Title

The Hegemony of the Reasonable Person in Anglo- American Tort Law

Permalink

https://escholarship.org/uc/item/9kj2g29r

Author

Simons, Kenneth W

Publication Date

2022-10-11

Peer reviewed

3

The Hegemony of the Reasonable Person in Anglo-American Tort Law

Kenneth W. Simons

I. Introduction: Negligence, Reasonableness and the Reasonable Person

It is common to divide Anglo-American tort doctrine into three broad categories: intentional torts, negligence, and strict liability. In the last century, negligence has been ascendant. More precisely, tort liability has increasingly required proof either of negligence or of an intentional tort, while strict liability, in the sense of liability without fault, persists only for a small number of circumscribed categories.[1]

The increasing importance of negligence liability has been accompanied by the progressive dilution or elimination of doctrines that restricted such liability, including the privity requirement, sovereign immunity, and more limited duties to licensees or trespassers who enter one's land (discussed below). At the same time, a number of negligence doctrines have extended liability. Recovery is increasingly allowed for negligent infliction of emotional harm unaccompanied by physical harm. "Enabling" torts have expanded, imposing liability on a wide range of actors, including therapists for not warning potential victims of their patients' criminal acts; landlords, businesses, and universities for not preventing criminal acts; businesses (and occasionally social hosts) who serve liquor to obviously intoxicated persons; and those who leave keys in the ignitions of cars that are then stolen.[2] "Reasonable foreseeability"

[1] This story oversimplifies, because strict product liability expanded in the middle of the twentieth century and because intentional torts and negligence doctrines contain what might be characterized as "strict liability" elements. Examples include the irrelevance of fault as to the ownership of property in trespass to land, and the objective criterion of fault in negligence, which ignores an actor's mental incapacities.

[2] Robert L. Rabin, "Enabling Torts" (1999) 49 DePaul LR 435.

Kenneth W. Simons, *The Hegemony of the Reasonable Person in Anglo-American Tort Law* In: *Oxford Studies in Private Law Theory: Volume 1*. Edited by: Paul B. Miller and John Oberdiek, Oxford University Press (2020).
DOI: 10.1093/oso/9780198851356.003.0003

of the harm is a decisive factor in establishing liability in these enabling torts.[3] Moreover, although the advent of strict products liability for manufacturing defects was widely expected to augur a general expansion of strict liability, this did not occur, and negligence was remarkably resilient.[4]

As a purer, more unqualified form of negligence has thus emerged, it becomes all the more critical to understand the meaning and scope of a central feature of negligence doctrine: the reasonable person.

In American tort law, jury instructions in negligence cases are typically rather perfunctory, asking whether the defendant failed to act as a "reasonably prudent person" or "reasonably careful person" or "reasonable person" would have acted under the same circumstances. Some instructions also indicate that negligence is the lack of "ordinary care."[5]

The reasonable person test is, to some extent, an idealized standard. Customary or average behavior is not necessarily reasonable behavior, except in limited circumstances such as professional negligence. It is improper, for example, to instruct members of a jury in a negligence case that they should decide whether they would have acted as defendant or plaintiff acted if they had been in his or her shoes. A compelling example (with which I am intimately familiar, after residing most of my life in Boston) is the typical Boston driver, who accelerates through a yellow traffic light or a light that has just turned red, without regard to traffic conditions. On the other hand, the way in which most ordinary individuals act surely seems relevant to what reasonable care demands.

The extent to which the reasonable person test is idealized and departs from ordinary or normal behavior is an important issue in describing and defending that test, as we shall see. But an initial question is why, if one is employing an evaluative criterion for legal liability, it would ever make sense to frame that criterion in terms of a reasonable person. Why not employ an evaluative criterion that explicitly invokes the relevant normative principle? That criterion might be "act in a way that shows equal respect for the interests of others" (as a corrective justice or contractualist theorist might say[6]) or "take the optimal

[3] Similarly, proximate cause is increasingly understood as extending to all "reasonably foreseeable" harms, an approach that is usually more expansive than the traditional directness test of proximate cause.

[4] G. Edward White, *Tort Law in America: An Intellectual History* (Expanded edn, OUP 2003) ch. 8.

[5] Benjamin Zipursky, "Sleight of Hand" (2007) 48 Wm. & Mary LR 1999, 2013–17; Patrick J. Kelley and Laurel A. Wendt, "What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions" (2002) 77 Chi-Kent LR 587, 595–612.

[6] For a recent discussion of Kantian theories of tort law, see Alan D. Miller and Ronen Perry, "The Reasonable Person" (2012) 87 NYULR 323, 348–61. Contractualist accounts include John Oberdiek, *Imposing Risk: A Normative Framework* (OUP 2017); Gregory Keating, "A Social Contract Conception of the Tort Law of Accidents" in Gerald J. Postema (ed.), *Philosophy and the Law of Torts* (CUP 2001).

precaution in light of the expected costs and benefits of all alternatives" (as the economists would have it[7]). It is not obvious why the reasonable person would make an appearance.[8]

A first answer to this preliminary question is that a reasonable person test performs a number of functions.[9] By personifying fault, it makes the requisite analysis of fault more concrete and vivid, which is especially valuable when the jury is the trier of fact. Moreover, many negligence cases do not involve advertent fault: the actor often has not made a conscious choice between alternative possible precautions. Consider cases of deficient skill, such as a surgeon whose hand slips or a rider who loses control of her bicycle despite utmost attention to the risk, as well as cases of inadvertent negligence, such as an automobile driver who forgets to check his side mirror before changing lanes. In these cases, the reasonable person test is especially appealing, and indeed no sensible substitute comes readily to mind.[10]

Furthermore, a reasonable person test can readily permit a significant degree of individualization. If we wish to make allowance for the fact that the actor is a child, is suffering from a physical disability, or confronts emergency circumstances permitting very little time to assess the risks of different alternatives (or very little time to think at all before acting), we can qualify the reasonable person to accommodate those special facts—thus, the reasonable child, the reasonable blind person, the reasonable person facing an emergency. And we can qualify the test even further—thus, the reasonable child of the actor's age, maturity, intelligence, and experience.[11] It is unclear how individualization could be achieved without employing a reasonable person test.

At the same time, the reasonable person test, unless supplemented with additional criteria, is extraordinarily vague. This creates a serious risk of inconsistency: presented with identical facts, a different judge or jury could easily reach a different conclusion about whether the actor failed to satisfy the test.

[7] Richard A. Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) ss 6.1 and 6.2; Steven Shavell, *Foundations of Economic Analysis of Law* (HUP 2004) ch. 8.

[8] Indeed, advocates of economic explanations of tort law have some difficulty explaining the point and value of the reasonable person test.

[9] The following analysis is drawn from Kenneth W. Simons, "Dimensions of Negligence in Criminal and Tort Law" (2002) 3 Theo. Inq. L. 283.

[10] For further discussion of deficient skill and inadvertent negligence cases, see Zipursky (n 5) 19–20; Kenneth W. Simons, "The Hand Formula in the Draft Restatement Third of Torts: Encompassing Fairness as Well as Efficiency Values" (2001) 54 Vand. LR 901, 931–33. Zipursky helpfully distinguishes the "performance-negligence" issue that arises in these cases from "precaution-negligence."

[11] Am. L. Inst., *Restatement, Third, Torts: Liability for Physical and Emotional Harm* (Am. L. Inst. 2010) § 10. Similarly, a reasonable person test can more readily accommodate excuses (such as duress or provocation) as well as justifications. Simons (n 9) 314; John Gardner, *The Reasonable Person Standard, The International Encyclopedia of Ethics* (Hugh LaFolette ed., 2nd edn, forthcoming 2020); John Gardner, "The Many Faces of the Reasonable Person" (2015) 131 LQR 563.

And insofar as a legal definition of negligence is intended to guide behavior, or at least provide notice of what is permitted and prohibited, such vagueness is highly problematic.[12]

There is much more to ponder about the reasonable person test in tort law. For now, I put off further general analysis and focus instead on four doctrinal examples that illuminate a range of descriptive and normative difficulties that the test poses.

II. Four Doctrinal Examples

A. Duties toward Land Entrants: Problematic Oversimplification

Historically, Anglo-American law drew a clear distinction between the duties owed by landowners and land possessors toward three different categories of entrants onto the land—invitees, licensees, and trespassers. The highest duty was owed to invitees, a lesser duty to licensees, and the least to trespassers. (For example, the owner owes a duty to inspect for hidden defects for the benefit of invitees but not for the benefit of licensees or trespassers; and she owes a duty to alert invitees and licenses, but not trespassers, about known dangers.) With respect to invitees and licensees, distinct rules specified the scope of the duty and thus whether the defendant was negligent. With respect to trespassers, the duty analysis identified the limited circumstances in which the defendant was liable for negligence, and clarified that in most circumstances, negligence was insufficient for liability, and "wilful or wanton conduct" or some similarly aggravated form of fault was required.

However, by the middle of the twentieth century, many courts became dissatisfied with these traditional rules. In the United Kingdom and many American states, the distinction between invitees and licensees was abolished by statute or by judicial decision.[13] The California Supreme Court went even

[12] Kenneth Abraham, "The Trouble with Negligence" (2001) 54 Vand. LR 1187. See also James Henderson, "Expanding the Negligence Concept: Retreat from the Rule of Law" (1976) 51 Ind. LJ 467, noting concern that negligence standards are 'polycentric,' i.e., open-ended and dependent on a variety of incommensurable factors; George Fletcher, "The Right and the Reasonable" (1985) 98 Harv. L. Rev. 949, 962, stating 'The reasonable person enables us to blur the line between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability.'

[13] Occupiers' Liability Act 1957 (OLA 1957), s. 2(2), establishing "a duty to take such care as in all the circumstances of the case is reasonable."

further in *Rowland v. Christian*,[14] purporting to abolish not only that distinction, but also the distinction between those categories and the category of trespasser. The *Rowland* decision is worth considering in more detail.

