater protection from a rich defendant and lesser protection from a poor defendant. The second advantage of the test is that it is easy to employ intuitively. One does not have to calculate the exact expected loss in order to understand that while a demand to spend 500 in precautions in a car worth 4000 is excessive, such a demand is not excessive for a car worth 300,000.

(f) Conclusion. The discussion so far has revealed the well-known difficulty of computing disutility. None of the proxies suggested above is sufficient in itself to adequately advance egalitarianism. The disutility of a loss derives significantly from one's remaining holdings after bearing the loss. It is also influenced by the magnitude of the loss and its proportion of the actor's holdings prior to the loss. I believe that in evaluating reasonableness, we are influenced by three notions: efficiency (that big losses should be prevented by expending small amounts); the diminishing marginal utility of money (that the party who would be left with more wealth after bearing the loss should bear that loss since her disutility is smaller); and the endowment effect (that the party who will be left with more wealth might still suffer more disutility if she loses a larger proportion of her wealth). Of these three notions, only the second reflects egalitarianism. The more one leans toward egalitarianism, the more one will emphasize the weight of diminishing

marginal utility in assessing disutility. There is no need to determine the priority and weight that should be given to the suggested tests, since courts make determinations about negligence intuitively. Courts should consider disutility (and not absolute magnitude of loss measured in dollars) as one relevant factor in evaluating a defendant's conduct, and in so doing, they should compare the burden to the defendant given her status and holdings and the burden to the average typical victim given his or her status. Since in many situations, the court (and the defendant) do not know the identities of the potential victims prior to the materialization of the risk, the egalitarian concern boils down to an examination of whether the actual defendant — the actual creator of the risk — is disadvantaged or well-off and, accordingly, takes into account the magnitude of her disutility from incurring precaution costs. Whenever the identity or socio-economic status of potential victims can be identified in advance, their expected disutility from bearing the loss should be compared to that of the actual defendant. Whatever proxies are used, my suggestion still raises some theoretical difficulties about the identification of those whose disutility has to be compared. Below, I deal with these difficulties.

2. Average Victim versus Actual Defendant

My model calls for comparing the disutility of the average typical victim with that of the actual defendant. In what follows, I will deal with the following issues: First, why does my model choose for the disutility comparison the typical victim's disutility as opposed to that of the actual victim? My answer is that this choice is necessary under notions of foreseeability and fault. The second question responded to is why the model chooses, for purposes of comparison, the disutility of the average victim rather than the disutility of potential victims who are below average (and hence their disutility is higher), which would afford better protection to the interests of the disadvantaged. I suggest that a shift to values of the below-average victim would result in a trade-off from the egalitarian perspective and would not necessarily serve the interests of the disadvantaged since they would be more likely to be liable to the rich as well. The third matter is why the model chooses the disutility of the actual, rather than average, defendant. In answering this, I explain an important distinction between precaution costs and accident costs. Only the latter's magnitude is influenced by the wealth of the litigant. The fourth question requires a brief explanation. The result of choosing the disutility of the average, rather than actual, victim is that while the egalitarian criterion does not lead to a finding of negligence, the disutility of the actual victim in fact is higher than the disutility of the defendant. Conversely, a defendant who is found to be negligent based on a comparison of his disutility to

that of the average victim might suffer greater disutility than that suffered by the actual victim. The question is what can be done in such cases? I distinguish between the non-egalitarian results caused by liability rules and compensation rules, explaining the relevance of egalitarian and distributive considerations outside the realm of the standard of care analysis and notions of fault, and suggest that the solution lies in changing compensation (as opposed to liability) rules and moving, at least partially, to liability that is not based on fault.

(a) Average victim versus actual victim. My model takes, for purposes of comparison, the *ex ante* average disutility of potential victims. In theory, the disutility of any potential victim who might bear the loss should be calculated, averaged, and then compared with the actual defendant's disutility from incurring precaution costs. The support for the *ex ante* average disutility test derives from the moral aspect of negligence liability and the requirement of foreseeability. The problem of the lottery-like effect of tort law and the lack of necessary connection between one's *ex ante* culpability or the magnitude of the risk that one imposes and the magnitude of ensuing liability was largely commented upon and is indeed problematic.[77] This difficulty, however, is broader than the one I deal with here. Within the negligence framework, the moral evaluation of whether the risk imposed was reasonable should always be based on an *ex ante* examination. If I drove 200 miles per hour and was lucky enough to cause only a scratch to someone's old car, I could not argue that I was not negligent since the resulting harm caused in fact was outweighed by the benefit I derived from driving quickly. The court would justly judge the *ex ante* risk I imposed, and that risk included serious harm to life, limb, and property. The model suggested here maintains that in evaluating expected loss, the expected disutility should be taken into account. In the same example, the expected average disutility to victims from my reckless driving exceeds my disutility from driving at the normal speed, even if I am poor. Therefore, the moral evaluation of the risk I imposed is that it is unreasonable, and this conclusion should not change even if I happened to cause property loss to someone so rich that her actual disutility from that loss to her is less than the poor driver's disutility of driving slowly (for example, driving quickly in order to get to a job

77 Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. Rev. 439 (1990); Patrick S. Atiyah, The Damages Lottery (1997); Jeremy Waldron, *Moments of Carelessness and Massive Loss, in* Philosophical Foundations, *supra* note 44, at 387.

interview that might take the driver out of the ranks of unemployment and poverty).

(b) Average versus less than average victim. I would like to explore here the extent to which further allowance should be given to the interests of the disadvantaged under conditions of imperfect information. The question essentially is whether in comparing a defendant's disutility from incurring precaution costs with the unknown victim's disutility from incurring the expected loss, the interests of the average victim, or the below-average victim, should be taken into account. The problem with adopting average figures of victim disutility from bearing accident losses is that it produces actual results that are undesirable from an egalitarian perspective, even though the evaluation process is sensitive to that perspective. When the *average* victim's disutility is higher than the (actual) defendant's disutility, the defendant will be liable, even if the disutility of the *actual* victim is lower than that of defendant and vice versa. Such a gap is inevitable if we seek to preserve negligence liability as based on notions of fault. Below, I suggest how this problem might be solved or alleviated by extending liability beyond the scope of fault and by changing compensation rules. I will attempt to show that modifying the test to include disutility of the below-average victim will not necessarily serve egalitarian concerns.

