

Balancing Acts: Intending Good and Foreseeing Harm—The Principle Of Double Effect in the Law of Negligence

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INTRODUCTION

The principle of double effect proposes that it is sometimes ethically permissible to *unintentionally* cause foreseeable harms that would not be permissible under the same circumstances to *intentionally* cause. Applicability of double effect in legal analysis, however, has generally been repudiated on the supposition that in the eyes of the law an actor is held to intend all the foreseeable, natural consequences of conduct. As one commentator states the objection:

[T]he law . . . has traditionally postulated the presumption that every person of sound mind intends the natural and probable (i.e., foreseeable) consequences of her actions. From that perspective, there is no principled moral distinction between the consequences of one's actions that are intended and those that are merely foreseen.¹

As so stated, however, such a critique against a role for double effect analysis in the law succeeds only by undermining basic distinctions made in the law itself. This point is illustrated perhaps most obviously by noting that liability in negligence is premised precisely on the view that a categorical distinction exists between causing a consequence *unintentionally* when *foreseeable* as a natural and probable effect of one's conduct, and *intentionally* causing that same

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1. Ben A. Rich, *Double Effect and Medical Ethics*, UC DAVIS MEDICINE, Spring 2004, http://www.ucdmc.ucdavis.edu/ucdavismedicine/past_issues/spring2004/alumni/ethics.html. A similar point is reflected in the following comments: “[M]ost problematic from a legal perspective, . . . DDE [the doctrine of double effect] accepts the proposition that the bad effect may be foreseeable but nonetheless unintended. The law, to the contrary, presumes that a person intends the natural and probable consequences of his or her actions.” BEN A. RICH, *STRANGE BEDFELLOWS: HOW MEDICAL JURISPRUDENCE HAS INFLUENCED MEDICAL ETHICS AND MEDICAL PRACTICE* 143 (2001); *see also* GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 286 (1958) (“What is true of morals is true of law. There is no legal difference between desiring or intending a consequence as following from your conduct, and persisting in your conduct with a knowledge that the consequence will inevitably follow from it, though not desiring that consequence. When a result is foreseen as certain, it is the same as if it were desired or intended.”); JERRY MENIKOFF, *LAW AND BIOETHICS: AN INTRODUCTION* 343 (2001) (“[Double effect] has had little direct effect on legal analysis It is a highly technical doctrine, and it is far from clear how useful it is in distinguishing between permissible and impermissible actions.”).

consequence.² If, as objectors allege, double effect fails simply because “no principled . . . distinction” can be drawn between causing foreseeable harm and intentionally causing harm, then the very distinction between negligent and intentional wrongdoing is also done away with.

The need to appeal to a self-contradictory critique to undercut double effect suggests instead that double effect analysis is rooted in basic insights about states of mind and culpability already operative in the law. Viewed in this light, the legal distinction between intentional wrongdoing and negligent wrongdoing corroborates double effect’s assertion that a fundamental ethical distinction exists between specifically intending a harmful consequence versus merely foreseeing that consequence as a more or less natural and probable effect of one’s conduct.

Even conceding, however, the general similarity between legal analysis and double effect in the way each differentiates culpability for intentional harm versus culpability for merely foreseeable harm, disagreement concerning the liability criteria applied in each analysis poses additional challenges for correlating double effect and negligence.

Economic efficiency interpretations of negligence, for example, purportedly based on the Learned Hand Formula and the *Restatement (Second) of the Law of Torts*, assert that a finding of culpability in negligence depends upon a utilitarian balancing of the good effects of conduct (“utility”) compared to its harmful foreseeable consequences (“magnitude of risk of injury”).³ Under that interpretation of negligence, however, consideration of an actor’s state of mind—essential in double effect analysis—ultimately fades into the background and becomes irrelevant as an essential component in properly assessing liability.

This article elaborates and defends the view that far from being an incomprehensible or inapt import from moral philosophy, double effect analysis lies at the heart of negligence theory. Part I elucidates in more detail the principle of double effect and describes its prima facie operation in negligence analysis. Part II considers and rejects the economic efficiency interpretation of basic negli-

2. “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. . . . [W]rong is defined in terms of the natural or probable, at least when unintentional.” *Palsgraf v. Long Island R. Co.* 248 N.Y. 339, 344-45 (1928). *See also* *Beasley v. A Better Gas Co.*, 604 S.E.2d 202, 205 (Ga. Ct. App. 2004) (“Liability in negligence is generally limited to circumstances when an actor could have foreseen that the harmful consequence would follow naturally and probably from conduct: [T]he injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrong-doer as likely to flow from his act.”); *Williams v. Indiana Dept. of Corr.*, 702 N.E.2d 1117, 1120 (Ind. Ct. App. 1998) (“In determining whether a party should be held liable for its negligent act or omission, this court ‘considers whether the plaintiff’s injury was a natural and probable consequence of the [negligence], which, in the light of attending circumstances, could have been reasonably foreseen or anticipated.’”); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (Wagon Mound No. 1)*, [1961] A.C. 388, 425 (“It is not the act but the consequences on which tortious liability is founded. . . . [L]iability (culpability) depends on the reasonable foreseeability of the consequent damage.”).