In *Rowland*, the court began with a statement of the general duty to use ordinary care to prevent harm to others and articulated a multifactor balancing test to decide when it is proper to depart from this general duty. The traditional classification had, according to the court, led to strained and artificial distinctions,[15] problematic "subtleties and confusion" and "complexity,"[16] and application of rules that was "difficult and often arbitrary."[17] The court noted that California courts had characterized the rules as "unrealistic, arbitrary, and inelastic," involving "exceedingly fine distinctions."[18]

In a rhetorically powerful passage, the court explained:

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.

Notice the court's invocation of "reasonable people" as an independent criterion for evaluating the landowner duty rules, as if it is perfectly obvious that the reasonable person test is the presumptively correct legal test to employ in tort law.

However, in the process of announcing a new unitary reasonable person test to replace the traditional three-fold classification, the court seemed to want to have it both ways, for the court paid lip service to the potential relevance of the entrant's status:

> The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's

14 443 P 2d 561 (Cal. 1968).
15 Ibid. 565.
16 Ibid. 566.
17 Ibid. 567.
18 Ibid. 567.

> status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.[19]

This is a maddeningly obscure concession. How, exactly, is status still relevant? To assert that it "may . . . have some bearing" without being "determinative" offers very little guidance.[20]

To be sure, the judicial rejection (or downplaying) of the traditional distinctions between entrants has much to commend it, especially with respect to the distinction between invitees and licensees.[21] What is striking about *Rowland*, however, is the court's confidence that switching to a unitary reasonable person test will solve all the problems that the traditional classifications engendered. Is a simple reasonable person jury instruction really sufficient to capture the policies and principles underlying the traditional categories, including the fair expectations of the parties, the rights of property owners, and the fault or illegal conduct of the victim?[22]

The evolving law concerning liability to different categories of land entrants displays increasing sympathy for the plight of victims, rejection of rule-based criteria in favor of the simpler standard of reasonable care, and an untested faith that triers of fact can incorporate into their reasonable person analysis those factual and normative features of the traditional categorical rules that are relevant and justifiable under contemporary norms.

[19] Ibid. 567.

[20] According to Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *The Law of Torts* (2nd edn, updated June 2016) s. 378:

> Courts sometimes say explicitly that the status of the visitor remains relevant on the issue of the foreseeability of the harm or the landowner's reasonable expectations. That is a shorthand expression; it is not the status itself that is relevant but some of the facts that establish status.

[21] The Restatement, Third, Torts, adopted by the American Law Institute in 2010, rejects the invitee/licensee distinction. *Restatement, Third, Torts: Liability for Physical and Emotional Harm* (n 11) §§ 49–54. So does the statutory law of the United Kingdom, OLA 1957 .

[22] Other courts did not share *Rowland*'s confidence: very few went as far as *Rowland* in eliminating *all* of the status categories, including even trespassers. And in California itself, controversial cases arose after *Rowland* that permitted trespassers to sue landowners, including a case in which a trespasser successfully sued a school district after he fell through a skylight while attempting to illegally remove floodlights from the roof of a school gymnasium. These cases prompted the legislature to respond by precluding lawsuits by criminal felons. Cal. Code § 847 (West).

B. Assumption of Risk: The Problematic Merger into Comparative Fault

Another illustration of the ascendance of the reasonable person is how American courts dramatically changed their treatment of the defense of assumption of risk in the middle of the twentieth century. This development, too, resulted in increased liability of potential defendants. However, the expansion of the reasonable person test into this domain has also been problematic.

The basic story is familiar, but its implications are less well understood. The traditional contributory negligence doctrine was all-or-nothing: if the victim was even slightly at fault, he recovered nothing, even if the injurer was highly negligent. Over time, by legislation or judicial decree, almost all American jurisdictions adopted comparative fault, permitting the trier of fact to allocate legal responsibility in proportion to each party's fault. This change greatly benefited victims, who at least had the hope of partial recovery even if they acted negligently.

The elimination of the harsh traditional contributory negligence doctrine left open the question of the continued vitality of other victim-focused doctrines, especially assumption of risk. Under the latter doctrine, courts precluded any recovery if the victim knowingly and voluntarily chose to confront the risk that the injurer negligently created. With the advent of comparative fault, however, most jurisdictions abolished assumption of risk as an independent and complete defense and "merged" it within comparative fault.[23] Under merger, if the plaintiff's voluntary and knowing choice to assume a risk was unreasonable, the plaintiff would have a chance to recover at least partial damages under comparative fault, while if her choice was reasonable, she would recover in full. Thus, the plaintiff often would be better off under merger than under the traditional assumption of risk rule. For example, if the plaintiff intervenes to assist a person being roughed up by unruly patrons in a bar and thereby incurs their wrath and suffers injury, traditional assumption of risk would bar recovery, but under the merger approach, the plaintiff would likely obtain full recovery.[24]

Meistrich v. Casino Arena Attractions is a leading case espousing the merger approach. As the court explained:

[23] Similarly, in English law, the advent of legislation requiring apportionment of fault between negligent defendants and negligent plaintiffs has resulted in a narrowing of the assumption of risk defense. James Goudkamp, "Defences to Negligence" in C. Sappideen and P. Vines (eds.), *Fleming's The Law of Torts* (10th edn, Thompson Reuters 2011) 335. In Australia, by contrast, all states have enacted legislation expanding the scope of assumption of risk: Ibid. 343.

[24] *Fagan v. Atnalta*, 376 SE 2d 204 (Ga. App. 1988), applying traditional assumption of risk principles to deny recovery on these facts.

> [A]ssumption of risk . . . [as a defense to negligence] is a mere phase of contributory negligence, the total issue being whether a reasonably prudent man in the exercise of due care (a) would have incurred the known risk and (b) if he would, whether such a person in the light of all of the circumstances including the appreciated risk would have conducted himself in the manner in which plaintiff acted.[25]

Remarkably, the opinion pays no heed to one of the principal rationales for the traditional assumption of risk doctrine—that it reflects the plaintiff's consent to the risk that the defendant negligently created.[26] Contrast this explanation from the Rhode Island Supreme Court, which has bucked the trend of merger and retained the independent defense:

> [C]ontributory negligence and assumption of the risk do not overlap; the key difference is . . . the exercise of one's free will in encountering the risk. Negligence analysis, couched in reasonable man hypotheses, has no place in the assumption of the risk framework. When one acts knowingly, it is immaterial whether he acts reasonably. The postulate . . . that assumption of the risk is merely a variant of contributory fault, is not, to our minds, persuasive.[27]

Advocates of merger do not explain why consent should be ignored in the context of negligently caused harm when consent is universally understood to be a vital defense to intentional torts, whether or not the plaintiff's decision to consent was reasonable.[28] If Harry Houdini dares someone to punch him in the stomach as hard as he likes, the doctrine of consent would preclude Houdini's recovery for the resulting injury, whether we deem his invitation to be reasonable or foolish. And if I ask you to speed when you drive me to the airport, and your resulting dangerous driving injures me, in some jurisdictions the doctrine of assumption of risk would preclude my recovery, again without regard to the reasonableness of my encouraging you to speed.

[25] *Meistrich v. Casino Arena Attractions, Inc.*, 155 A 2d 90, 95–96 (NJ 1959).

[26] Indeed, in one passage, the court curtly states: "[W]e place beyond present discussion the problem raised by an express contract not to sue for injury or loss . . . and also situations in which actual consent exists, as, for example, participation in a contact sport." Ibid. 93. Yet the latter no-recovery category, in which plaintiff consents to what would otherwise be an intentional tort, is justified by the same basic consensual rationale as assumption of risk, according to advocates of an independent assumption of risk defense.

[27] *Kennedy v. Providence Hockey Club, Inc*, 376 A 2d 329, 76–77 (RI 1977).

[28] For a fuller exploration of the similarities and differences between the two consent contexts, see Kenneth W. Simons, "Exploring the Relationship between Consent, Assumption of Risk, and Contributory Fault" in John Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (OUP 2014); Kenneth W. Simons, "Reflections on Assumption of Risk" (2002) 50 UCLA LR 481.

To be sure, recognizing an independent assumption of risk defense has its dangers, especially the risk that the scope of the defense as applied will greatly exceed its legitimate underlying rationale.[29] In my view, the defense should be retained but interpreted narrowly.[30] Thus, in the case where the plaintiff attempts to rescue someone from a beating and suffers injury, the defense should not apply and the plaintiff should obtain partial or full recovery under comparative fault; but in the case where the passenger encourages a driver to speed, the passenger should be denied recovery.

Although the prevalent American approach to assumption of risk after the advent of comparative fault is abolition and merger, this does not mean that all fact patterns that traditionally would be handled by the defense of assumption of risk now result in complete recovery (if the plaintiff acted reasonably) or potential partial recovery (if the plaintiff acted unreasonably). Assumption of risk lives on as a complete defense even in many "abolitionist" jurisdictions, but it survives in altered form, as "primary assumption of risk."[31]

Under primary assumption of risk, courts decide, as a matter of law, that a particular category of activity is not subject to liability, or is subject only to limited liability,[32] based in significant part on the fact that many or most participants in the activity consent to the relevant risks. Primary assumption of risk is a type of no-duty or limited-duty rule.

[29] Jurisdictions such as Rhode Island that retain the defense often struggle over the question of scope and resort to artificial criteria, such as demanding that the defendant surmount a surprisingly high threshold to establish that a plaintiff's choice was "voluntary." Compare *Kennedy* (n 27) with *Hennessey v. Pyne*, 694 A 2d 691 (RI 1977) (jury question whether plaintiff voluntarily assumed risk of being hit by golf ball).

[30] I believe that assumption of risk should be retained in only two situations—when the plaintiff actually preferred, ex ante, the risky alternative that the defendant negligently created to the less risky, non-negligent alternative that would have avoided the plaintiff's harm; and when the plaintiff insisted on a relationship with defendant. See Simons, 'Reflections on Assumption of Risk' (n 28).