According to this test, actors would have to take into account a potential disutility that is higher than the average. This means that they would have to take into account the possibility that the victim is disadvantaged. Theoretically, such an approach can be supported by ideas of social responsibility toward the weak, Rawls' difference principle,[78] or ideas similar to the eggshell skull rule. The problem with such an approach is that it might bring about just as undesirable results from a distributive perspective as the average disutility test, and perhaps worse. Adopting a higher-than-average disutility test would bring about two contradictory distributive results. It would result in greater transfer of wealth from the average and poor to the very poor, but would also result in a transfer of wealth from the average and poor to the rich and the very rich. Determining what is the overall distributive effect from adopting a higher-than-average disutility test is not easy. On the one hand, it seems to protect the very poor (and in this sense, it seems to be in accord with Rawls' difference principle). On the other hand, this added protection to the very poor might be too costly in terms of the added burden

78 Rawls, *supra* note 48, at 220.

to the poor.[79] Bear in mind that under existing compensation rules, liability results in regressive redistribution of wealth: the wealthier receive a bigger piece of the compensation pie. Therefore, extending the scope of liability, which is the result of adopting a higher-than-average disutility test, would result with probably overall regressive distribution of wealth. Taking into account also the reality of lower rates of filing suits by deserving poor victims would only exacerbate this problem. Finally, let us remember that from a moral perspective, the average disutility test seems more adequate. After all, a finding of negligence tells us that the actor did not balance properly his interests with the interests of others. Adopting a higher-than-average disutility test would lead to findings of liability in circumstances in which the overall risk to society, given the uncertainty of the victim's identity, seems to be justified.

(c) Actual versus average defendant. My model treats differently the defendant and plaintiff by comparing the disutility of the actual defendant with the disutility of the average victim. While prior to the accident, the identity of the victim is unknown, the identity of the potential tortfeasor is known. The potential tortfeasor knows her status prior to the activity in question and therefore can make the cost-benefit analysis based on her actual data. The test should take defendants' *actual* disutility, but victim's *average* disutility into account *since*: (1) the magnitude of precaution costs remains constant across defendants with different holdings; (2) the disutility caused by the burden of incurring precaution costs varies according to defendants' means; (3) the defendant knows and courts can relatively easily assess the defendant's means; (4) the moral evaluation of one's activity derives from comparison of disutility; and (5) the identity of the typical victim is not typically known in advance and the identity of the actual victim is seldom known.

(d) Reasons for regressive results: liability versus compensation rules. It should be noted that there are two separate reasons why the Hand formula as traditionally applied by law and economics leads to regressive results. The first reason is that since the expected loss of the rich is higher, the same risk might be deemed negligent if it targets the rich, but non-negligent if it targets the poor. In such a case, the rational potential tortfeasor would risk the poor; he would be deemed non-negligent; and he therefore would not need to compensate the poor for the harm resulting from his action. This results in a systematic regressive redistribution of wealth. The second reason for the

---

79 For Ronald Dworkin's critique of Rawls' difference principle, see Dworkin, Sovereign Virtue, *supra* note 39, at 330-31.

regressive result derives from compensation rules rather than liability rules. Once liability is established (be it based on negligence or strict liability), the rich victim receives more compensation than the poor victim does, due to the principle of full compensation. This provides an incentive to potential tortfeasors to channel risks as much as they can to the poor, so that in the event that they are found liable, they will pay the lowest possible amount. Given the assumption that in general, tort law under-compensates victims, a regressive redistribution of wealth results, although this effect is less acute than under a traditional negligence rule, whereby the victims might not get any compensation at all.[80] Note that reformulating the standard of care is able at best to solve only the first problem. A solution to the second problem requires a change in compensation law and some departure from the principle of full compensation. This can be achieved by some kind of equalizing of the awards paid, regardless of the identity of the actual victim.[81] Note that this idea, which sounds quite radical at first, is to some extent applied in modern compensation schemes, which frequently include a cap on the size of the awards or are based on standardized compensation amounts.

(e) Resolving remaining non-egalitarian results caused by imposing liability. The previous discussion has shown us that two sources of non-egalitarian results will remain even under an egalitarian-sensitive standard of care analysis. One is due to the fact that the test compares the defendant's actual disutility with the disutility of the average, rather than actual, victim.[82] The second source of non-egalitarian derives from the principle of full compensation.[83]

The first problem is composed of two problems, which are the mirror images of one another. In one type of case, a defendant who is found to be negligent (partially since his disutility from incurring precaution costs *was outweighed* by the average disutility that the expected loss causes) *in fact incurs greater disutility* from bearing the precaution costs (and the expected loss) than the disutility to the actual victim. This problem might be alleviated by giving courts discretion to reduce the amount to be paid as compensation. Such a solution has been adopted in certain civil law jurisdictions, such as Finland and Sweden. This adjustment rule qualifies

---

80 For further discussion of this point, see Keren-Paz, *Randomness, supra* note 7, at 93-96.

81 From the efficiency perspective, it seems that the least problematic way is to award the actual victim the amount that should have been given to the average victim. This issue requires further inquiry.

82 *See supra* Part IV.B.2.(b).

83 *See supra* Part IV.B.2.(d).

the general duty to compensate the victim in full by affording courts the discretion to reduce the damages award based on the defendant's means and in comparison with the victim's means.[84] In the second type of case, a defendant who is found to be not negligent (partially since his disutility from incurring precaution costs *outweighs* the average disutility that the expected loss causes) *in fact incurs less disutility* from bearing the precaution costs than the disutility to the actual victim from bearing the loss. This is part of the general deficiency of negligence-based liability on fairness grounds. The victim subsidizes the defendant's non-negligent activity. A general shift to strict liability might solve this problem (but with no corresponding change in compensation rules, such a shift will cause other problems from an egalitarian perspective). However, even if one is reluctant to move generally to a strict liability regime, one might think of a rule that will give courts discretion to require the defendant to compensate the victim for her loss, in full or in part. A factor in exercising this discretion should be the egalitarian concern, namely, that the actual victim damaged by the activity is poor or otherwise disadvantaged. What is important to note is that such a duty to compensate is not grounded in notions of negligence. The defendant has to compensate the victim based on notions of distributive justice (fairness and/or egalitarianism), but not on notions of corrective justice and fault. With respect to the symbolic aspects of liability, such liability does not imply culpability on the part of the actor.

The second problem — regressive redistribution caused by the principle of full compensation — calls for a change of compensation rules. Compensation rules are problematic, due both to the absence of correlation between the degree of fault and extent of liability and the systematic regressive effect they produce.[85] Both problems could be solved by creating some kind of standardization of awards, namely, that all victims would receive the same amount regardless of their actual losses. The absence-of-correlation problem could also be solved by tying compensation to the *ex ante* expected loss created by the actor's behavior,[86] while the regressive-redistribution problem could be solved by tying the magnitude of the damages award to the defendant's means. The egalitarian discontent with current compensation law

---

84 *See* Act of Tort ch. 2 § 1.2 (Fin.) (general adjustment rule); ch. 2 § 2 (adjusting liability of minors); ch. 2 § 3 (adjusting liability of the mentally ill, mentally retarded, and persons of unsound mind); ch. 4 § 1 (adjusting employee's liability); Sv. Prop. 1975:12, at 177 (Swed.) (general adjustment rule in Sweden). For a review of these provisions, see Thomas Wilhelmsson, Critical Studies in Private Law 113-24 (1992).

85 *See supra* Part IV.B.2.(a), (d).