3. *See infra* Part II.A.1.

gence theory, addressing the challenge that such an interpretation presents for the effort to situate double effect analysis in the law. Part III illustrates and confirms the overlap between negligence and double effect analyses by consideration of a sampling of case applications.

I. INTENDING GOOD AND FORESEEING HARM

A. *The Principle of Double Effect*⁴

Arising historically from the development of Thomas Aquinas's discussion of the ethical permissibility of self-defense and related issues, modern formulations of the principle of double effect (*DE*) assert that *under certain circumstances* it is licit to perform an *otherwise* ethically unobjectionable act for the sake of some good effect, even if that act foreseeably involves causing a harmful or "evil" consequence.⁵ The limiting circumstances of *DE* are commonly captured by the following elements:

1. The conduct causing the intended good must otherwise be unobjectionable (that is, prior to assessment under *DE*).
2. The intended good effect cannot itself be caused by the unintended evil effect.
3. The importance of the intended good effect must reasonably justify the causing of the unintended evil effect, and
4. The evil effect must not *in fact* be intended as a means or an end by the agent.⁶

As these conditions provide, causing a foreseeable harm is permissible under *DE* only when the evil effect is unintended and when it does not function as a causal means to accomplish the good effect. Further, the intended good must be of such reasonable importance as to justify causing the unintended, foreseeable harm.

DE has been applied in numerous distinct factual scenarios.⁷ One contemporary application of *DE*, in the context of the treatment of terminally ill patients,

4. For more elaborate discussion of the principle of double effect and the nature of intentional action, see Edward C. Lyons, *In Incognito: The Principle of Double Effect and American Constitutional Law*, 57 FLA. L. REV. 469, 492-99 (2005).

5. *Id.* at 482-84.

6. See Joseph T. Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 THEOLOGICAL STUD. 41, 42-43 (1949) (citing numerous formulations of *DE*).

7. Common philosophical discussion of double effect includes consideration of a variety of scenarios, including among others, terrorist bombings versus strategic bombings, abortion versus therapeutic hysterectomy with death of fetus in utero, pre-emptive killing versus self-defense, and multiple examples involving trolley cars and the intentional directing of a car to avoid killing certain persons while foreseeing the death of others as a result. See, e.g., Alison McIntyre, *Doing Away with Double Effect*, 111 ETHICS 219-20 (2001).

is illustrated by the medically accepted distinction between palliative care and physician-assisted suicide.

The intent of palliative treatment is to relieve pain and suffering, not to end the patient's life, but the patient's death is a possible side-effect of the treatment. It is ethically acceptable for a physician to gradually increase the appropriate medication for a patient, realizing that the medication may depress respiration and cause death.⁸

In *Vacco v. Quill*,⁹ the United States Supreme Court, expressly relying on *DE*, defended the validity of distinct legal treatment of palliative treatment and physician-assisted suicide based primarily on the differing state of mind of the agents in the two cases. Rejecting an equal protection claim asserted by plaintiffs seeking a right to physician-assisted suicide, the Court held that:

[D]iffering treatment of the acts comports with fundamental legal principles of causation and intent. . . . The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. . . . Put differently, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences.¹⁰

The Court explained that in cases of physician-assisted suicide, a physician and willing patient engage in conduct specifically "because of" the intent to bring about death: "[a] doctor who assists a suicide . . . 'must, necessarily and indubitably, intend primarily that the patient be made dead.'"¹¹ In palliative care, though the conduct hastens or foreseeably risks hastening the patient's death, no similar intent is entailed: "[j]ust as a State may . . . permit[] patients to refuse unwanted lifesaving treatment, it may permit palliative care . . . which may have *the foreseen but unintended 'double effect'* of hastening the patient's death."¹²

More particularly, *DE* is satisfied in the latter case because the death of the patient is neither intended as a goal or end of the conduct nor as a means to pain relief.¹³ In light of the patient's dire, terminally ill condition, any incremental

8. *Report of the Council on Ethical and Judicial Affairs of the American Medical Association*, 10 ISSUES L. & MED. 91, 92 (1994). Respiratory depression and death of terminally ill patients from such treatment, if administered properly, is, in any event, rare. See, e.g., Susan Anderson Fohr, *The Double Effect of Pain Medication: Separating Myth from Reality*, 1 J. PALLIATIVE MED. 315, 319 (1998).

9. 521 U.S. 793 (1997).

10. *Id.* at 801-03.

11. *Id.* at 802 (citation omitted).

12. *Id.* at 807 n.11 (emphasis added).

13. In palliative analgesic treatment, the intention of the actors is to relieve pain by means of the psycho-physiological effect of opioids in preventing the experience of pain. See Lyons, *supra* note 4, at 555-56. This is true even though death may thereby sometimes be foreseeably caused due to the respiratory depression that can occur as a concomitant, but rare independent effect of opioid administration. *Id.* In physician assisted-suicide, however, opioids are not the drug of choice. In such cases of

unintended shortening of life is ethically justified in view of the significant relief from suffering offered by the analgesic. In contrast, in physician-assisted suicide, the intent of the physician and patient is to effect pain relief precisely by killing the patient. Instead of intending ethically neutral conduct of analgesic treatment, actors in physician-assisted suicide specifically prescribe a lethal dose of drugs intentionally aiming at bringing about complete respiratory depression and death as the means of pain relief.