[31] Similarly, English courts have recognized limited duty rules in the context of sporting injuries. As stated in *Blake v. Galloway* [2004] 1 WLR 2844, "a breach of the duty of care will only be established where there has been recklessness or a very high degree of carelessness." See S. Deakin, A. Johnston, and B Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2013) 768. See also James Goudkamp, *Tort Law Defences* (Hart Publishing 2013) 58 (noting that when courts deny recovery based on assumption of risk, although they refer to the doctrine as a defense, "they are frequently holding that there is no negligence on the part of the defendant.").

Canadian courts also recognize limited duty rules in sporting and recreational activities cases, while at the same time recognizing only a very narrow conception of assumption of risk, one that requires that the plaintiff agreed to accept both the physical and legal risks (i.e., impliedly agreeing to waive one's right to sue in tort). See G. H. L. Fridman, *The Law of Torts in Canada* (3rd edn, Thompson Reuters 2010) 447–54, 457–59; A. Linden and B. Feldthusen, *Canadian Tort Law* (8th edn, LexisNexis Canada 2006) 508–13.

[32] A common way of limiting liability is to preclude recovery for simple negligence and to require the plaintiff to prove reckless or wanton conduct or conduct intended to harm. See, e.g., *Knight v. Jewitt*, 834 P 2d 696, 711 (Cal. 1992).

It is striking that if a jurisdiction aggressively employs the "no duty" approach, the supposed death of assumption of risk is greatly exaggerated. If abolishing the defense of assumption of risk is accompanied by expanding the limited duty rule of primary assumption of risk, then many victims are no better off, and some may indeed be worse off, than if neither change had been made.[33]

An intriguing alternative approach to both primary and secondary assumption of risk has been endorsed by a few American jurisdictions: employ an extremely flexible conception of what constitutes negligence on the part of an injurer, one that takes into account the policies and principles that underlie these assumption of risk doctrines.[34] Thus, in *Pfenning v. Lineman*, the Indiana Supreme Court rejected a limited duty rule for sports participants, and instead purported to adopt a negligence test: "[I]n negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty."[35] The court then applied the test to several claims, including a claim that a golfer failed to yell "fore" and thus failed to give a reasonable warning to the plaintiff when the golfer's drive hooked to the left. The court concluded that, even if the golfer did not yell "fore" loudly enough, and even if he did not warn at all (an omission that violates conventional golf etiquette), as a matter of law such an inadequate warning "is within the ordinary behavior of golfers." But this reasoning, it should be clear, employs a stipulative definition of reasonable care, no different in substance from other courts' more candid formulation that mere negligence (here, in failing to shout a warning) is insufficient for liability to other participants in a sporting activity.

[33] They may be worse off in two respects. First, the plaintiff has the burden of proving duty (which is negated by primary assumption of risk), while the defendant has the burden of proving the defense of secondary assumption of risk. Second, primary assumption of risk is a wholesale judgment that an activity is not subject to liability in light of the preferences of many or most participants (as well as other factors), while the defense of assumption of risk is a retail judgment requiring the defendant to prove, case by case, that the individual plaintiff subjectively was aware of, and voluntarily chose to encounter, the risk.

Under primary assumption of risk, for example, a first-time spectator to a baseball game who knows nothing about the risks of being hit by a foul ball or by a flung bat would be precluded from recovery. The more subjective defense of secondary assumption of risk would not have that preclusive effect. See Simons, 'Reflections on Assumption of Risk' (n 28).

[34] See, e.g., *American Powerlifting Ass'n v. Cotillo*, 934 A 2d 27 (Md. 2007) (spotters failed to catch the bar during powerlifting competition); *Allen v. Dover Co-Recreational Softball League*, 807 A 2d 1274 (NH 2002) (errant throw in recreational softball game); *Auckenthaler v. Grundmeyer*, 877 P 2d 1039 (Nev. 1994) (plaintiff injured while riding horse by another rider's horse); *Lestina v. West Bend Mutual Ins Co*, 501 NW 2d 28 (Wisc. 1993) (plaintiff injured by collision during recreational soccer match).

[35] *Pfenning v. Lineman*, 947 NE 2d 392, 404 (Ind. 2011).

This unusually flexible "negligence" approach creates a more fundamental problem: it conceals the significant weight accorded to the preferences and consent of participants in an activity as reasons for precluding liability. I believe it would be more honest to recognize that such consent is an independently weighty reason for denying tort liability. Consider another claim asserted by the plaintiff in *Pfenning*: she had never played golf before and did not know anything about its safety or etiquette rules; thus, she could not subjectively appreciate the risks she faced. The court responded that the operator of the golf course had an "objectively reasonable expectation . . . that persons present on its golf course would realize the risk of being struck by an errant golf ball and take appropriate precautions."[36] But the operator surely knew that not all persons on the course fully appreciated that risk. The operator's justification for not taking further precautions to protect unaware victims deserves more careful analysis than this. Perhaps it would be unrealistic or unduly burdensome to take extensive precautions against the harms of mishit golf balls, because most participants in the activity would prefer an affordable and bucolic experience. Towering brick walls separating fairways from each other would effectively reduce these risks, as would replacing current golf balls with plastic whiffle balls. But such precautions would undermine the value of the sport to participants. Golf is a good walk, whether or not Mark Twain is correct that it is a good walk spoiled.[37]

C. Plaintiff's Negligence: The Problematic Symmetry with Defendant's Negligence

A third legal context in which the reasonable person test is more problematic than first appears is its use to characterize the negligence of a tort victim.[38] The reflexive judicial approach, in all Anglo-American jurisdictions, is to apply a symmetrical standard of care for victims and injurers: just as injurers are liable for failure to use reasonable care to prevent harm to others, victims receive reduced compensation insofar as they failed to use reasonable care to prevent harm to themselves. The advent of comparative fault has made this

[36] Ibid. 406.
[37] Alas, it appears that Mark Twain is not the original source of the quote. See: <http://quoteinvestigator.com/2010/05/28/golf-good-walk>.
[38] Much of the discussion that follows is drawn from Kenneth W. Simons, "Victim Fault and Victim Strict Responsibility in Anglo-American Tort Law" (2016) 8 J. Tort L. 29. See also Robert Stevens, "Should Contributory Fault Be Analogue or Digital?" in Dyson, Goudkamp, and Wilmont-Smith, *Defences in Tort* (Hart Publishing 2015).

symmetrical approach seem inexorable and unremarkable. And the standard of the reasonable person may seem to support this approach, insofar as it suggests a requirement that the actor exercise moderation between excessive and deficient attention to risk (whether to others or to oneself).

Quite often, however, the legal system does not actually adopt a symmetrical attitude toward victim and injurer conduct. Courts depart from symmetry in a number of ways. Thus, courts recognize several categorical doctrines that permit *full* recovery without regard to the possible fault of the victim (e.g., when the defendant has a duty to protect the victim from his own vulnerability or incapacity, or when the defendant is engaged to provide medical care or other services to the victim necessitated by the victim's own prior fault). Courts also recognize categorical doctrines that automatically preclude *any* recovery despite the supposed presumptive status of comparative fault (e.g., the illegality doctrine, the mitigation of damages doctrine, and, as we have just seen, the defense of voluntary assumption of risk).

Even when courts do permit the comparison of victim conduct with injurer conduct, the way in which victim conduct is relevant to tort liability is frequently qualitatively different from the way in which injurer conduct is relevant. Often, when legal rules characterize a victim as being "at fault," this does not mean that the victim should have acted differently, but only that he should be strictly responsible for his choice or action (e.g., because he justifiably forfeited his right to full damages). Indeed, sometimes, a victim actually has a moral or legal right *not* to take a precaution, yet it is appropriate to deny him full damages for the harm that the precaution would have averted. An example: a victim's religious beliefs counsel against following a doctor's advice about how to recover from surgery, with the result that the victim's injuries are vastly increased.

Nevertheless, symmetry is sometimes appropriate, especially when the actor's unreasonable conduct creates substantial risks both to others and to himself (e.g., when the actor drives an automobile carelessly). But in many other cases, symmetry is much less defensible, at least if one endorses a largely nonconsequentialist rather than a purely utilitarian account of tort law. On certain utilitarian accounts, especially those that evaluate legal rules according to whether they maximize economic efficiency, the only question is whether an actor made the optimal choice among alternatives; it is irrelevant whether the actor is endangering only others, only himself, or some combination of the two. A nonconsequentialist account, by contrast, might decline to treat an actor as unreasonable in the same sense, or to the same degree, when he endangers only or mainly himself, as when he endangers others: such an account might recognize a more robust duty to avoid injuring others than to avoid injuring oneself.[39]

Granted, the vagueness of the reasonable person test makes it difficult to know whether a fact-finder applying the test is interpreting it in symmetrical fashion to the negligence of an injurer and of a victim. Perhaps the jury or judge will usually treat unreasonable risk to others as a qualitatively more serious type of fault than unreasonable risk to self. However, if one shares my belief that these are indeed qualitatively distinct phenomena that often should be treated asymmetrically, it might be sensible to so instruct the jury or to have the judge apply different standards. The larger lesson is that articulating negligence *simply* in terms of the reasonable person may, once again, flatten analysis and ignore prominent features of the legal topography.

D. Liability Only if Plaintiff Responded "Reasonably": A Problematic Limitation

A number of tort doctrines (apart from contributory and comparative fault) make liability depend on how a reasonable or average person in plaintiff's position would react to defendant's conduct.[40] Thus, the invasion of privacy torts consider whether an intrusion on seclusion or the publication of a private fact "would be highly offensive to a reasonable person."[41] Fraud requires reasonable or justifiable reliance by plaintiff.[42] Products liability law employs a "reasonable consumer expectation" test in two contexts—when determining liability

[39] Indeed, it is doubtful that a victim has an actual "duty" not to unreasonably injure himself. Kenneth W. Simons, "The Puzzling Doctrine of Contributory Negligence"(1995) 16 Cardozo L. Rev. 1693, 1795; Stevens (n 38) 254.