86 *See* Schroeder, *supra* note 77.

derives from the fact that compensation law gives more compensation to the rich than it does to the poor, despite the fact that the disutility to the rich from the loss is less. This could be solved outside of negligence law: by putting a cap on losses; by awarding compensation for average (rather than actual) loss; or by giving courts discretion to adjust awards. One could also think of a rule by which liability would be restricted to an amount that imposes on the defendant the same disutility that the uncompensated loss would cause for the plaintiff.

C. How Does It Work?

In this Section, I will briefly show how the approach defended and explained above can work in practice. My examples are partially based on case law and partially hypothetical. I explore cases of active risk creation and failure to prevent risk by third parties. Two caveats are in order. First, space constraints prevent me from exhausting the analysis of these examples. As I mentioned above, egalitarian analysis is contextual and therefore requires a careful factual examination and detailed analysis, something that cannot be provided here in full. Second, with respect to the case law, it is not my claim that when making their decisions, courts *necessarily* had in mind egalitarian considerations. Rather, I argue that egalitarian considerations support the results reached by the courts.

1. Active Risk Creation

Example 5: Maternal Prenatal Duty. Courts in common law jurisdictions resist imposing a duty on pregnant women toward their future children.[87] While the doctrinal question is dealt with at the duty stage, it also has relevance for standard of care analysis. Opposing such a duty might be based on one of the following alternative grounds. The one is that the burden for pregnant women that the duty would impose would be so significant per se, that it cannot be justified. The alternative ground of opposition is that given women's relative disadvantage in society, it is not justified to impose such a duty on them. I believe that the latter proposition is more valid and that the distinction is significant (mainly with respect to the interest of women

87 In most jurisdictions in which the question arose, a duty was denied. Cases recognizing a duty have done so only when the mother was insured, a fact that allays the interests of the plaintiff-child and defendant-mother that the mother will be found liable. *See* Tsachi Keren-Paz, On Mothers, Babies and Bathwater: Tort Law, Distributive Justice and Prenatal Duties, Paper Presented at the American Law and Society Association Annual Meeting, Miami Beach (May 28, 2000) (on file with author).

in protection from domestic violence).[88] For my purposes, what is important is to understand the basic cost-benefit analysis involved here. The burden on women is unacceptable since it is borne in full by women, who are a disadvantaged group in society, whereas the benefits of such a rule are enjoyed by men and women alike. This seemingly makes *a liability rule to be unreasonable* based on egalitarian considerations.

Moreover, when evaluating each particular activity of pregnant women (assuming a duty is imposed), some activities (though not all) that otherwise would have been considered negligent should be deemed as reasonable given women's disadvantaged position in society. The basic insight defended in this article is that the disadvantaged should be less expected to sacrifice their interests in balancing those interests with the interests of others. Given the restriction on women's autonomy in society, we should expect less from them in terms of restricting their autonomy to further the interests of others. This analysis suggests that the same restriction of autonomy might be deemed unacceptable if it is fitted to women (given their initial restricted autonomy), but acceptable if it is fitted to men. Indeed, I would be less reluctant to find a future father who smokes around his pregnant partner negligent than I would to find the pregnant woman negligent for smoking, one reason being the disparity in the initial allocation of autonomy between the sexes. This analysis also suggests that given the inherently comparative nature of negligence evaluations, some activities by pregnant women might still be deemed unreasonable, since their disutility due to the precaution costs incurred (even after allowing for women's initial disadvantage) is still outweighed by the disutility to the future child from the accident costs it will incur (for example, when the women consumes cocaine in the middle of her pregnancy). It should be noted that there are reasons for opposing a maternal prenatal duty even in cases in which as a matter of standard of care analysis, a finding of negligence can be established.

Examples 1 & 2: Using Cheap Coal. These examples have been discussed above.[89] My conclusion is that while the use of cheap coal by the poor is reasonable, its use by the rich is negligent.

In Example 3 (the refinery example) discussed above[90] my conclusion was that J.R. should be found liable for negligence toward the residents of Poortown. A finding of negligence is important here, as it is contrary to the economist's intuitions. The poorer the victim, the less cost-justified

88 *Id.*

89 *See supra* Part II.A.

90 *See supra* Examples 3, 4 and *supra* text accompanying notes 73-76.

the precaution. Economic analysis bluntly suggests channeling risks to the already poor, since the resulting loss, as measured in dollars, is the lowest. Here, the progressive potential of the egalitarian approach is realized in full. When examined in terms of welfare, the loss to the poorest entails the largest disutility. Hence, courts should adopt what is in practice a strict liability rule regarding risks that are channeled downwards to the disadvantaged based on their lower expected loss. This would prevent at least the result of regressive subsidy given by the poor to enterprises, a subsidy that results in systematic regressive redistribution of wealth. Therefore, courts should find such risk placement negligent, which they can do by a disutility comparison.

Furthermore, an egalitarian-sensitive standard of care analysis might result in progressive redistribution of risk.

Example 6: The Refinery II. Assume that J.R.'s refinery has to be built and that the only two possible locations are Richtown and Poortown. Moderate protection to the disadvantaged would require a finding of negligence wherever the refinery is built. This would still result in the refinery being built in Poortown. However, a truly progressive court would, based on a comparison of disutility, find *only* the building of the refinery in *Richtown* as reasonable. In such a case, negligence law gives J.R. a strong incentive to locate the refinery in Richtown, and one of two things would happen. If negotiations are impossible, the residents of Richtown will bear the loss. What is important here is that the residents of Poortown will not bear any loss, and given the assumption that tort law generally under-compensates for losses, this is a desirable result.[91] If negotiations are possible, the residents of Richtown might bribe both J.R. and the residents of Poortown to build (or move) the refinery to Poortown. In such a case, a progressive redistribution of wealth is possible.[92]

2. Failure to Prevent Risk Created by Third Parties

Generally. In this category there is a triangle of third parties (the immediate creators of the risk), potential victims, and potential defendants. Egalitarian considerations play a part at several stages here, including the duty of care stage. As for standard of care analysis, egalitarian considerations are relevant at two levels. First, as always, the question is whether the disutility caused

---

91 In addition, some would think that the decrease of the gap in holdings between the residents of Richtown (who do not get compensated) and Poortown is desirable in and of itself.

92 The ability of the residents of Poortown to enjoy part of the "bribe" depends on whether they are protected by a property rule (injunction) or a liability rule (compensation).

by the burden to act (to prevent the risk to the third party) is outweighed by the victim's disutility from bearing the uncompensated loss. In this respect, to the extent that the defendant is a corporation or a public authority (as often is the case), the disutility of incurring the precaution costs (or the cost of liability) should be measured by the disutility to those to whom the loss is passed on. For example, if a public authority is under a duty to supervise a third party, the disutility should be determined according to the ways in which the costs of complying with the duty or paying for its breach are funded. (By a tax raise? If so, for whom? By reducing welfare benefits? By reducing financial support to the opera?) This disutility should be compared with the disutility to the victims. (Who are the victims? Investors on the stock market? Molested children?)