DE analysis hinges on the belief that important ethical implications often flow from the distinction between effects an actor affirmatively and intentionally desires and chooses to create through his conduct and side-effects the actor causes unintentionally, albeit foreseeably. This is so because personal responsibility for action in its paradigmatic form is constituted only under the former conditions—that is, when particular actions or effects are brought about precisely because the actor affirmatively *wants* such consequences to be made real and thus in a specific manner *chooses them* to be.¹⁴ Under such circumstances, the causal relation between the actor's mental inclinations and the realities that result from those inclinations yields personal responsibility for the actor. By such deeds, the actor in the strongest manner possible reflexively determines the sort of person he or she is—that is, in view of the character of the objects and actions he or she intentionally brings about (either as means or ends) by choice, actors form and express their own ethical character as persons.¹⁵

Merely foreseeable effects, however, are not similarly related to the cognitive-affective inclinations of the actor and thus do not imply the same level or intensity of personal identification and, consequently, responsibility.¹⁶ The notion of mere “foreseeability” properly captures the limited role played by foreseeable objects in reasoning about what to do, that is, in practical reasoning. With respect to such foreseeable objects, the actor has no positive or affirmative psychological orientation such that he or she can be said to be *trying to bring such an effect about*. Culpability for causing merely foreseeable harms therefore is mitigated by the fact that the actor does not affirmatively desire or choose to bring about those effects. The actor's state of mind establishes that he or she was not the type of person who *wanted* in a positive, affirmative sense to bring about that result.

Just because such effects may be merely foreseeable rather than intended,

intentional killing, a barbiturate, not primarily efficacious as an analgesic, is the preferred drug because of its general, though not exceptionless, reliability in causing death quickly and efficiently. *See, e.g.,* Dick. L. Willems et al., *Drugs used in Physician-Assisted Death*, 15 *DRUGS AND AGING* No. 5, 335-40 (1999) (a combination of barbiturate and curare are effective for euthanasia, while opioids are less reliable because of the unpredictable duration of the process of death); Robert D. Truog et al., *Recommendations for end-of-life care in the intensive care unit: The Ethics Committee of the Society of Critical Care Medicine*, 29 *CRIT. CARE MED.* 2332-48 (2001) (barbiturates lack significant analgesic properties and are generally associated with the practice of euthanasia).

14. Lyons, *supra* note 4, at 493-99.

15. *Id.*

16. *Id.*

however, does not excuse the actor *tout court* from liability. Culpability determinations regarding conduct under such circumstances then depends upon a balancing of the interests and rights of the actor to pursue the intended end of conduct in light of the magnitude and type of foreseeable harm that might be caused.¹⁷

In sum, as opposed to paradigm cases of wrongdoing where an actor *intentionally* seeks to bring about some harm as an end or as a means and is therefore culpable without further analysis,¹⁸ in cases where harm is merely foreseeable but unintended, determination of culpability requires consideration of whether the actor's conduct under the circumstances was reasonable. In such circumstances it is precisely *DE*'s reasonability condition that comes into play: "[t]he importance of the intended good effect must reasonably justify the causing of the unintended evil effect."¹⁹

Under *DE* analysis, if the intended good is not sufficiently important or consistent with the legitimate interests and rights of the actor (or if the foreseen harm is of sufficient magnitude and/or is inconsistent with the rights of others not to have such harms imposed on them), causing that foreseeable harm will be considered unreasonable and therefore impermissible.

B. Negligence Analysis and Double Effect

1. The Distinction between Intentional Wrongdoing and Negligent Wrongdoing

In exemplar cases of *intentional* wrongdoing under the law, actors are culpable because they bring about unlawful effects that they cognitively and volitionally specify as 'what-is-to-be-caused';²⁰ in *negligent* conduct, however, the unlawful effects for which actors are responsible do not correspond to anything actors cognitively specify as 'what-is-to-be-caused' or intended by their chosen conduct.²¹ Instead, culpability in negligence arises precisely when

17. *Id.* at 498-99.

18. Note that in criminal law intent and motive are distinguished. A good ulterior motive generally will not excuse a particular act of intentional criminal conduct chosen as a means to that ulterior end. See, e.g., 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.3(a), at 358-59 (2nd ed. 2003).

19. See Mangan, *supra* note 6 and accompanying text, at 42-43.

20. "There is a continuum from innocent inattention to culpable negligence to wanton recklessness; but the difference between the latter and actual intent to kill is not simply a further difference in degree—it is a difference in kind. In plain words, it is the difference between doing an act without caring what its consequences may be, and consciously intending that the act kill a specific human being." *In re Jackson*, 835 P.2d 371, 411 (Cal. 1992).

Admittedly, this characterization of intentional action fails to resolve important questions of how the law treats that special subset of effects foreseen with "substantial certainty"; whether it is appropriate to include them within the category of intentional action; and, if so, how this impacts the validity of the distinction *DE* envisions between intention and foreseen consequences. See *infra* notes 191-193 and accompanying text.

For a critique of the view that culpability in negligence and intentional misconduct can be calibrated on a single continuum based on increasing foreseeability of harm, see Lyons, *supra* note 4, at 510-16.