[40] Benjamin Zipursky uses the term 'secondary qualities' to describe legal properties that depend on how others respond, in thought or emotion, to the defendant's conduct:

> The idea is that just as colors are defined in reference to the perceptual responses of normal persons, so too are certain legal qualities defined in reference to the affective responses of normal persons. For these kinds of qualities, the word 'reasonable' is typically used in defining moments.

Benjamin C. Zipursky, "Reasonableness In and Out of Negligence Law" (2015) 163 U. Pa. LR 2131, 2144.

[41] Am. L. Inst., *Restatement, Second, Torts* (Am. L. Inst. 1997) § 652B (requiring, for the privacy tort of intrusion on seclusion, that "the intrusion would be highly offensive to a reasonable person"); ibid. § 652D (requiring, for the privacy tort of publicity to private life, that "the matter publicized is of a kind that . . . would be highly offensive to a reasonable person").

[42] Am. L. Inst., *Restatement, Third, Torts: Liability for Economic Harm* (Am. L. Inst. 2020) § 11, cmt d; Jason Solomon, "Judging Plaintiffs" (2007) 60 Vand. LR 1749, 1765–67.

for food impurities[43] and, in some jurisdictions, when determining whether a product has been defectively designed.[44] A doctor's duty to disclose the risks of a proposed treatment depends, in most American jurisdictions, on whether a "reasonable patient" would find the risk material to the decision whether to choose the treatment.[45] A recent United Kingdom Supreme Court decision adopts a similar test, but also seems to support liability when the doctor should know that a particular patient would find a risk material, even if a reasonable patient would not.[46] And Title VII sexual harassment law considers whether a reasonable plaintiff (or perhaps a reasonable woman) would find the co-employee's advances unwelcome.[47]

In all of these contexts, employing a "reasonable person" test cuts against, rather than in favor of, liability. More precisely, it is more difficult for a plaintiff to satisfy such a test than to satisfy a purely subjective test that considers only the effect of the defendant's conduct on the individual plaintiff. The more objective test might preclude liability even though this particular plaintiff was highly offended by the intrusion upon seclusion, or actually relied upon the defendant's fraud, or considered an undisclosed risk from medical treatment material.

Many of these examples involve intentional torts. Indeed, the inclusion of reasonableness requirements in intentional torts extends further. For example, apparent consent precludes liability in American law when the defendant

[43] Thus, the Restatement Third of Torts: Product Liability provides that "a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient." Am. L. Inst., *Restatement, Third, Torts: Product Liability* (Am. L. Inst. 1992) § 7.

[44] Ibid. § 2, cmts g, h. The "consumer expectation" test of design defect, which tends to impose liability more readily than the competing risk-utility test, sometimes refers to the "reasonable" consumer and sometimes to the "ordinary" consumer. See, e.g., Restatement Second (n 41) § 402A, cmt i (product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer").

[45] See, e.g., *Canterbury v. Spence*, 464 F 2d 772 (DC Cir. 1972). See also Dobbs, Hayden, and Bublick (n 20) s. 309 (jurisdictions are split between those that require only those disclosures that medical custom indicates should be disclosed, and those that require disclosures of information that a reasonable patient would want to have). In *Bernard v. Char*, 903 P 2d 667, 675 (Haw. 1995), the court endorses an objective test of causation but permits a great deal of individualization: "[V]iewing the question from a core of reasonableness establishes an initially uniform standard . . . from which adjustments for idiosyncracies may be made. . . . [T[he analytical exercise is grounded in objective reasonableness, but the standard may still flexibly accommodate the individual characteristics of each patient."

[46] See *Montgomery v. Lanarkshire Health Board,* [2015] UKSC 11 [87]:

> The doctor is . . . under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, *or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.* (emphasis added)

[47] See *Schiavo v. Marina Dist. Development Co., LLC,* 123 A 2d 272, 284 (NJ Super. (2015); Elizabeth L. Shoenfelt, Allison E. Maue, and JoAnn Nelson, "Reasonable Person Versus Reasonable Woman: Does It Matter?" (2002) 10 Am. UJ Gender Soc. Pol'y & L. 633.

reasonably (though mistakenly) believes that the plaintiff consented.[48] And a reasonable (though mistaken) belief in the facts that would establish a privilege such as self-defense typically precludes liability, in both the United States and Commonwealth jurisdictions.[49] In these instances, as well, reasonableness limits liability, as compared to a rule providing that, as between an innocent victim and a reasonable but mistaken defendant who causes harm, tort law should favor the victim.

Why do courts employ a reasonable victim test when the defendant's liability depends on the victim's response? One possible explanation is that the victim is expected to conform to a standard of appropriate behavior; therefore, we entirely preclude her from recovering if she fails to respond "reasonably." But this explanation is often quite implausible, both descriptively and normatively. It amounts to blaming the victim for failing to react "reasonably" to the defendant's intentional wrongdoing, a remarkable and unjustified extension of principles of comparative fault.

The most plausible rationale for employing a reasonable victim test in this context is fairness to defendants. It is arguably unfair to require defendants to mold their behavior to accommodate a plaintiff who possesses nonstandard preferences or who reacts to a defendant's conduct in an unusual way, when defendants could not reasonably expect that their behavior would have a legally cognizable effect on such a plaintiff. Moreover, problems of fraud might arise if a plaintiff knew that he or she could obtain a tort recovery based only on a subjective reaction that would not be shared by other similarly situated victims. Employing a reasonable person test also obviates the need for the judge to specify the conditions that limit defendant's liability, when the judge has the sense that some such limitation must be imposed. And finally, the reasonable person test is quite familiar to judges. Thus, invoking it in the "reasonable victim" context is an understandable extension.

When the law employs a reasonable person test for judging the reactions of plaintiffs, does "reasonable person" have the same meaning as when that criterion defines the necessary qualities of a defendant? It probably does

[48] See *Restatement, Second, Torts* (n 41) ss 50 and 892(2). In English law, however, authority appears to be divided concerning whether a reasonable mistake about consent will result in liability. See Sappideen and Vines (n 23), citing two cases as giving a negative answer, *Re F* [1990] 2 AC 1 and *Chatterton v. Gerson* [1981] QB 432 and one case as giving an affirmative answer, *Ashley v. Chief Constable of Sussex Police* [2008] 1 AC 962; [2008] 1 AC 974 (Lord Scott). An affirmative answer is given in Sir Percy Henry Winfield and John Anthony Jolowicz, *Winfield & Jolowicz on Tort* (W. Edwin Peel and James Goudkamp eds., 19th edn, Sweet & Maxwell 2014), but a negative answer in ibid. s. 26-013 (stating that the defendant's mistake about consent, even if reasonable, is not a defense, citing *Chatterton* (above)).

[49] See *Restatement, Second, Torts* (n 41) § 63; Sappideen and Vines (n 23) 99; Winfield and Jolowicz (n 48) s. 26-031.

not: "reasonable" in this context usually seems to mean average or customary, though the case law is sparse. Moreover, it often makes sense to employ a specialized meaning here. If the main purpose of such a test is fairness and notice to potentially liable actors, then "reasonable plaintiff" should be defined differently—not as a criterion of ideal behavior, but as a description of normal or typical behavior.[50] For we are asking, not whether the plaintiff acted responsibly or reasonably, but only whether the defendant had fair notice of how the plaintiff would act.

In many cases in this category, the distinction between a "reasonable" person test and a "normal" or "ordinary" person test will not affect the legal outcome, but in some cases, it might. At the extremes, it will be obvious that neither a reasonable person nor an ordinary person would care whether the nurse or doctor disclosed a one in a million chance of a mild side-effect from surgery such as constipation; while both the reasonable and the ordinary person will want to be informed about a 10 percent chance that paralysis will result. Similarly, in the self-defense context, either test would permit defensive force by an actor who is responding to an obvious, serious threat of force when no alternative seems to exist. However, in closer cases, the distinction can make a difference. Suppose a small drunk person suddenly approaches the defendant, swears at him and threatens to shove him, and the defendant immediately pushes the drunk away. A jury instructed to apply the reasonable person test to the actor's belief that the victim was making a genuine threat of force is somewhat less likely to support the claim of self-defense than if it is asked to apply an ordinary or average person test.[51]

An alternative possible approach for this general category is a subjective test, considering how the actual plaintiff reacted to the defendant's conduct. Thus, informed consent doctrine could employ a subjective test, inquiring whether the particular plaintiff would have attached importance to a particular risk in deciding whether to proceed with medical treatment.[52] In principle, a subjective test is the better approach, because it is the patient's individual profile that

[50] Zipursky (n 40) 2144 (characterizing the reasonable person test in these contexts as identifying "normal" responses).

[51] Self-defense reasonableness criteria should, however, be applied realistically, in light of the actor's need to make a quick decision based on incomplete information. One response to this problem is to examine the surrounding circumstances to determine whether the defendant's beliefs about necessity and proportionality were reasonable. Another response is to question the cognitive focus of these reasonableness requirements. See Kenneth W. Simons, "Self-Defense: Reasonable Beliefs or Reasonable Self-Control?" (2008) 11 New Crim. LR 51 (endorsing a reasonable self-control test in lieu of a reasonable belief standard in some self-defense cases).

[52] Some American jurisdictions do employ a subjective test. See, e.g., *Scott v. Bradford*, 606 P 2d 554 (Okla. 1979).

is most crucial in determining what information would be helpful to a decision about treatment. To be sure, practical difficulties might arise in applying the subjective test. How is the doctor or nurse to know the subjective desires of the patient? On the other hand, medical personnel and patients often have conversations about the risks and benefits of alternative treatments, and sound medical care calls for doctors and nurses to undertake at least some minimal investigation of the lifestyle choices and other preferences of the patient in order to ensure that risk disclosure is as useful as possible. Moreover, a reasonable person test is not necessarily easier to apply in this context than a subjective test. Given the opacity and vagueness of the reasonable person test, noted above, it is not at all clear that that test will result in more reliable and consistent jury verdicts on similar facts than the subjective test.