Second, and this is seemingly a unique feature of nonfeasance, determinations regarding the defendant's decision not to act should take into account the possibility that intervention would only channel the risk created by the third party to another victim, rather than reduce (or eliminate) the risk. In a way, this stage is not really unique to nonfeasance cases. As the discussion of the refinery example demonstrated, the reasonableness of putting the residents of Richtown at risk should (or at least could) be partially assessed by the likelihood that a determination of unreasonableness would channel the risk to the residents of Poortown. Under instrumental approaches to tort law, the disutility of third parties is definitely a relevant factor in determinations of reasonableness.[93] Not only the utility or disutility to third parties from undertaking the risk-creating activity should be taken into account, but also their disutility from being the substitute victims of accidents, whether unavoidable or not.[94] At any rate, the problem of substitute victims is both more prevalent and more visible in cases of nonfeasance.

With regard to substitute victims of accidents, it should further be observed that the egalitarian consideration (as well as other distributive considerations) might and usually should be relevant for purposes of evaluating the reasonableness of the defendant's failure to protect his victim. While under the economic analysis of law, an omission to act can be deemed negligent (and entail liability if a duty of care exists) only if that omission failed to reduce the overall risk (as opposed to merely channeling it to a substitute victim), the egalitarian approach would explore also the distribution of the risk entailed by the decision to act or refrain from acting. It is possible that a failure to act that increased the overall risk would be

93 *See* Restatement (Second) of Torts § 294 (1965).

94 *Id.* § 295.

deemed reasonable, since it brought about a more equitable distribution of the risk.[95] Examples 7 and 8 will clarify this point. But first, I would like to demonstrate how a traditional comparison of disutility might justify existing practices of standard of care in the context of supervision.

Example 7: Parents' Liability. At common law, parents' liability for damage caused by their minor children to third parties is limited to circumstances of negligent supervision.[96] Courts (at least in the United States) usually strictly limit the scope of liability, requiring a showing of the proclivity of the child to engage in the same (or, according to some versions, similar) endangering activity that led to the plaintiff's loss.[97] Such a restrictive approach is objectionable on numerous policy grounds. Moreover, this rule is likely to result in regressive distribution of wealth and power between women and men, due to the gender division of labor whereby women are both the primary caretakers and custodians of minor children. Accordingly, I advocate a move toward strict liability for both parents that is not custody-dependent, coupled with a right to contribution by the defendant-parent for the other parent that is not fault-based.[98] Here, I suggest that the narrow boundaries delineated by the courts for the standard of care in cases of parental supervision (a narrowness that is objectionable in light of policy considerations such as optimal deterrence and the idea of fairness) is explicable on egalitarian grounds. Due to the phenomenon of women being the primary caretakers of children and primary custodians in single-parent families and, furthermore, due to the individual nature of tort liability, such liability on its pecuniary and symbolic aspects is borne unequally by women relative to men. Moreover, a less lenient standard of care would cause further encroachment on women's autonomy, and therefore, for reasons similar to those discussed with respect to maternal prenatal duty, the standard of care expected from parents (in practice, mainly from women) is lax. Since almost any kind of liability regime would impose a greater burden on women (since they are the primary custodians), the ideal solution from the perspective of egalitarian considerations would be to deny liability altogether. It might be that the very narrow scope of liability,

---

95 Thus the egalitarian approach departs from the rule adopted by the Restatement, *id.* The Restatement postulates that the alternative risk should be "equal or greater."

96 Restatement (Second) of Torts § 316.

97 *See, e.g.*, Sun Mountain Prod., Inc. v. Pierre, 929 P.2d 494 (Wash. App. Div. 1 1997) The rule as stated in the Restatement (Second) of Torts § 316 seems to be broader than the similar (or particular) act rule, which the majority of the American courts seem to endorse. *See, e.g.*, Fuller v. Studer, 833 P.2d 109 (Idaho 1992); Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955).

98 *See* Keren-Paz, Limits of Private Law, *supra* note 7, at 429-70.

which is based on the idea that the parent is not negligent in the absence of knowledge about the child's proclivity, is the balancing point between considerations supporting liability and considerations opposing it, when chief among the latter is the egalitarian concern.

Example 8: A Decision Where to Inspect. There are two parks in town, one in an affluent neighborhood, the other in a poor one. Budgetary constraints allow the stationing of only one police officer in only one of the parks. The local municipality has to decide where to place the police officer.[99] This example raises the issue of the limits of the liability of public authorities for nonfeasance. While there are many reasons for courts' deference in this area, I would like to show the relevance of the egalitarian concern as a factor supporting or opposing a finding of negligence. Our initial assumption is that the decision itself to finance only one police officer to patrol the parks is immune from a finding of negligence. Indeed, such an assumption is well established in the case law. On the other hand, a decision as to where to place the police officer is more likely to be scrutinized by the court (than the initial decision to finance stationing only one police officer) and more likely to be subject to a standard of care analysis, although this is by no means certain. Again, the dictates of economic efficiency and egalitarian sensitivity conflict. From the efficiency perspective, the expected loss to visitors to the park in the affluent neighborhood is higher than the expected loss to visitors in the other park. Therefore, a decision to locate the police officer in the "poor" park would be negligent. A different outcome results under an egalitarian approach. The disutility to the affluent visitors from lack of police supervision in the park is lower than the disutility of the poor from the same lack of supervision. First, the rich can hire privately someone to patrol the park. Such an option is not available to the residents of the poorer neighborhood. Second, the potential victim's disutility from having to shift to an alternative leisure activity given the lack of adequate supervision in the park is low, given their resources (they could go to a restaurant). The poor residents have less available affordable alternatives. Third, due to the diminishing marginal utility of money, the disutility of the rich from the loss caused to them in the park due to the lack of supervision would be lower than the disutility to the poor. In addition, a finding of negligence for not protecting the "affluent" park would channel the risk of being victimized to the poor, a regressive and undesirable result. Finally, a finding of liability of the public authority toward the rich would increase

---

99 This example is an adaptation of the Israeli case of *Groobner*, Groobner v. Municipality of Haifa, 30(1) P.D. 141, 158. *See also* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1586 (1987).

the amount that has to be paid in damages in comparison to the amount that would be awarded to poor victims. This increased burden would harm the public and would likely cause disproportionate harm to the poor. Note that there are three possibilities for a finding of liability: that the municipality is negligent if it placed the police officer in the "poor" park; that it is negligent if it placed the police officer in the "affluent" park; or that it is not negligent regardless of where it decided to place the police officer.[100] While other policy considerations might support a no-liability rule, an egalitarian approach ranks, in descending order, the desirability of the solutions as: second, third, and first solutions. A determination that neither choice is negligent would still expose the municipality to public choice pressures to have the police officer stationed in the "affluent" park, with no incentive provided by tort law to counter this pressure. A finding of negligence of the public authority only toward the poor victims would give the municipality incentive to put a police officer in the "poor" park.