21. "The term 'negligence' is ordinarily used to express the foundation of civil liability for an injury to person or property that is not the result of premeditation and formed intention. Intent and negligence

an actor engages in conduct²² and the harmful consequence *is not intended* but merely foreseeably risked and when that risked harm under the circumstances is considered unreasonable.²³

These definitions—constituting the most basic forms of culpable mental state, or mens rea—reflect the law’s categorical distinction between *intentional* and *negligent* conduct—concepts that cut across both criminal and civil law. Distinct classes of legal conduct, each with its own set of liability norms and corresponding punishments, are constituted precisely by the differing manner in which unlawful effects causally originate from an actor’s mental state.²⁴

2. The Role of Intent and Foreseeability in Negligent Conduct

Consideration of these black-letter distinctions between intentional and negligent wrongdoing immediately suggests distinctions in the law similar to those found in *DE* analysis. This similarity is first reflected in the fundamental condition both in negligence and *DE* that the harm caused by the actor not be intended but merely foreseeable. The similarity of this characteristic in negligence law and *DE* illustrates that the law also recognizes a fundamental distinction between that heightened form of culpability reserved for cases of intentionally causing harm and cases of causing merely probable and foreseeable harm.

a. *Deliberate Conduct: Intention and Negligently Caused Harm*

In this context it is pivotal to note that negligent conduct—conduct by means

are mutually exclusive; one cannot intend to injure someone by negligent conduct, and the absence of a positive intent to inflict injury is a distinguishing characteristic of negligence.” 57A AM. JUR. 2D *Negligence* § 30 (1999) (footnotes omitted).

22. “Conduct” in the sense used here applies both to commission and, in cases where the law imposes a duty to act, omission. “Since the early law found its hands full in dealing with the more serious forms of misbehavior, it was natural that the early cases should be concerned almost exclusively with positive acts, rather than with omissions to act, or with ‘misfeasance’ rather than ‘nonfeasance.’ Slowly, however, the idea developed that certain relations between the parties might impose an obligation to take affirmative action, so that there might also be liability for nonfeasance.” W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 28, at 161 (5th ed. 1984).

23. See, e.g., *Moran v. City of Del City*, 77 P.3d 588, 592 (Okla. 2003) (“In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them.”) (quoting KEETON, *supra* note 22, § 31, at 169) (emphasis omitted); Wisconsin Jury Instruction—Civil § 1005 (2004) (“A person . . . is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.”).

24. “[F]or more than a century, [negligence] has received more or less general recognition as an independent basis of liability, with distinct features of its own, differing on the one hand from the intentional torts, and on the other from those in which strict liability is imposed.” KEETON, *supra* note 22, § 28, at 160-61. “As other courts have recognized, comparison presents practical difficulties in allocating fault between negligent and intentional acts, because [they] . . . are different in degree, in kind, and in society’s view of the relative culpability of each act.” *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997).

of which harmful effects are unintentionally brought about—does not entail that the actor’s conduct be unintentional. Although often overlooked in legal discussion, the conduct of the actor by which liability in negligence is created is in itself usually intentional and directed at other, intended effects.²⁵

When, for example, an actor negligently causes injury in an automobile accident by driving with excessive speed, it is generally true that the driver intentionally and knowingly operates the vehicle, often with the express awareness that he or she is doing so in excess of the legal speed. Although an injury to a pedestrian caused by driving at such a speed may be inflicted negligently and not intentionally, the possibility of imposing liability in negligence arises precisely because of the duty of the actor to be aware of the foreseeable danger created in the context of *that very intentional conduct itself*.

Further, even if it is occasionally true that the actual conduct causing harm is not intentional, legal liability usually depends upon the existence of some prior intentional conduct that justifies imposition of fault-based liability. In cases of driving under the influence of alcohol, for example, it might be true that sometimes a driver is so inebriated as to be incapable of intentional conduct at the time of inflicting injury. In such a case, negligent culpability is traced to that prior intentional, voluntary act of becoming inebriated when doing so created a foreseeable risk of unreasonable injury under the circumstances and thus the actor knew or should have known that his conduct was unreasonable.²⁶

25. “An act committed intentionally may give rise to an action in negligence if one or more harmful consequences of the act are unintended” 57A AM. JUR. 2D *Negligence* § 30 (2004). This distinction is clearly recognized in the seminal negligence case of *Brown v. Kendall*:

The whole case proceeds on the assumption, that *the damage* sustained by the plaintiff . . . was *inadvertent and unintentional* We use the term “unintentional” rather than involuntary, because in some of the cases . . . *the act* of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a *voluntary act*, although its *particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act*.

60 Mass. 292, 294 (1850) (emphasis added); see also *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928) (guard intentionally helping passenger onto train was not negligent because risk of explosion from package was not apparent); *In re Polemis*, [1921] 3 K.B. 560 (stevedore intentionally hoisting cargo that brushed planks, causing them to fall and damage the ship, was negligent because the possibility of causing some damage was reasonable); *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.*, [1967] 1 A.C. 617 (“Wagon Mound No. 2”) (tanker company could be liable in negligence for intentionally throwing oil into harbor when chief engineer for tanker company could have foreseeably known that the oil was flammable on water); *Vaughan v. Menlove*, 132 Eng. Rep. 490, 3 Bing. (N.C.) 467 (C.P. 1837) (defendant intentionally constructing and maintaining hayrick could be negligent when risk of fire was reasonably foreseeable).