The law of offensive battery is another important illustration of this category of cases. Most American jurisdictions permit battery liability, not only for nonconsensual intentional physical contacts that cause harm, but also for those that cause offense. But what counts as offensive? The conventional answer is: those contacts that are offensive to a *reasonable* sense of dignity.[53]

In most situations, this answer is sensible. Suppose a woman shakes a man's hand after being introduced at a party, unaware that the man has a religious or other personal objection to touching any person of the opposite sex other than a family member. It would be unfair to find the woman liable for offensive battery, since she reasonably believed that the other person consented and did not find the touching offensive. But suppose the plaintiff has made his objection clear to the defendant in advance. What legitimate right does the defendant have to ignore his unusual, subjective preference? Similarly, suppose a guest at a wedding, for religious reasons, requests that she be served a meal other than pork. The caterer agrees to do so but later decides it is too much bother. Suppose he lies to the guest and asserts that the food does not contain pork.[54] If the guest then unknowingly consumes the pork, should there not be liability, since the caterer knows of the guest's special sensitivity, even though consuming pork might not be offensive to a "reasonable" sense of dignity? A compelling argument exists that offensive battery liability should be imposed, not only when the contact offends a reasonable sense of dignity, but also when the defendant knows that the contact will be offensive to a particular plaintiff's sense of dignity, even if the plaintiff's sense of dignity is unusually

[53] See *Restatement, Second, Torts* (n 41) § 19.

[54] See Am. L. Inst., *Restatement, Third, Torts: Intentional Torts to Persons* (Tentative Draft 4, April 1, 2019) § 3(b), illustration 5.

sensitive or is simply different from whatever the factfinder would characterize as "reasonable."

The tort of battery protects the autonomy rights of individuals, permitting them to decide which intentional contacts to permit and on what terms. A defendant must obtain the plaintiff's consent to a physical contact, even if the defendant in good faith believes that the contact will be beneficial to the plaintiff. Moreover, the right to choose embraces, not just "reasonable" or "ordinary" choices, but also choices that reflect unconventional cultural values, religious beliefs, or subjective preferences. An adult Jehovah's Witness has the right to refuse a blood transfusion that would save her life. A patient is free to reject any form of medical treatment even if 99 percent of patients would consent to it. A person is free not to engage in any form of sexual conduct even if almost all other people in the relevant situation would consent to the conduct. (Suppose the plaintiff expresses a preference not to kiss or engage in any intimate behavior with another until they have decided to marry.) It is difficult to square the very widely accepted requirement of deference to highly unconventional beliefs about medical treatment and other physical contacts with a standard under which the plaintiff must show that the contact offended a "reasonable" sense of dignity.

The Restatement Third of Torts: Intentional Torts to Persons (for which the author is chief Reporter) addressed this issue in an earlier draft, as follows:

> Section 3. Battery: Definition of Offensive Contact
>
> A contact is offensive . . . if:
>
> (a) the contact offends a reasonable sense of personal dignity; or
> (b) the contact is highly offensive to the other's unusually sensitive sense of personal dignity, and the actor knows that the contact will be highly offensive to the other.[55]

Section 3(b) proved very controversial, however. Opponents were concerned that expanding liability to situations in which the defendant knows that the plaintiff is unusually sensitive would create significant problems—for example, in workplaces where employees must interact. For examples, some employees might insist on unjustifiable or unduly burdensome accommodation of their peculiar sensitivities and idiosyncrasies. There were also concerns

[55] Am. L. Inst., *Restatement, Third, Torts: Intentional Torts to Persons* (Tentative Draft 2, March 10, 2017) § 3(b).

that the culpable state of mind required by this standard—that the defendant must know that the contact will be highly offensive to the plaintiff-—would be too easy for the plaintiff to prove or would too readily be left for the jury to decide. These are legitimate concerns, and the Reporters offered some limiting language in response.[56] In the end, however, the members of the American Law Institute rejected the knowledge prong of section 3(b).

The current status of the debate in the Institute over the definition of offensive battery is as follows. A new draft has been approved that, in many cases, will reach the same result of recognizing liability that the knowledge prong would have reached, but the rationale for the result has subtly changed. Many who opposed the knowledge prong favored a flexible reasonable person test, under which such characteristics as the plaintiff's religious beliefs and sexual preferences would be considered part of the inquiry into whether the defendant's touching of the plaintiff offended a reasonable sense of dignity. The new draft adopts this flexible approach, thus permitting liability in cases such as the caterer who knowingly serves pork to a wedding guest despite the guest's religious objection or the person who has unusually modest preferences with respect to sexual conduct; in these cases, a factfinder could conclude that under these distinctive circumstances, the contact would offend a reasonable sense of dignity.[57]

This approach might be criticized. Recasting the question in this manner—asking whether a reasonable person *with the plaintiff's religious beliefs* or *with the plaintiff's unusual sensitivity* would be offended—arguably is not intellectually honest and deprives the reasonable person test of objectivity. Consider a more extreme case. Suppose the plaintiff has an intense, irrational fear of butterflies or of shaking hands with anyone. If the tort principle of respecting autonomous choice justifies permitting such a plaintiff to recover from a defendant who is fully aware of this unusual characteristic, it is arguably more honest to employ a doctrinal test that directly expresses that principle, a test providing that it is tortious to contact a person when the actor knows of the person's unusual, subjective sensitivity to offense. Instead of asking the awkward question whether a reasonable person who is terrified of butterflies

[56] The final paragraph of § 3 attempted to ameliorate these concerns:

> Liability under (b) shall not be imposed if the court determines that such liability would violate public policy or that requiring the actor to avoid the contact would be unduly burdensome.
>
> Ibid.

[57] Subsection 3(b) also provides for a narrow extension of liability to cases in which the actor knowingly and purposely causes a highly offensive contact, even if the contact would not be considered offensive to a reasonable sense of dignity. Ibid.

would be highly upset if someone placed a butterfly on her body, the inquiry under the known extrasensitivity approach is more straightforward: Did the actor know that the plaintiff would be offended by the type of contact that the actor caused?

Nevertheless, the evolution of the Restatement Third of Torts' definition of offensiveness demonstrates that the gravitational pull of "reasonable person" criteria is very strong. I now turn to a discussion of two more fundamental questions: why these criteria are so attractive to courts and when the use of such criteria is most justifiable.

III. Analysis

A. Why Are Reasonable Person Criteria So Widely Employed?

Over the last century, courts have increasingly employed reasonable person criteria in some areas and have persisted in employing them in many others. This section offers some possible explanations. The analysis that follows discusses the use both of reasonableness criteria generally and of reasonable person criteria in particular.

Earlier analysis suggested some particular functions of the reasonable person test—to make vivid and concrete the task of the jury or trial judge in analyzing fault; to address negligence when it takes the form of deficient skill or inadvertence; and to permit any desired degree of individualization. Let us now take a broader view of how and why such tests are employed.

1. Negligence Liability Has Expanded

As noted above, many American courts have moved toward a general presumption that negligence is the appropriate standard of care, unless a particular intentional tort or strict liability category applies. This development often reflects a more pro-victim orientation than prior doctrine. But insofar as the presumption endorses a fault requirement in lieu of a potential strict liability rule, it represents a more conservative judicial attitude toward the appropriate scope of tort liability.

Moreover, as we have seen, reasonable person tests are also employed to expand the scope of intentional tort privileges and defenses: a reasonable belief that one is under attack or that another person actually consented to one's conduct is usually a complete defense, even if that belief is mistaken. So used, these tests *limit* liability, as compared to a test that denies exculpatory significance to defenses if the actor was mistaken about whether he was justified.[58]

2. Inclusiveness: Considering All Relevant Facts and Reasons

Another reason why reasonableness and reasonable person tests are attractive is because they appear to permit all relevant facts and normative reasons to be brought to bear on the legal issue at hand. Many jury instructions specifically state the test as what a reasonable person would do “under the circumstances” or “under the same or similar circumstances” or “under all the circumstances.”[59]

This inclusiveness seems, at first glance, to be an advantage. How could one object to considering all of the circumstances? But inclusiveness is only an advantage if the criteria of relevance are clear. Giving weight to everything is a vacuous and useless criterion, indistinguishable from giving weight to nothing.[60] And the criterion of relevance here—what a reasonable person would do in light of these circumstances—is troublingly vague, as we have seen.

3. The Benefits of Employing a Standard Rather than a Rule

The increasing use of reasonableness criteria in tort reveals the attraction of a simple, general standard, as opposed to more detailed negligence rules or the particularized criteria of intentional torts. Sometimes flexible standards such as the reasonable person are better than bright-line rules, for familiar reasons. Reasonableness tests avoid the artificiality and inaptness of such rules in cases at the margins. For example, landowner duty rules for different categories of entrants became increasingly complex when courts understandably created exceptions and qualifications that seemed better suited to serve the underlying purposes of the rules and to avoid injustice. Similarly, traditional all-or-nothing contributory negligence rules developed exceptions (such as last clear chance), and then exceptions to those exceptions.

However, if the reasonableness criterion itself does not sufficiently further the relevant tort goal (such as deterrence) or is not constitutive of a relevant tort principle (such as fairness or equal concern), then a rule, or a different standard, might be preferable. This is especially likely to be true when

[58] In the past, some jurisdictions did preclude invocation of defenses if the defendant was mistaken, even reasonably mistaken, about the facts apparently supporting the defense.

[59] See Kelley and Wendt (n 5), Appendix.

[60] Judge Richard Posner raises a similar concern about multifactor tests in his recent book. Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* (HUP 2016) 117 (decrying the “pretense of analytical rigor” when courts employ open-ended multifactor tests).

reasonableness is merely a proxy for such a goal or principle. (Consider factor 6, below.)