Example 9: Failure to Warn Women at Specific Risk of Being Sexually Assaulted. A group of white women living in first-floor apartments with balconies in a certain neighborhood are at specific risk of being sexually assaulted by a serial rapist. The police, throughout the investigation, avoided warning those women out of fear that such warning might jeopardize the investigation. In the Canadian case of *Doe v. Board of Commissioners of Police*,[101] the court imposed liability on the police for a failure to warn. The court's decision revolved around the duty issue, and it did not explore the issue of standard of care in depth. Despite some inconsistencies in the reasoning, the court seemed to ground liability on the fact that giving a warning would not have compromised the investigation. The investigators' professed reason for not giving a warning was that it would have caused the rapist to flee from the area and set out on another spree of rapes in another area. The court rejected this reasoning based, among other things, on testimony given by *defense* expert witnesses, who conceded that giving a warning, under the circumstances of the case, would not have compromised the capture of the rapist.[102]

It is not my intention here to engage in a critique of the reasoning in *Doe*. While I support the decision reached by the court, its reasoning is questionable with regard to both duty and standard of care analysis. I use *Doe* as a further demonstration of the proper ambit of egalitarian

---

100 Two other possibilities — that the municipality is negligent for not stationing two policepersons or that the municipality is not negligent even for not stationing any policeperson — are excluded under the underlying assumptions of this example.

101 [1998] 39 O.R.3d 487 (Gen. Div.).

102 *Id.* at 517-18.

considerations in standard of care analysis, and I have three comments in this respect. *First*, in itself, the consideration that providing a warning might divert the risk of being victimized to another group of victims is a legitimate one to be considered by investigators and therefore should influence reasonableness evaluations. *Second*, generally (although probably not in the context of sexual assaults) refraining from giving warning might be considered reasonable even if it increases the total risk imposed by the offender, but provided it brings about a better distribution of that risk from an egalitarian perspective. In the context of sexual assaults however, I tend to believe that the goal of reducing total risk should take precedence over the goal of more equitable distribution of that risk, to the extent that egalitarian considerations in this regard might be irrelevant.[103] *Third*, at times the goals of preventing future crimes and apprehending offenders for previously committed crimes might be at odds with one another. Assuming that the reasonableness of a trade-off between less prevention and better apprehension varies with context (meaning that at times the police might decide to further the goal of apprehending offenders even by using potential victims as bait to catch them), I argue that egalitarian considerations are relevant in the determination of the reasonableness of such a trade-off in each given case. This means that all other things being equal, the use of members of disadvantaged groups as bait would weigh in favor of a finding of negligence, since such a use burdens disproportionately the disadvantaged to the benefit of all of society, which amounts to a form of regressive subsidy.[104]

V. RESPONDING TO SOME CHALLENGES

Thus far, I have justified reformulating the standard of care analysis to make it sensitive to egalitarian considerations (Parts I to III). I have examined ways to go about such reformulation and have shown how an egalitarian-sensitive standard of care analysis would work in practice (Part IV). In this Part, I will respond to several possible challenges to my proposed thesis: that it is incongruent with existing tort law; that it violates the parties' reasonable reliance and interest in predictability; and that it brings about the undesirable

---

103 *See* Keren-Paz, Limits of Private Law, *supra* note 7, at 394-98. Still, there might be relevance to other distributive considerations that are neither egalitarian nor efficiency-oriented. *See id.* at 391-94.

104 For a more detailed discussion of these points, see *id.* at 382-87.

social segregation of the rich from the poor. On the whole, I find none of these arguments compelling.

A. Incongruity with Existing Tort Law

Arguably, a suggestion to incorporate egalitarianism into the standard of care analysis, for all its normative worth, deviates too far from existing tort law and, therefore, should be opposed on that ground alone. I term this charge "the incongruity challenge." My first response to this challenge is that my claim is essentially a normative one, while claims of incongruity are applicable mainly, if not only, with regard to *positive* theories. For the reasons stated above, the standard of care analysis *should* be attuned to the demands of egalitarianism, and to the extent that it does not do so sufficiently, it should be reformulated to repair this. I do maintain, however, that the suggestion put forward in this article does not dramatically deviate from existing tort law. While it does represent an extension of existing tendencies, its adoption would be more akin to evolution than to revolution. Moreover, I believe that adopting a more egalitarian standard of care fits well with and is supported by the modern tendency in several jurisdictions to incorporate public values (such as equality) into private law doctrines. Furthermore, the practice of tort law (as opposed to judicial rhetoric) already shows sensitivity to egalitarian considerations in the realm of negligence law, and therefore the adoption of the suggested rule is also supported on the grounds of judicial sincerity. In the subsection below, I defend the claim that egalitarian considerations can be squared with existing standard-of-care formula endorsed by the courts. I would further argue that court practice indicates the influence of egalitarian considerations on court decisions. The subsequent subsection will defend the claim that taking into account egalitarian considerations fits well with (limited) recognition of needs and equality in negligence doctrine, tort doctrine, and private law doctrine.

1. Standard of Care

In this subsection, I make three claims: (1) There is nothing in the prevailing definition of standard of care in common law jurisdictions to prevent evaluating the reasonableness of defendants' behavior also according to egalitarian considerations. (2) There are few decisions by English courts that explicitly endorse the relevance of the parties' relative holdings for purposes of determining whether the defendants' behavior was negligent or not. (3) The practice of judges and juries lends support to the claim that the parties' wealth or statuses influence judgments about the reasonableness of the activity in question.

(a) The definition of standard of care can contain egalitarian considerations. The first point to be observed is that the test for the standard of care is by nature flexible and amenable, so that it has the capacity to include egalitarian concerns. The test (which varies from one jurisdiction to another) is broad enough conceptually and rhetorically to embrace egalitarian considerations. It goes without saying that whenever the reasonable person is used by courts to characterize the standard of care,[105] that definition can be filled with egalitarian content. The reasonable person is as capable of being *homo distributus* as she is capable of being *homo economicus*. If the standard of care is defined as what a reasonable person would do and if a reasonable person is expected to prevent some, but not other, harms from her neighbors, nothing stops that reasonable person from adjusting her level of care to the relative position and status of the parties and taking into account the real burden that prevention and accident costs would have for them. Courts are ready to admit that the standard of care is normative rather than empirical, that the reasonable person is the court, and that the court sets the required standard of care.[106] Nothing stops courts from deciding that a reasonable person should take egalitarian considerations into account.

Furthermore, as mentioned above, the prevalent version of the cost-benefit-based standard of care evaluates the social value of the risk-creating activity for purposes of determining whether it is negligent or not.[107] The social value test is a natural vehicle for including egalitarian considerations in the standard of care. In the house-heating examples (Examples 1 and 2), the social value of the heating activity (which creates pollution) derives (or at least can be interpreted as deriving) from the parties' relative statuses and opportunity costs. The social value of using a cheap coal by the poor is high, since it allows him to increase significantly his quality of life in comparison to the alternative of using much more expensive coal. By contrast, the social value of the use of the cheap coal by the rich is lower, since her well-being would not be significantly impaired if she were to use the more expensive coal.