26. See, e.g., *People v. Haley*, 96 P.3d 170, 192 (Cal. 2004) (“When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter.”) (quoting *People v. Ochoa*, 966 P.2d 442, 485 (Cal. 1998)); *Biscan v. Brown*, No. M2001-02766 COA-R3-CV, 2003 WL 22955933, at *25 (Tenn. Ct. App. Dec. 15, 2003) (“[A] person who *voluntarily* becomes intoxicated can be found negligent if his or her conduct does not meet the standard of care required of a sober person; voluntary intoxication does not relieve a person of his or her own negligence.”).

In typical cases, in order to determine liability for negligently causing harm, negligence is measured precisely against the recognizable, foreseeable, but unintended risks that a reasonable person has a duty to associate with the performance of his or her deliberate, that is, intentional, conduct. If negligence were not rooted in a basic foundation of intentional conduct, either directly or derivatively, it would be incoherent to assert that the actor “knew or should have known” that such conduct was unreasonable.²⁷ In short, *DE* and negligence both address the question of culpability in the context of intentional action concomitantly involving the unintended causing of harms.

b. Reasonable Foreseeability of Harm

Further overlap between *DE* and negligence analysis is reflected in the constitutive role played by foreseeability in each. As noted above, a primary function of *DE* is to delineate conditions under which an actor may permissibly engage in conduct that has the foreseeable effect of causing or risking unintended harm.²⁸ It is of course precisely that *foreseeability* of harm that raises an ethical question. If harm were in principle unforeseeable, no ethical issue would arise concerning whether one may permissibly act or refrain from acting.

The function of foreseeability in negligence reflects similar suppositions. If harm caused by conduct was not foreseeable, actors could have no way of evaluating whether or not such conduct was reasonable in light of that harm. Accordingly, no basis would exist for asserting that the actor engaged in that conduct unreasonably, that is, with a wrongful state of mind. As one legal commentator states this condition: “Unforeseeable injuries set an outer boundary for a norm-based conception of responsibility”²⁹

27. Of course, the perspective of the negligence analysis generally evaluates the reasonability of conduct from the “objective” perspective of a reasonable person, but it does so precisely in order to assess legal culpability vis-à-vis the “subjective” state of mind of the individual actor. *See, e.g.*, George Fletcher, *The Fault of Not Knowing*, 3 THEORETICAL INQUIRIES IN LAW 1, 18 (2002) (discussing how the paradigm sense of fault underlying negligence liability is rooted in the view that in “having the opportunity to correct one’s belief and failing to exercise that capacity lies the foundation of the fault of not knowing”).

28. It is clear, for example, that if some conduct would be justified under *DE*, though it had the effect of causing unintended harm foreseen with certainty, the conduct would be justified a fortiori if it was foreseen to merely risk such harm. *See, e.g.*, Thomas A. Cavanaugh, *The Intended/Foreseen Distinction’s Ethical Relevance*, 25 PHILOSOPHICAL PAPERS 179, 180 n.5 (1996) (“[Double Effect] is usually applied to cases in which the harm is foreseen as an inevitable concomitant Presumably, if such an act were accounted ethically in the clear by [double effect], so would an act similar in all respects but for its causing harm without inevitability.”).

29. Arthur Ripstein, *Philosophy of Tort Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY AND JURISPRUDENCE 656, 668 (Jules Coleman & Scott Shapiro eds., 2002). “Where *x* is unforeseeable, the prospect of it cannot serve to guide conduct, because, being unforeseeable, nothing in particular counts as avoiding it. Because no norms can apply to such injuries, those who suffer them cannot complain of inappropriate treatment by the defendant.” *Id.* at 667.

At least one scholar rejects the notion of foreseeability as an appropriate “touchstone” for imposing liability in negligence. “I . . . argue . . . that our understanding of the tort liability system has been skewed by an earlier, flawed attempt at descriptive theory. . . . We owe to that theory the view that negligence is conduct that poses an unreasonable foreseeable risk of harm to others.” Patrick J. Kelley,

On the other hand, *DE* further proposes that mere foreseeability of unintended harm does not foreclose the permissibility of conduct. Rather, *DE* proposes that, under the conditions specified, the causing of foreseeable, unintended harm may be permissible.³⁰ Similarly, in negligence, *mere* foreseeability of harm resulting from conduct, standing alone, does not suffice to establish negligence and a duty to avoid the conduct. Under the law, some foreseeable risks are so remote that they must be considered irrelevant for imputing negligence should that harm obtain—such a risk is sometimes referred to as a “naked possibility.”³¹ Negligence analysis instead relates principally to injuries likely enough to be considered “reasonably foreseeable.”³² As Cardozo noted, “[t]here must be knowledge of a danger, not merely possible, but probable.”³³

Thus, in both *DE* and negligence, mere foreseeability of harm does not, by itself, entail the existence of a duty to prevent such harm. In both cases, it is recognized that attendant risks accompany almost every legitimate human pursuit. Any rule prohibiting all conduct under circumstances involving foresee-

Who Decides, Community Safety at the Heart of Tort Liability, 38 CLEV. ST. L. REV. 315, 317 (1990). Instead, it is claimed that negligence liability is based, like battery, on objective breaches of accepted conventions and coordinating norms of the community governing conduct. *Id.* at 324-25.