Is the use of a general reasonable person standard an inescapable necessity, in light of the particularity, variability, and contextual nature of situations requiring tort liability judgments? That is the lesson that many American courts derive from Justice Oliver Wendell Holmes' famous and ill-fated effort to replace the general negligence standard with a set of specific rules, such as the requirement that a driver about to cross a train track must stop, look, and, if necessary, leave his vehicle to make sure that it is safe to proceed.[61] But we should be careful not to draw the wrong lesson from Holmes' failed effort. In a few situations, such as a driver falling asleep at the wheel, courts do adopt the Holmesian approach, treating a specified type of conduct as negligence per se. More importantly, even when a detailed rule is not suitable, it is still an open question whether the very general "reasonable person under the circumstances" test provides sufficient guidance. An intermediate solution between that test and Holmes' approach is quite feasible and is frequently employed by courts: define the duty with greater specificity but well short of the specificity of a "stop, look, and listen" rule. Examples include the duty owed by professionals such as doctors and lawyers; by land occupiers to trespassers; or to co-participants in recreational and sporting activities.

4. Moderation

The quality of being a "reasonable" person, like the quality of "reasonable" care or of "reasonable" foresight,[62] suggests moderation—neither too high nor too low a standard. Just as a "reasonable" rate means a rate that is not excessive, reasonable care means neither an extraordinarily high nor a very low standard of care.[63]

[61] In *Baltimore & Ohio Railroad v. Goodman*, 275 US 66 (1927), the Court, per Justice Holmes, endorsed this bright-line rule; in *Pokora v. Wabash Railway*, 292 US 98, 105 (1934), the Court, per Justice Cardozo, rejected the rule, relying on "the need for caution in framing standards of behavior that amount to rules of law."

[62] "Reasonable foresight" (of the type of harm suffered by the plaintiff) is the test used by many courts to define proximate cause or scope of liability limitations. Courts appear to view this as an attractively moderate test, intermediate between (1) "defendant is a proximate cause only if he subjectively foresaw the risk" (which is too pro-defendant) and (2) "defendant is a proximate cause so long as the risk was not freakish or extraordinary" (which is too pro-plaintiff).

[63] See Zipursky (n 40) 2139:

> "Reasonable" is a very common and well-worn adjective for referring to a moderate, or buyer-favorable price, and "reasonable" is comfortably and commonly used as a qualifier of time vaguely connoting a kind of Goldilocks "just right" quality.

See also ibid. 2146, noting that reasonableness often operates to convert a rule into a standard, ensuring a moderate level of the quality in question. Zipursky goes on to endorse a "moderation-based account" of reasonableness in negligence law. Ibid. 2153.

The language of "ordinary" care, used in many jury instructions, also suggests moderation.[64]

Economic tests of negligence often are not moderate in this sense, because they require a relatively high standard of care.[65] Specifically, many modern economic theories of tort law endorse an optimizing theory of reasonable care, one that seeks the precise level of precaution that will minimize the sum of accident costs and the costs of preventing accidents. We might call this optimizing account idealization-on-steroids: it condemns not only insufficient precautions, but also excessive precautions. In either case, the precaution falls short of the optimal, ideal tradeoff between prevention costs and accident costs. Driving a car that creates excessive safety risks is inefficient, but so, on this account, is driving a car that incorporates excessive safety precautions. Moreover, failing to take an easy precaution would sometimes be negligent, on the economic account, even if the precaution has only trivial safety benefits. Consider Benjamin Zipursky's example of a person who owns an all-wheel drive SUV, parked in his garage, and a new sedan, parked on the street. On a rainy night, the driver chooses to drive the slightly less safe sedan out of convenience and because the sedan is more fun to drive. Zipursky points out that negligence law is not so demanding of us that we always must drive the safer car that we own, yet economic theory might suggest otherwise.[66] These intuitively doubtful but inexorable consequences of many economic theories are good reason to doubt the principles underlying the theories.

The Learned Hand test of negligence is closely associated with the economic analysis of negligence. But the test need not be given a specifically economic interpretation.[67] Thus, the Restatement Third of Torts endorses a catholic interpretation of the Learned Hand test:

[64] A recent article systematically analyzes reasonableness and reasonable person tests and concludes that, as understood by ordinary persons and as frequently applied by legal actors, these tests are a hybrid, intermediate between (and partly reflecting) reasonableness as a statistical average and reasonableness as a prescriptive ideal. In the author's view, "normality" best expresses this hybrid standard. Kevin Tobia, "How People Judge What Is Reasonable" (2018) 70 Ala. LR 293.

[65] See Richard Wright, "The Standards of Care in Negligence Law" in David G. Owen (ed.), *Philosophical Foundations of Tort Law* (OUP 1995) 249, 255–63.

[66] Zipursky (n 40) 2165.

[67] See Winfield and Jolowicz (n 48) ss 6-022, 6-027, stating that Commonwealth courts employ a negligence calculus similar to the Learned Hand test, but explaining:

> Commonwealth courts generally have not reduced the breach of duty element to an economic question. McHugh JA summed up the position in Commonwealth jurisdictions as follows: "Negligence is not an economic cost/benefit equation. Immeasurable 'soft' values such as community concepts of justice, health, life and freedom of conduct have to be taken into account. [Citing *Western Suburbs Hospital v. Currie* (1987) 9 NSWLR 511, 523.]"

See also Simons (n 10) 925–26 (arguing that the Learned Hand factors need not be understood in utilitarian terms, and that courts typically do, and should, recognize that only the *socially recognized* advantages and disadvantages of taking a precaution should be compared).

> Primary factors to consider in ascertaining whether [a] person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[68]

Moreover, section 6 of the Restatement, comment d, sets forth a fairness or corrective justice rationale as well as an economic incentive rationale for imposing negligence liability.[69]

Is the Learned Hand test nevertheless overly demanding, even if it is applied flexibly and even if the factors are not understood in a narrowly economic way? The worry here is that any balancing test that employs marginal analysis will be too demanding, if it deems any conduct to be negligent whenever the marginal advantages (in the form of risk reduction) of taking a precaution barely outweigh the marginal disadvantages (however understood). This way of understanding negligence seems to put an actor at the mercy of a quantitative formula, under the threat of liability if he slightly miscalculates either the inputs or the final computation.

But the worry is overstated. The more qualitative analysis called for by a fairness approach resists translation into purely quantitative variables. Moreover, a flexible Learned Hand test should consider the epistemic difficulties that actors routinely face (a) in determining what risks of harm are likely to occur, and with what probability, and (b) in judging whether a precaution will reduce those risks, and to what extent. Reasonable, not perfect, foresight is all that is required. In the end, the Hand test is flexible enough to express either a very demanding, a moderately demanding, or even an undemanding standard of care.

5. Normative Modesty (or Normative Evasion)?

When the trier of fact is empowered to decide whether the injurer or victim complied with the standard of the reasonable person, the appellate court (or the trial judge delegating to the jury) plays a more modest role in defining the legal standard. This position of deference is appealing insofar as the deferring actor doubts that it is legitimate, or wise, for her to devise more precise legal criteria reflecting her own views of justice or policy or the views of a group of unelected judges.

[68] *Restatement Third, Torts: Liability for Physical and Emotional Harm* (n 11) § 3. Cmt c clarifies that these primary factors must be supplemented or supplanted in certain cases, including emergencies, actors who are children, disabled actors, and inadvertent or inattentive actors.

[69] Ibid. § 6, cmt d.

Moreover, delegating this decision to the jury or trier of fact in terms of what reasonableness requires or what "reasonable person" means has a rhetorical benefit: the inquiry seems at least partly factual, and not purely normative. "What would a reasonable person have done?" sounds considerably less normative than, "What should *this* defendant (or *this* plaintiff) have done?"[70]

But normative modesty is sometimes normative evasion. Sometime, the tort law standard can and should be articulated more clearly, in order to assure greater consistency across similar cases and to give fair notice to primary actors. And, perhaps more importantly, often it is both desirable and perfectly legitimate for common law judges to play a prominent role in defining these standards ex ante. After all, negligence doctrine already contains numerous distinct rule-like doctrines that are widely accepted, including the customary standard for professionals, the general absence of an affirmative duty to prevent harm to strangers, numerous categories of special relationships (such as contract, family status, or creation of a risk), and distinctive standards for children and the physically disabled.

6. A Proxy for Other Values or Concerns

Sometimes, the reasonable person test is merely a proxy for other legitimate concerns. As we have seen, when the defendant's liability depends in part on how potential victims will react to the defendant's conduct, courts often reflexively ask how a "reasonable" victim would react—for example, they consider whether a reasonable victim would be offended by the breach of privacy or by the nonconsensual touching. But this approach is not meant to describe an actual standard of behavior for such a victim. The point, rather, must be to protect defendants from liability when they could not expect the victim to have reacted as he did.

Nevertheless, the approach is problematic, for reasons we have explored. It should normally be sufficient to show either that the plaintiff's reaction was normal (but not necessarily "reasonable" in a more ideal sense), *or* that defendant knew (or perhaps should have known) that the plaintiff would suffer the legally relevant type of harm, such as an interference with privacy or an offensive physical touching.

[70] Put differently, the reasonable person test might express a hybrid notion that gives weight to both statistically average and ideal behavior. See Tobia (n 64). Tobia's general account is problematic, however, in endorsing the use of a relatively uniform reasonable person test across widely varying legal domains. Yet (as he concedes) tort law might have especially strong reason to employ a largely prescriptive account. Ibid. 310.

In short, when reasonableness criteria are merely a proxy, they should be viewed with much more skepticism, for it is then an open question whether different or supplemental criteria should be employed in order to better serve the relevant policies or principles.