---

105 *See* Blyth v. Birmingham Waterworks Co., [1856] 11 Ex. 781, 784; Restatement (Second) of Torts § 283 (1965); C.T. Walton et al., Charlesworth & Percy on Negligence 365 (10th ed. 2001).

106 *See, e.g.*, Glasgow Corp. v. Muir, 1943 A.C. 448, 457 ("It is still left to the judge to decide what in the circumstances of the particular case the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen.").

107 *See supra* note 21 and accompanying text.

In fact, nothing in the original Hand formula prevents courts from making a cost-benefit analysis that is not based merely on absolute amounts or economic efficiency.[108] Accident costs and precaution costs could be understood in a more complex and nuanced way. In Example 1 (the house-heating example), the precaution costs of the poor could be understood to be a loss of 60% of his income, which is meager to begin with. The accident costs could be understood to be a much smaller decrease in the victim's well-being. Therefore, the result of the cost-benefit analysis could be that the poor person's use of the cheaper coal is not negligent.

(b) Some courts endorse egalitarian considerations in standard of care analysis. Although rarely, at times, courts explicitly concede the relevance of the parties' relative resources with respect to the evaluation of the defendant's activity as negligent or not. For example, in *Goldman v. Hargrave*,[109] the Privy Council delineated the contours of liability for an occupier's failure to remove or reduce hazards to his neighbors. The court, which explicitly based the defendants' liability on negligence and not on nuisance,[110] decided that one of the factors in evaluating negligence is the scope of the defendant's resources relative to the danger and relative to the plaintiff's resources.[111] A narrow reading of the case could emphasize the fact that the court dealt with an omission to prevent a risk that the defendant did not create, a point that the court was conscious of.[112] Such a reading, however, is unnecessary, and in any event, the rationale behind the decision justifies a similar analysis in all cases of negligence. A similar reasoning (and result) was employed in *British Railways Board v. Herrington* in which the court opined, "[A]n impecunious occupier with little assistance at hand would often be excused from doing something which a large organization with ample staff would be expected to do."[113] Courts also take into account the limited resources of public authorities with respect to the need to distribute available income between a number of demanding social functions.[114]

(c) Court practice reveals a tendency to take into account egalitarian

---

108 *Cf.* Kenneth. W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 Vand. L. Rev. 901, 907 (2001).

109 [1967] 1 A.C. 645 (P.C.) (appeal taken from High Court of Australia).

110 *Id.* at 657.

111 *Id.* at 663.

112 For one such typical reading, see, e.g., W.V.H. Rogers, Winfield and Jolowicz on Tort 112 (15th ed. 1998).

113 [1972] A.C. 877, 899.

114 *See, e.g.*, East Suffolk Rivers Catchment Bd. v. Kent, [1941] A.C. 74, 95-96.

considerations for standard of care purposes. In order to evaluate the adequacy of the incongruity challenge, my proposal should be examined against court practice and not against (or at least not merely against) court rhetoric. Several empirical studies show that seemingly deep-pocket defendants are more likely than "empty-pocket" defendants to be found negligent and to pay larger awards.[115] Especially relevant is the work of Valerie Hans. Hans did not find jury verdicts to be correlated directly with perceptions of financial resources, but rather with defendant status, role, size, organizational resources, potential impact, and special knowledge, all of which affect defendants' perceived responsibility so as to justify different evaluations by juries of the same behavior.[116] Note that the differences in perceived knowledge and control might, themselves, be influenced by perceived differences of wealth. If this interpretation is true, juries comply with the moral argument underlying my thesis in this article: that one's resources affect the moral evaluation of one's conduct. Moreover, given the fact that juries subject different defendants to different standards of care based on their relative positions and status and given the insight that one's ability to prevent harm depends on one's resources, it would not be a big leap for juries to take into account defendants' wealth for purposes of determining the standard of care expected from them, even if currently juries do not take this data into account.

There is also empirical support for the claim that courts take into account the plaintiff's status. Donald Harris has found that in the United Kingdom, poor plaintiffs have higher success rates in negligence suits than do the rich.[117] It seems, then, that tort practice as applied by juries and judges in different jurisdictions sits well with a theory calling for overt recognition of egalitarian considerations in the standard of care analysis.

Court practice showing sensitivity to egalitarian considerations at the stage of evaluating an activity's reasonableness can be seen also in what

---

115 *See, e.g.*, Audrey Chin & Mark A. Peterson, The Rand Corporation, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials (1985); James K. Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. Legal Stud. 751 (1985). In reaching this conclusion, the studies took into consideration the facts that deep-pocket defendants and empty-pocket defendants tend to engage in different types of legal cases and to cause different types of typical injuries — which are facts that also influence liability rate and size of awards.

116 Valerie P. Hans, Business on Trial 117-20, 122-27, 212-14 (2000); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DePaul L. Rev. 327, 351 (1998).

117 Donald Harris, Compensation and Support For Illness and Injury 55 (1984).

courts are *not* doing and why. Standard economic analysis suggests that courts should view risk-imposing activity as negligent if the risk targeted the rich and the same activity as non-negligent if it targeted the poor.[118] However, I am not familiar with any judicial decision that sanctions such a result.[119] This suggests that courts are influenced, consciously or not, by the egalitarian imperative not to employ different degrees of protection for potential victims.[120]

Finally, occasionally court decisions in specific cases reveal sensitivity to egalitarian considerations, even if not expressed in courts' reasoning and rhetoric. For example, in *Matthews v. Amberwood Associates Ltd. Partnership, Inc.*,[121] the Maryland Supreme Court imposed liability on a deep-pocket defendant landlord for the fatal injury suffered by a social guest of a tenant from the tenant's dog. While the overall desirability of the result in *Matthews* might be disputed (and its multidimensional distributive results should be more carefully examined), most probably the result was motivated by the distributive-egalitarian concern. Indeed, the dissenting judge faulted the result reached by the majority for "the implication that rich landlords and sympathetic victims are judged by totally different standards."[122]

2. Considering Needs and Equality in Tort Law and Private Law

Incorporating egalitarian considerations into standard of care analysis also fits with broader tendencies in tort law and private law that reveal limited attentiveness to needs and equality considerations. Due to space constraints, I will only briefly mention this attentiveness, without exploring it in full. *Sensitivity to needs* is shown by tort law in two ways. *First*, as was mentioned above, distributive considerations concerning *loss-spreading* and *deep pockets* have influenced the development of tort doctrine and are helpful in explaining specific results. Thus, for example, vicarious liability, products

---

118 *See supra* note 74. *See also* Keren-Paz, *Randomness*, *supra* note 7. Richard Posner admits that this result should, indeed, follow. Richard Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* Philosophical Foundations, *supra* note 44, at 99, 110.

119 *But see* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L.J. 165, 174, 246 (1999) (arguing that the Environmental Protection Agency, while making cost-benefit analysis did not attach a lower valuation of life to migrant farm workers than the national average, even though migrant farm workers are poorer than the average person).

120 I avoid here the examination of whether such a practice is also supported from an optimal deterrence perspective.

121 719 A.2d 119 (Md. 1998).