While a systematic response to this view is beyond the scope of this Article, one initial objection is that, while such a theory appropriately stresses the need for the introduction of normative content in negligence analysis, it underplays the constitutive role of foreseeability in establishing those very norms. Part of the reason why conventions or norms come to be established is precisely because of *foreseeable risk* to substantive values regularly posed by certain forms of conduct. As illustrated by the complexities surrounding the legal doctrine of violation of statute as proof of negligence per se and defenses to such a cause of action, decisions relating to breaches of norms and conventions in specific cases inevitably raise questions concerning the foreseeabilities (on the part of the community and the part of the actor) involved in proscribing the conduct. Finally, as argued in this Article and by others, what counts as a relevant foreseeable fact need not entail utilitarian, consequentialist reasoning. Hence, critique of the univocal, all encompassing “omniscient” foreseeability posited by utilitarianism is inapposite to a discussion of “reasonable” foreseeability posited on a non-consequentialist interpretation of negligence analysis. See, e.g., discussion *infra* Part II.A.3 and following.

30. See Mangan, *supra* note 6 and accompanying text.

31. See, e.g., *Hill v. Lundin & Assocs., Inc.*, 256 So. 2d 620, 623 (La. 1972) (rejecting the view that the “naked possibility” that a third party would move a ladder left unattended by the plaintiff into an unsafe position constituted an unreasonable risk of foreseeable harm that the plaintiff had a duty to avoid).

32. “Foreseeability is an element of fault; the community deems a person to be at fault only when the injury caused by him is one which could have been anticipated because there was a reasonable likelihood that it could happen.” *Stewart v. Jefferson Plywood Co.*, 469 P.2d 783, 786 (Or. 1970); see also *Bolton v. Stone*, [1951] A.C. 850, 867 (Lord Reid, concurring) (stating that the foreseeable risk that a cricket ball would be hit out of the field and hit a passerby on an unfrequented road was so small that, under the circumstances, a reasonable man would have been justified in disregarding it and taking no steps to eliminate it).

33. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916). Of course the notion of “probability” in context of negligence does not refer simply to an event that is more likely to occur as not. “[W]hen the inquiry is one of foreseeability . . . that inquiry is not whether the thing is to be foreseen or anticipated as one which will probably happen, according to the ordinary acceptance of that term, but whether it is likely to happen, even though the likelihood may not be sufficient to amount to a comparative probability.” *Gulf Refining Co. v. Williams*, 185 So. 234, 236 (Miss. 1938); see also *infra* note 37.

able risk of harm would scrupulously and unreasonably limit normal human activity. As one legal commentator observes, “[t]he problem is that the only non-negligent act would be sitting quietly in one’s room. A norm of conduct that says ‘do not do anything that will foreseeably deprive others of persons or objects upon which they rely’ precludes almost anything anyone might do.”³⁴ Similar statements have been made in the context of *DE* analysis: “If one is to act intelligently . . . one must choose . . . some basic value or values rather than others, and this inevitable concentration of effort will indirectly . . . interfere with the realization of . . . other values These unsought but unavoidable side-effects accompany every human choice, and their consequences are incalculable.”³⁵

c. Reasonable Foreseeability of Unreasonable Harm

The preceding considerations disclose that in both *DE* and negligence, reasonable foreseeability of unintended harm provides a necessary condition for culpability. Unreasonably remote risks of harm do not justify imposing restrictive burdens on actors and thus do not trigger the necessity for negligence or *DE* analysis. Thus mere foreseeability standing alone does not provide a *sufficient* condition for imposing liability. Rather, in both *DE* and negligence analysis, only when a risk is sufficiently foreseeable to demand consideration does a determination need to be made whether the conduct in question is still *reasonable* and therefore permissible in spite of that reasonably foreseeable risk.

In *DE*, this condition is explicit: the importance of the intended good effect must reasonably justify the causing of the unintended evil effect.³⁶ A finding of negligence, similarly, requires that a reasonable actor knew or should have known that the harm foreseeably risked under the circumstances was *unreasonable*: “[The] idea of limiting liability to that which can be anticipated is formulated into the foreseeability test for negligence, which states that one is negligent only if he, as an ordinary reasonable person, ought reasonably to foresee that he will expose another to *an unreasonable risk of harm*.”³⁷ Under

34. Ripstein, *supra* note 29, at 684; *cf.* Eisenberg *ex rel.* McNeese v. Pier, 497 N.W.2d 124, 129 (Wis. 1993) (“Nearly all human acts . . . carry some recognizable but remote possibility of harm to another. No person so much as rides a horse without some chance of a runaway, or drives a car without the risk of a broken steering gear or a heart attack. But these are not unreasonable risks.” (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 170 (W. Page Keeton ed., 5th ed. 1984))); Bolton, [1951] A.C. at 867 (“In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others.”).

35. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 119-20 (1980).

36. *See* Mangan, *supra* note 6 and accompanying text.