7. Simplicity

A reasonable person criterion is often much simpler than a more detailed set of rules or criteria. Employing this criterion as the central requirement of tort negligence is about as simple as one can get with a fault criterion. Any other imaginable criterion will have additional or more specific requirements, which the law-creator must carefully construct and define. Moreover, simpler criteria often have a practical benefit: they are easier to explain to the trier of fact, and their application to a particular set of facts is often easier for the parties to prove. (Compare proving whether a reasonable person would have taken a precaution that defendant driver neglected to take with proving whether the defendant, given all of his individual physical and mental capacities, was capable of taking that precaution.) Thus, if everything else is equal, simplicity is surely one virtue of a legal rule or standard.

But simplicity often comes at a cost. Consider self-defense. A very simple legal test of self-defense would be as follows: "Use only such force as a reasonable person would use in response to the threat." That would hardly offer sufficient guidance to judges, juries, and primary actors. At the same time, it is difficult to specify all of the requisite self-defense criteria with detailed rules governing triggering conditions, proportionality, and necessity. In both criminal and tort law, jurisdictions typically specify some aspects of self-defense but address others by a simple "reasonable person" criterion. Thus, the legal criteria are commonly fairly specific about proportionality requirements (e.g., deadly force only in response to a deadly threat or a threat of rape or kidnapping), less specific about necessity requirements (e.g., requiring imminence or necessity, and perhaps articulating a duty to, or no duty to, retreat), and quite unspecific about belief requirements (requiring only that the actor's beliefs about the facts demonstrating proportionality and necessity be "reasonable").

The last point is noteworthy. It is extremely common for legal standards to treat epistemic requirements very simply, requiring only that the actor "knew or should have known" some fact relevant to the underlying norm (such as what harms the actor's conduct risked, whether the injured person consented, or whether the actor was justified in self-defense). The epistemic meaning of the reasonable person test is typically parasitic on another legal norm, and it is often a fairly uncontroversial question whether the actor "should have known" the relevant facts. Even here, however, complications can arise. How much inquiry the actor should have made is not a straightforward question, for example.

Finally, the very simplicity of a reasonable person criterion may invite overuse. Sometimes more specific criteria are both feasible and desirable, but a reasonable person test is employed out of mere habit or intellectual laziness.

8. Preferable to Alternative Legal Tests

Most of the other explanations just mentioned support this all-encompassing explanation: a reasonableness or reasonable person test is better than other types of legal rules that one might consider applying to the problem at hand. Or, to paraphrase Winston Churchill: sometimes, a reasonable person test is the worst test of legal liability, except all the others.

This is not the occasion to identify every species of legal rule or standard that is available to a legislator or judge in laying out the content of tort law. But it is worth noting briefly some major competitors to a reasonable person test. One might employ a multifactor balancing test, such as the Restatement Second of Torts' test of abnormally dangerous activities.[71] Such tests are often problematic, however, in creating a mere illusion of determinacy.[72] One might employ a rule with clear necessary and sufficient conditions.[73] But such rules are difficult to formulate and frequently create significant problems of overinclusiveness and underinclusiveness. Or one might employ a vague criterion other than reasonableness or the reasonable person, such as "unduly burdensome" or "liable if factor A substantially outweighs factor B." No test is a panacea.

[71] See *Restatement, Second, Torts* (n 41) § 520:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

[72] See Posner (n 60).

[73] Compare the *Restatement, Third, Torts: Liability for Physical and Emotional Harm* (n 11) § 20(b), test for abnormally dangerous activities:

> An activity is abnormally dangerous if:
>
> (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
> (2) the activity is not one of common usage.

9. Familiarity and Caution

Often—probably too often—courts gravitate toward a reasonable person test simply because the test is so widely used in tort law (and elsewhere in the law). The test seems to be a safe choice, one that is unlikely to cause trouble or surprise. Such factors as moderation, normative modesty, and simplicity further support this tendency.

Familiarity and caution are hardly sufficient reasons for using this test, however, especially in light of the demonstrable risk that the test will be used indiscriminately in a range of distinct contexts that deserve careful differentiation.

B. When Should Reasonable Person Criteria Be Employed?

Let us now turn to the prescriptive question: how should the reasonable person test be employed? Many aspects of this question have already been addressed, but a more general discussion should prove helpful.

1. Establish a Standard of Behavior for Injurers

Reasonable person criteria are frequently used to establish a standard of behavior for those who cause injury to others. At first blush, it would seem that the reasonable person should be understood in this context as an ideal, a paragon of virtue, a person who never errs.[74]

Supporting this interpretation is the apparent defect of the major competing interpretation—the average or ordinary or normal person test. This test is problematic in potentially valorizing behavior that is conventional yet insufficiently attentive to the interests of others. Moreover, Mayo Moran points out another significant problem with the "ordinary" or "normal" person interpretation: it may perpetuate discriminatory stereotypes about gender, race, religion, ethnicity, and mental and physical disability.[75] On the other hand, the

[74] Recall A. P. Herbert's famous parody:

> [The reasonable person] is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; . . . who believes no gossip, nor repeats it, without firm basis for believing it to be true; . . . who never from one year's end to another makes an excessive demand upon his wife, his neighbours, his servants, his ox, or his ass; . . . who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, . . . this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow citizens to order their lives after his own example.

A. P. Herbert, *Uncommon Law* (Capuchin Classics 2011).

[75] Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP 2003) ch. 5.

"ordinary" person test seems more justifiable in some of its applications. Thus, the "reasonable child" standard of care, an especially important qualification of the objective reasonable person test, is often justified on the basis that the status of childhood is a "normal" human condition through which all adults pass.[76]

The objective features of reasonable person tests, especially the controversial but long-standing tort position that mental disabilities and incapacities should be ignored in judging whether such a person acted with reasonable care, demonstrate that the reasonable person can be a very high standard of behavior—indeed, in some cases, an impossible standard to satisfy.[77] This might nevertheless be a defensible position for tort law to take in many contexts. After all, tort law, unlike criminal law, need not require as a condition of liability that the actor deserves moral blame.

One obvious way to split the difference between understanding the reasonable person as a (sometimes unattainable) ideal and as an (insufficiently demanding) description of ordinary or normal conduct is to characterize the reasonable person as one who has normal *capacities* for exercising care.[78] Even if the average Boston driver runs yellow (or even red) lights, almost all Boston drivers have the capacity for greater prudence. Oliver Wendell Holmes famously asserted that "when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare."[79] This passage is best understood as asserting, not that acting with an average or customary degree of care is, as a matter of law, not negligence, but only that people are usually entitled to expect that others have average or normal capacities for acting with proper care.

Nevertheless, focusing on average capacities rather than average conduct does not dissolve the tension between the ideal and the ordinary person conceptions. Ordinary people with average capacities are, by definition, capable of achieving a more ideal level of care than ordinary care. Should they not be considered negligent if they fall short of that ideal?[80]

[76] See ibid. ch. 4.

[77] See Goudkamp (n 31) s. 8.3, thoroughly and sharply critiquing tort law's refusal to make significant allowances for insanity.

[78] See H. L. A. Hart, *Punishment and Responsibility* (2nd edn, OUP 2008).

[79] Oliver Wendell Holmes, *The Common Law* (Macmillan & Co 1881) Lecture III.

[80] Also, recall Mark Grady's point that when people must take repeated nondurable precautions, such as constantly paying proper attention while driving, it may be virtually impossible to achieve perfect compliance. Mark F. Grady, "Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion" (1998) 82 NWULR 293, 319–20. Indeed, attempting to achieve perfect compliance might actually be less safe than, say, resting one's eyes from time to time.

Another possible way to bridge the gap between the normal and ideal, the descriptive and the prescriptive, is to appeal to community norms and values.[81] A number of courts and commentators consider the jury the conscience of the community and thereby try to justify the jury's dual role in negligence cases: first, identifying a community standard of care; and second, applying that standard of care to the actor. Even when a judge rather than a jury is the trier of fact, he or she might be expected to be familiar with community values about how reasonable people should behave when their conduct might endanger others (or themselves).

But the appeal to community or customary values poses problems of its own. Which community is relevant, either geographically or temporally? Should one look to historical or traditional values, to values that have endured, or to contemporary values? Is an appeal to such values at bottom an effort to disguise an evaluative judgment as a factual one? Would it be more honest to discuss and defend the so-called "community values" openly?

Whatever the answer to these questions, we should be skeptical of approaches that insist on an extremely demanding standard of reasonable care across the board, as the earlier discussion of economic analysis of negligence suggests.

Should the law move in the opposite direction? Some would advocate a relatively low standard of care, and would frame the question, not as whether the actor complied with an idealized standard, but as whether the actor's behavior was acceptable or permissible. Permissible behavior includes behavior that is just barely above the line of impermissibility, and such behavior is well short of ideal.[82] Instead of "the reasonable person," we might speak of the "not unreasonable person." "Ordinary" prudence is closer to this conception than is "reasonable care."[83]

Characterizing reasonable care as merely permissible conduct ordinarily identifies too low a standard, I believe. As a descriptive matter, tort law largely rejects that characterization, because in most circumstances it rejects

[81] See Stephen G. Gilles, "On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury" (2001) 54 Vand. LR 813; Kelley and Wendt (n 5) 591–92; Patrick J. Kelley, "Who Decides? Community Safety Conventions at the Heart of Tort Liability" (1990) 38 Clev. St. LR 315; Catharine Wells, "Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication" (1990) 88 Mich. LR 2348, 2402–13; Tobia (n 64) 312–16.

[82] See Kent Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84 Colum. LR 1897, 1904. "Justifiable" conduct or risk-creation is another concept sometimes employed here. But justifiable conduct could mean either conduct that one has good, affirmative reason to perform, or conduct that is merely permissible or within one's rights. Thus, substitution of this term does not resolve the debate noted in the text.

[83] See Zipursky (n 40) 2156.

customary or average care as a sufficient standard of care. The reasonable person is not merely a person who acts permissibly, but one who acts prudently, carefully, and with due care for the interests of others. She is at least minimally virtuous. She does not merely avoid acting impermissibly toward others. Zipursky elucidates this idea by stating that the reasonable person is "not wholly insensitive to the demands of others," "not wholly selfish and inconsiderate," and "somewhat fair-minded."[84] I endorse a slightly more demanding standard, one that treats the reasonable person as more admirable than these insipid descriptions suggest. However, I quite agree that the reasonable person need not be a paragon of virtue; nor must she select the best of several reasonable options.