122 *Id.* at 138. *See also id.* at 139.

liability, and liability of public authorities have been explained as partially based on loss-spreading and deep-pockets grounds.[123] Some courts explicitly endorse distributive considerations, mainly loss-spreading ones, as factors in determining liability.[124] While courts in some jurisdictions reject insurance as a relevant factor in liability determinations,[125] the existence or absence thereof remains a hidden persuader and an explanation for results achieved by courts and juries.[126] *Second*, the growing tendency in many jurisdictions to replace no-fault plans with classic tort fault-based liability is itself mainly motivated by distributive considerations. These plans usually trade-off full compensation for a broader basis of entitlement to compensation, which is both motivated and justified by needs-based considerations.

Tort law is also showing some limited *sensitivity to equality concerns. First, the formal commitment to an objective standard of care undermined* by the weighing-in of the circumstances of each case. This amounts to an indirect way of inserting some subjective aspects into the standard of care.[127] In addition to this informal across-the-board inclusion of subjective elements, tort doctrine at times explicitly adopts a subjective standard, or an objective-subjective standard in certain circumstances, especially with regard to the standard of care required of children[128] and in the context of contributory negligence.[129] Hence, allowance is made for children's age; the standard of care required of professionals is higher;[130] and at times, the parties' disabilities, especially physical disabilities of defendants, are taken into account.[131] This

---

123 *See, e.g.*, Atiyah, *supra* note 36, at 22; Fleming, *supra* note 33, at 410.

124 *See, e.g.*, McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14, 19 (Wis. 1962); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944); Avellone v. St. John's Hosp., 135 N.E.2d 410, 415 (Ohio 1956).

125 *See, e.g.*, Hamstra v. B.C. Rugby Union, [1997] 1 S.C.R. 1092, 1108; Lister v. Romford Ice & Cold Storage Co. Ltd., [1957] 1 All E.R. 125, 133.

126 John G. Fleming, The Law of Torts 13 (9th ed. 1998).

127 *See* Rogers, *supra* note 112, at 171; W. Page Keeton et al., Prosser & Keeton on the Law of Torts 174-75 (5th ed. 1984); Walton, *supra* note 105, at 366.

128 *See, e.g.*, Mullin v. Richards, [1998] 1 All E.R. 920 (a test for negligence based on reasonable child of the same age in the same situation); Gough v. Thorne, [1966] 3 All E.R. 398 (same test for determining contributory negligence of a minor); Caradori v. Fitch, 263 N.W.2d 649 (Neb. 1978); Restatement (Second) of Torts § 285 (1965) (test of reasonable person of like age, intelligence, and experience under like circumstances).

129 *See, e.g.*, De Nartini v. Alexsander Sanitarium, 13 Cal. Rptr. 564 (1961) (allowing for the mental incapacity of plaintiff for purposes of contributory negligence); Keeton et al., *supra* note 127, at 178.

130 *See, e.g.*, Bolam v. Friern Hosp. Management Comm., [1957] 1 W.L.R. 582; Heath v. Swift Wings, Inc., 252 S.E.2d 256 (N.C. App. 1979).

131 *See, e.g.*, Rogers, *supra*, note 112, at 238; Daly v. Liverpool Corp., [1939] 2 All

tendency reflects sensitivity to equality considerations, since from a justice perspective, the main problem in adopting an objective standard is holding individuals accountable for not meeting the required standard, despite their *inability* to meet that standard. An objective standard, therefore, overburdens those who cannot meet its requirements.

More broadly, tort law is and should be attentive to the demands of equality by virtue of its being part of legal cultures that endorse equality and are committed to its enhancement.[132] Some jurisdictions are committed to the idea that public law values in general and equality in particular should influence the doctrinal development of private law, including the tort branch.[133] This commitment to equality is not merely rhetorical. Indeed there is a growing body of case law reshaping private law doctrines in accordance with the demands of equality (though, for my part, not enough). Examples include the (inconsistent) use of intentional infliction of emotional distress to combat racist and sexist slurs;[134] the growing attentiveness to the symbolic aspects of recognizing certain false statements as defamatory;[135] the continuing resistance to impose a duty of care on pregnant women toward their subsequently born-alive children for alleged negligence during pregnancy;[136]

E.R. 124; M'Kibbon v. Glasgow Corp., 1920 Sess. Cas. 590; Haley v. London Elec. Bd., [1965] A.C. 778 (implicit); Keeton et al., *supra* note 127, at 175-76; Fletcher v. City of Aberdeen, 388 P.2d 743 (1959); Restatement (Second) of Torts § 283C (1965) (standard required from the physically disabled is that of a reasonable man under like disability).

132 For example, Ken Cooper-Stephenson and Kate Sutherland have argued that tort law includes and promotes concepts of substantive equality. *See* Cooper-Stephenson, *supra* note 7; Kate Sutherland, *The New Equality Paradigm: The Impact of Charter Equality Principles on Private Law Decisions, in* Charting the Consequences 245 (David Schneiderman & Kate Sutherland eds., 1997).

133 *See, e.g.*, Sutherland, *supra* note 132, at 253-58; C.A. 294/91, Jerusalem Chevra Kadisha v. Kestenbaum, 46(2) P.D. 464, 530; 3 Aharon Barak, *Interpretation in Law* 680-85 (1994) (Hebrew). For comparative law solutions, see *id.* at 667-78.

134 *Compare* Wiggs v. Courshon, 355 F. Supp. 206 (S.D. Fla. 1973) (imposing liability for a racial epithet), *and* Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (imposing liability for a series of sexist slurs), *with* Logan v. Sears Roebuck & Co., 466 So.2d 121 (Ala. 1985) (not imposing liability for a sexual-orientation slur), *and* Bradshow v. Swagerty, 563 P.2d 511 (Kan. Ct. App. 1977) (not imposing liability for a racial epithet).

135 *See, e.g.*, Patrice S. Arend, *Defamation in an Age of Political Correctness: Should a False Public Statement That a Person Is Gay Be Defamatory?*, 18 N. Ill. U. L. Rev. 99, 111 (1997).

136 *See, e.g.*, Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988); Dobson v. Dobson, [1999] 2 S.C.R. 753. *See supra* note 87 and accompanying text.

the reduction of gender inequality in awarding damages in general[137] and damages for lost earnings in particular;[138] and the attentiveness to structural sexist approaches by the police in investigating sexual offences.[139] A similar tendency is noticeable in contract law.[140]

B. Reliance and Predictability

The challenge from the reliance and predictability front is that adopting a standard of care that varies with parties' wealth would hinder the reliance interests of both potential victims and potential tortfeasors whose exposure to loss and liability would be less predictable. This is problematic for both efficiency and autonomy reasons.[141] From the efficiency perspective, unpredictability and the given legal rule's complexity undermine tort law's behavior guidance function. From the autonomy perspective, unpredictability hinders the individual's ability to lead her life. I do not take upon myself the task of responding to the general charge that questions the use of private law for redistributive purposes.[142] Rather, I prefer to focus on the question of loss of predictability in the context of an egalitarian-sensitive standard of care, especially on the possible loss of tort law's capacity to direct behavior. But first, I will explain why an egalitarian-sensitive standard of care does not compromise the reliance and predictability interests of victims and tortfeasors.