37. *Jefferson Plywood*, 469 P.2d at 786 (emphasis added). Of course the concepts of reasonable foreseeability and unreasonable harm are not static and unrelated to one another. They may vary inversely with a finding of negligence under a number of permutations. As the foreseeable probability of a harm increases, the necessary magnitude of harm required to impose a duty may decrease, similarly, decreasing foreseeability of harm in conjunction with increasing magnitude of harm might also be found negligent. Together these two concepts define the parameters of the sort of foreseeable risks that are relevant in negligence analysis. *See, e.g., MacPherson*, 111 N.E. at 1055 (Cardozo, J.)

such an analysis, negligence requires a consideration of whether acceptance of some reasonably foreseeable risk of harm itself is *reasonable* under the circumstances. As one legal theorist notes in this context:

The essence of negligence is unreasonableness; due care is simply reasonable conduct. There is no mathematical rule of percentage of probabilities to be followed here. A risk is not necessarily unreasonable because the harmful consequence is more likely than not to follow the conduct, nor reasonable because the chances are against that. A very large risk may be reasonable in some circumstances, and a small risk unreasonable in other circumstances.³⁸

3. Synopsis

The law's general discernment of a constitutive distinction between intentionally causing harm and negligently causing harm as a foreseeable but unintended effect conforms to the basic distinction between intentional and unintentional wrongdoing operative in *DE* analysis. Further comparison of *DE* and negligence reveals other more specific characteristics shared by the analyses. In both, foreseeability of harm is a necessary condition for imposing liability. In ethics and law, reference must be made to the possibility of deliberative consciousness of potential results of conduct in order to maintain a fault-based theory of culpability. If harm was not in any way a foreseeable result of conduct, one could not be blameworthy for causing that harm.

Both theories, however, also provide that *mere* foreseeability of harm provides an insufficient basis for creating a duty to refrain from or modify conduct. Instead, culpability determinations demand that risked harms be found *sufficiently unreasonable* before any duty can arise to modify behavior and avoid the possibility of causing harm.

In sum, both *DE* and negligence recognize that when harm is not purposeful or intentional, assessment of culpability involves a finding that the foreseeable harm is unreasonable. Absent such a finding, no culpability is imposed upon the actor for engaging in the conduct, even if the risked harm should result.

II. RATIONALITY CRITERIA APPLIED IN NEGLIGENCE AND DOUBLE EFFECT

The overlap between negligence and *DE* considered in the preceding section suggests more than superficial similarity. One impediment, however, to equating the analyses arises out of debate concerning precisely what reasonability standard operates in each theory; specifically, what functions as the rationale for

("The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger the greater the need of caution.")

38. Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42 (1915); see also *Gulf Refining*, 185 So. at 236 ("The test as respects foreseeability is not the balance of probabilities, but the existence, in the situation in hand, of some real likelihood of some damage and the likelihood is of such appreciable weight and moment as to induce, or which reasonably should induce, action to avoid it on the part of a person of a reasonably prudent mind.").

resolving which foreseeable harms are reasonable and which are not.³⁹ Obviously, if negligence and *DE* determine the “reasonableness” of the risked harm in significantly different ways, an effort to find substantive convergence between them will be undermined.

A. Formulations of Negligence

As numerous courts and scholars have observed, jury instructions on the issue of negligence are careful not to impose anything but the most general standard for judging the “reasonableness” of conduct.⁴⁰ These usually provide quite broadly that, “[n]egligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances”⁴¹

In contrast to this vague conception, the standard academic articulation of the negligence standard—familiar to judges, academics, and law-students—is found in Judge Learned Hand’s formula.⁴² Hand proposed that a finding of negligence involves consideration of three variables: 1) the probability of injury created by one’s conduct; 2) the “gravity” or magnitude of injury should that probability obtain; and 3) the interest that the actor must sacrifice or the burden the actor must suffer to eliminate that risk.⁴³ Restated succinctly in *United States v. Carroll Towing Co.*, Hand suggested that “possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called *P*; the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether $B < PL$.”⁴⁴ Thus, according to Hand, negligence exists if $B < PL$, where *B* is the “cost” of the actors sacrificed interest or “burden” necessary to avoid the harm, *P* is the probability of harm and *L* is the extent of harm or loss.⁴⁵

Hand’s model appears similar if not identical to the negligence standard of

39. See, e.g., John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (discussing dominant approaches operative in negligence law); Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509 (1993) (same); see also *Perkins v. Entergy Corp.*, 756 So. 2d 388, 402 n.26 (La. Ct. App. 1999) (referencing numerous interpretations of the negligence standard), *aff’d*, 782 So. 2d 606 (La. 2001).

40. See Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 595 (2002).

41. *Id.* (quoting N.Y. P.J.I. Civ. 2:10 (3d. ed. 2000)).

42. See, e.g., Richard Lempert, *Juries, Hindsight, and Punitive Damages Awards: Failure of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 885 (1999) (stating that some academics “use Learned Hand’s well-known formula for negligence . . .”); JoEllen Lind, *The End of Trial on Damages?: Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 315 (2003) (“Learned Hand’s well-known formula for . . . negligence brings this home . . .”).

43. *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (“The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.”), *rev’d on other grounds*, 312 U.S. 492 (1941).

44. 159 F.2d 169, 173 (2d Cir. 1947).