2. Establish a Standard of Behavior for Victims

As discussed earlier, a symmetrical standard of care for injurers and victims is sometimes appropriate, especially when the actor's unreasonable conduct creates substantial risks of harm both to others and to himself. But when a victim creates "unreasonable" risks only or almost entirely to himself, his fault (if this is fault at all) is arguably qualitatively different. We might wish to recognize this difference in applying comparative fault rules: the fault of an actor who endangers only himself could receive much less weight than the fault of actors who pose significant risks to others.

3. Impose Liability Only If Plaintiff Responded "Reasonably"?

Although courts frequently preclude liability when a victim responds in an "unreasonable" way to the injurer's conduct, they should be cautious about how and even whether they use reasonable person criteria here. First, the "ordinary" or "average" person is often a more apt criterion than the "reasonable" person in these cases. Second, it is often preferable to use a narrowly tailored subjective test (one that, for example, permits offensive battery liability when the defendant knows of the individual plaintiff's susceptibility to offense), either alone or in conjunction with an average person test. However, in certain contexts, including some privacy and products liability cases, a "reasonable victim" test might be preferable: such a test might identify situations in which the plaintiff is able, and properly expected, to take care to prevent harm to himself.

[84] Ibid. 2161.

4. Supplement the Reasonable Person Test

A partial solution to the vagueness problems with an unadorned reasonable person test is to supplement that test with other general criteria, such as "equal consideration of the interests of others," community values, or balancing the burden of precaution against the risks to be prevented by the precaution; with general character traits, such as prudence or considerateness:[85] or with more specific criteria, such as the actor's specialized duty as a parent, therapist, veterinarian, or doctor. Similarly, a jury instruction might clarify that creating risks only to oneself is a less serious form of fault than creating risks to others.

On the other hand, to the extent that courts wish to be agnostic about the underlying principles and justifications of tort doctrine, supplementing the reasonable person test with general criteria such as cost-benefit balancing or equal consideration of interests might be counterproductive insofar as it takes a stand on controversial questions about the moral and legal principles underlying tort doctrine.[86] Whether it is desirable for courts to be normatively modest and catholic, here or elsewhere, raises fundamental questions about the judicial role in common law cases. If one concludes that judicial modesty about underlying principles is an overriding value or is essential to the legitimacy of the common law, then the reasonable person test is an especially attractive legal criterion.[87]

5. Individualize the Reasonable Person Test?

The appropriate degree of individualization of the reasonable person test—for example, according to age, physical or mental capacities, gender, occupation, or role—will depend in significant part on how one answers the other

[85] See Gardner (n 11) 580–81; Zipursky (n 40) 2156.

[86] See Gardner (n 11) 567:

> The reasonable person does not embody, nor does he fail to accommodate, any particular account of which reasons there are, or of how and when they come to be defeated or undefeated by each other. He does not stand for one justificatory standard rather than another, or for one type of justificatory standard rather than another. He is neither value-pluralist nor value-monist, neither consequentialist nor nonconsequentialist, neither actualist nor probabilist, neither Kantian nor Benthamite. He does not stand for "public justification", "impartial justification", "reasonable justification", or indeed any other "distinctive conception of . . . justification". He stands only for justification *tout court*. (footnotes omitted)

[87] Gardner makes a similar point in an arresting way: he claims that the principal function of the reasonable person test in tort law (and in law generally) is to import an extra-legal norm into the law. "[The reasonable person] exists to allow the law to pass the buck, to help itself pro tempore to standards of justification that are not themselves set by the law, and which therefore are only as good as the standards of justification used by the person or people to whom the buck is passed." Gardner (n 11) 568–69. Gardner is right to emphasize that the law's reasonable person criteria often are a partial reflection of standards of ordinary behavior and common-sense morality. But I am less convinced that such nonlegal standards fully determine the content of these legal criteria. Further discussion of this question must await another occasion.

questions addressed above.[88] For reasons of space, I do not explore this important issue further here.

IV. Conclusion

In conclusion, three points. First, reconsider the earlier question why reasonable person criteria are needed at all. Why not simply instruct the trier of fact to directly apply the fairness or economic criteria that render an actor's conduct negligent? In reply, I have offered several arguments, including the assistance an anthropomorphic test affords the fact-finder in making its task more concrete, the value of the reasonable person test in cases of deficient skill and inadvertence, the possible desirability of common law courts employing a stance of normative modesty, and the test's capacity to achieve the desired degree of individualization.

Zipursky offers a very different reply. In his view, it is a fundamental mistake to conceive of negligence as a matter of an unjustifiably low level of precaution against risk. Rather, the reasonable person criterion is the primary criterion of negligent conduct, while the idea of a reasonable level of precaution is secondary.[89]

In some cases, Zipursky is correct. When the question is whether an actor is negligent for displaying deficient skill (e.g., in conducting surgery or in riding a bicycle), it is unhelpful to frame the negligence inquiry as depending upon the justifiability of a particular level of precaution, in light of the advantages and disadvantages of selecting that level of precaution. That framing is similarly unhelpful in many cases of inadvertent negligence.

But when the question is whether the actor is negligent for choosing to drive at a high rate of speed for a particular purpose, or for not adding a safety feature to a product, or for building a fence of a particular height around a baseball or cricket field, an inquiry into the choices available to the actor, including their

[88] On individualization, see Moran (n 75); Peter Westen, "Individualizing the Reasonable Person in Criminal Law" (2008) 2 Crim L. & Philos. 137; Gardner (n 11) 578–79; Omri Ben-Shahar and Ariel Porat, "Personalizing Negligence Law" (2016) 91 NYULR 627.

[89] See Zipursky (n 40) 2162–63:

> The Hand Formula view [which Zipursky rejects] does not even consider the question of what a reasonable person is, or why we would want to use the idea of a reasonable person in determining whether the defendant was negligent. It is only concerned with the right or appropriate level of risk. . . . Of course, the reasonable person does enter the story, but only in a way that is reverse-engineered. The reasonable person is one who would not take unreasonable risks, and unreasonable risks are given content independently.

advantages and disadvantages, is critical to determining whether the actor was negligent. Although Zipursky purports to reject this balancing approach, portions of his discussion seem to favor it.[90] In my view, no coherent conception of advertent negligence can ignore the question of the socially acceptable level of precaution.[91]

Second, any serious discussion of the best way to formulate reasonableness and reasonable person criteria would greatly benefit from empirical research—specifically, research investigating how survey subjects (and, by extrapolation, juries) apply different reasonable person instructions, and whether supplementary or different criteria would actually improve consistency of evaluation of fact patterns or would otherwise lead to improved outcomes.[92] (Research would also be useful in exploring judges' understandings of these criteria.) Kevin Tobia's recent work is instructive. In three surveys, he finds that ordinary people understand reasonableness as an intermediate concept, setting a higher standard than a judgment of the relevant average but a lower standard than a judgment of the relevant ideal.[93] These experiments addressed ordinary understanding of the concept of reasonableness, not of the reasonable person. It would be helpful if future research also addressed the latter criterion.

Third, a powerful feature of contemporary tort doctrine too often goes unnoticed: reasonableness criteria, and the reasonable person test in particular, exert a very strong gravitational pull. Courts and legislators should resist succumbing to this force and should give careful consideration to whether other legal tests better serve the policies or better express the principles underlying contemporary tort law. Sometimes, reasonableness is the wrong standard to

[90] Thus, Zipursky suggests that the reasonable person criterion expresses "the capacity to constrain one's behavior and choices in a manner that is not wholly insensitive to others' needs and wishes, but rather displays some sense of mutuality." Zipursky (n 40) 2161. Somewhat more concretely, he says that "being reasonable requires constraining one's conduct by reference to the perils one creates for others," and that "[a] person who is reasonable in the mutuality sense and acts reasonably will choose to constrain his or her behavior in some fashion so that it is less likely to injure others." Ibid. 2162. These are gestures in the direction of a test focusing on the acceptable level of risk. Their practical guidance seems minimal, however, and their content is rather obscure.

[91] For a Rawlsian account of negligence that focuses on the reasonable level of precaution, not on the reasonable person, see Gregory Keating, "Reasonableness and Rationality in Negligence Theory" (1996) 48 Stan. LR 311, 369; Gregory Keating, "Is Cost-Benefit Analysis the Only Game in Town?" (2018) 91 So. Cal. LR 195.

[92] Compare Shen et al., "Sorting Guilty Minds" (2011) 86 NYULR 1306; Ginther et al., "The Language of Mens Rea" (2014) 67 Vand. LR 1327 (2014); Ginther et al., "Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt" (2018) 71 Vand. LR 241. In these studies, two of which I joined as co-author, the *mens rea* categories of the Model Penal Code were subjected to rigorous empirical testing. The results were not pretty: subjects were unable to accurately classify different scenarios in which actors possessed the mental state of recklessness from those in which they possessed the mental state of knowledge.

[93] Tobia (n 64) 316–29.

apply. Other times, although in principle it is an apt standard, more rule-like criteria are feasible and preferable to a reasonable person criterion.

For example, we have seen that it is often unwise to employ a reasonable person test when referring to a victim's response to the actor's conduct. At the same time, when we are analyzing a defendant's negligence toward others, the reasonable person formulation is quite useful as the primary legal criterion in cases involving inadvertence or deficient skill, while in cases involving advertent risky conduct and choices between risky alternatives, that formulation might be more useful as a supplement to a balancing test (such as the Learned Hand test) that evaluates when risk-creation is justifiable.

It is easy to slide from the almost tautological truth that people should act reasonably, to the much more debatable point that reasonable person criteria should presumptively apply throughout tort law. The hegemony of tort law's reasonable person should often be resisted.