1. Victim's Perspective

With regard to *victims*, a problem arises only in remote-parties situations. (In other situations, the identity of the tortfeasor is known to the victim, so that no problem of predictability arises.) In remote-parties situations, the victim does not know from the outset the identity of her tortfeasor, and therefore the victim has no real reliance interest. Moreover, under current negligence law, the victim's right to compensation is random and depends on a set of conditions she does not control. More specifically, the victim's right to

137 *See, e.g.*, C.A. 64/89, Gabay v. Luzon, 48(4) P.D. 673.

138 *See, e.g.*, Reilly v. United States, 665 F. Supp 976, 997 (R.I. 1987), *aff'd*, 863 F.2d 149, 167 (1st Cir. 1988). Of course, some courts do take this fact into account. *See, e.g.*, Shows v. Shoney's, Inc., 738 So.2d 724 (La. App. 1st Cir. 1999).

139 Doe v. Bd. of Comm'rs, [1998] 39 O.R.3d 487 (Gen. Div.).

140 *See* Zamir, *supra* note 52, at 1751-53, 1783-85.

141 *See* Alan Schwartz, *Products Liability and Judicial Wealth Redistributions*, 51 Ind. L.J. 558, 572-73 (1976).

142 I respond to that charge in Keren-Paz, Limits of Private Law, *supra* note 7, at 139-67.

compensation is, in practice, already limited by the tortfeasor's financial means. If the tortfeasor is insolvent, the victim will not get compensation. Moreover, in remote-parties situations, the reliance interest of potential victims is limited to the *average* result. Victims take into account (assuming they can do the calculation) their expected exposure to uncompensated loss, and this figure is the sum of discrete expected losses that they have to bear. Under the suggested doctrinal rule, each victim would get more protection from losses caused by high-status defendants and less protection from losses caused by low-status defendants. Nothing supports an assumption that the new exposure to liability is less predictable than that under the current situation, given imperfect information and the use of average values in cases of remote-parties interactions.

2. Tortfeasor's Perspective

The analysis from the potential tortfeasor's perspective is similar to that regarding the victim. When the identity of the victim is known in advance to the tortfeasor, no loss of predictability exists. When it is not known, the use of average disutility preserves the reliance interests. High-status defendants will know that their exposure to liability increases, and low-status defendants will know that their exposure to liability decreases. There is nothing unpredictable about this. Moreover, the prevalent existence of insurance will decrease any possible unpredictability. Actuarial calculations will determine the expected decrease of expected liability, and insurers will collect higher premiums from the rich. This would somewhat offset the regressive redistribution caused by adverse selection.[143] It should also be recalled that existing tort law includes a significant lottery aspect from the tortfeasor's perspective. His liability depends on the identity of the victim, including the victim's wealth. The prevalent existence of insurance reduces this unpredictability, and insurance would be available also under the suggested reformulation of the standard of care.

3. Tort Law's Capacity to Direct Behavior

One might fear that the added complexity of the proposed rule would hinder tort law's capacity to direct behavior and to set the borderline between the permissible and the forbidden. This might be true to some extent because the proposed rule requires us to depart from a simplistic view that ignores context and the actor's ability to prevent the loss given her resources. The simplistic view judges as equal activities that create the same expected loss

143 For this problem, see Priest, *supra* note 99, at 1540-48.

(measured in dollars) without regard to the substantial burden those losses impose on the actor and others. To this I will give a threefold answer. *First*, the loss of the capacity of the courts to guide behavior due to a determination that is based on the actual defendant's status is insignificant. Granted, the degree of behavior control is more limited under such a rule: the same behavior might be negligent if conducted by one person, but reasonable if conducted by another. However, this is not new in standard of care cases. The same behavior might be reasonable or not based on contingent factors such as urgency, availability of alternative courses of action, and the identity of potential victims. This suggests that potential tortfeasors can derive only limited guidance from courts' determinations about negligence even under existing doctrine. A regime of egalitarian-sensitive standard of care analysis still guides behavior at two levels. One, all defendants with a similar status know that similar behavior is likely to be deemed negligent. Two, potential actors know that the reasonableness of their behavior will be judged also based on their resources and their knowledge about the identity of those they place at risk.

Second, given the widespread skepticism regarding tort law's effectiveness in directing behavior,[144] there is doubt as to the significance of a further loss of the capacity to guide behavior. If, indeed, tort law can give only crude guidance for behavior, it is doubtful whether there is any loss of behavior control under the suggested rule. The rule gives broad guidance that one's duty to others depends on one's means and that one should make greater effort to prevent harm to the disadvantaged than to the well-off. These messages are clear, and their radiating symbolic effects provide ample guidance for behavior.

Third, even if there is a small loss in behavior control, it is more than justified by the attainment of better justice between the parties and by the practical and symbolic aspects of the results achieved in the concrete cases. Loss of predictability might be a worthy price to pay in order to achieve more just results. One can find little solace in the predictability that an unjust system can offer.

C. The Segregating Effect

The last challenge to my proposed model I will respond to is that the rule could segregate the rich and the poor and, more generally, the upper classes

144 Stephen D. Sugarman, *Doing Away with Tort Law*, 73 Cal. L. Rev. 555, 559-91 (1985). *Cf.* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter*, 47 UCLA L. Rev. 377, 422-30 (1994).

and lower classes in society. If the rich are at risk of not being compensated from risky activities conducted by the poor and of being more liable to the poor, they might seek to distance themselves from the poor.

I find this concern to be unconvincing for several reasons. To begin with, the current tort regime provides the poor with strong incentives to disengage themselves from the rich, due to the regressive effects of tort law: it is cheaper to harm the poor than to harm the rich. Therefore, the question of which regime would produce greater social segregation is unclear and contingent on the relative ability of the poor and rich to segregate themselves given the appropriate incentives to do so. In addition, we have many reasons to be skeptical about the segregating effects a change in the standard of care would bring about. First and foremost, the effects of law in general and tort law in particular seem to be negligible when compared to other cultural and social forces. There are strong pressures for both social integration and segregation, and these forces seem to be much more significant than the incentives provided by tort law (e.g., Would rich parents decide not to send their children to the same school with children of the poor *due* to the change in negligence law?). We should not overestimate the importance of law in guiding behavior. Moreover, many tort situations are between remote parties, and in such circumstances, the ability to segregate hardly exists. Put differently, the costs to the rich from an attempt to segregate themselves would greatly exceed the losses incurred from non-segregation (Would capital owners employ rich employees and pay them accordingly in order to save in expected liability to employees for employment-related accidents?). Finally, even if indeed the proposed rule would cause segregation, this result might be desirable. A call for integration that gives the rich strong incentive to harm the poor (who have limited ability to avoid it) is hardly morally appealing. It is akin to the forging of a partnership between the horse and its rider.