45. “[T]he . . . duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability [of the injury]; (2) the gravity of the resulting injury . . . ; (3) the

unreasonableness proposed in the influential *Restatement (Second) of the Law of Torts*:

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.⁴⁶

Under this test, an actor's conduct is unreasonable and negligent if the utility of conduct does not outweigh the magnitude of the risked injury.⁴⁷

1. The Measure for Weighing Utility and Risk

Unquestionably, the most problematic aspect of the Hand formula and the *Restatement's* parallel description of negligence lies in properly interpreting the meaning of the balancing or "weighing" function and the related notions found in each expression of the negligence standard. This is of particular significance in attempting to draw a parallel between negligence and *DE* because certain legal scholars, preeminently Richard Posner and William Landes, argue that these concepts refer exclusively to economic measurements and entail application of a utilitarian calculus.⁴⁸

Posner's cost-efficiency reading of Hand's formula proposes that if the *economic* costs associated with an actor's efforts to avoid foreseeable injury exceed the economic costs of the foreseeable injury, then there would be no negligence. As Posner explains, elaborating the purported identity between his theory and Hand's formula:

burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms." *Id.*

46. RESTATEMENT (SECOND) OF TORTS § 291 (1965). "The Restatement (Second) of Torts, published some eighteen years later, reflects the Carroll Towing standard, providing a risk-benefit test for unreasonable conduct and negligence." Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1605-06 (1997).

47. The negligence analysis presented in the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 3 (Tentative Draft No. 1, 2001), emphasizes the economic interpretation of negligence even more strongly, but has had, up to this point in time, little support in the case law and has met with considerable academic opposition. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863 (2001).

48. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) ("[T]he common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation."). In fact, Landes and Posner go on to argue that not only negligence but also intentional tortious conduct is subject to a similar mathematical analysis. *Id.* at 153. "Most proponents of the economic approach to negligence use as a starting point the formulation of the negligence standard provided by Judge Learned Hand in *United States v. Carroll Towing Co.*" Hegyes v. Unjian Enters., Inc., 286 Cal. Rptr. 85, 110 n.4 (Cal. Ct. App. 1991) (Johnson, J., dissenting).

It is time to take a fresh look at the social function of liability for negligent acts. The essential clue, I believe, is provided by Judge Learned Hand's famous formulation of the negligence standard—one of the few attempts to give content to the deceptively simple concept of ordinary care. . . . If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention. . . . If, on the other hand, the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted, and so in this case the enterprise is made liable, in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments.⁴⁹

Restated, if the minimal marginal cost involved in avoiding a probable risk of injury (either the cost of prevention or abandonment of the conduct) would be greater than the marginal cost of that risked harm, it will be economically advantageous, and thus non-negligent, to continue the conduct and allow the risked foreseeable harm to occur rather than make any effort to avoid it.

2. The Incompatibility between a Utilitarian Conception of Negligence and the Operation of Double Effect

Before considering whether Posner's view accurately captures the reasonability standard applied in negligence, it is important first to draw out the manner in which such a view would preclude any linking of negligence analysis and *DE*.

Economic efficiency theory proposes that the permissibility of an act, whether it be intentional or negligent, is evaluated based on whether the monetary utility of the conduct outweighs the negative economic effects.⁵⁰ The incompatibility of this view with *DE* analysis arises from two distinct yet intertwined lines of reasoning. First, if judgments of permissibility are based solely upon evaluation of the harmful or beneficial *effects* of conduct, considerations of state of mind become irrelevant in establishing culpability. Second, the economic analysis of negligence reduces the wide variety of human goods, both intrinsic and instrumental, to a single univocal concept of value, that is, monetary equivalence.

Illustrative of these points is Posner's (in)famous analysis of *Bird v. Holbrook*.⁵¹ In *Bird*, a defendant tulip-farmer had purposely set and concealed a spring-gun in order to disable any thief trespassing upon his property. The

49. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972).

50. See LANDES & POSNER, *supra* note 48, at 149-89.

51. Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971) (contrasting the risk of deaths caused by automobile accidents to the deaths caused from intentionally set spring-guns, and asserting that the permissibility of both is essentially a function of economic analysis without reference to any consideration of the actors' states of mind). See also 130 Eng. Rep. 911 (1828).

plaintiff, Bird, was injured by the gun when he trespassed onto defendant's land in an effort to help a neighbor recapture an escaped pea-hen.⁵²

Affirming that "intentionality is neither here nor there,"⁵³ Posner makes no claim that the defendant's conduct was unlawful because of anything *inherently* wrong with an actor purposefully setting out lethal weapons to defend property. Instead, Posner argues that an economic interpretation properly captures the "pattern" of the law.⁵⁴ In his view, the function of the law is simply to balance the economic costs to society of raising livestock versus tulip farming. While spring guns may indeed be the most financially efficient means for tulip growers to protect their fields, significant costs would inevitably be imposed upon livestock owners in keeping their animals strictly enclosed should such defensive measures be permitted. Applying these economic considerations, Posner concludes that a liability determination against the defendant was appropriate because the economic utility of using spring-guns for tulip owners did not justify the economic costs imposed upon members of the community.⁵⁵ For Posner, it is the economic consequences that matter. Whether the consequences are brought about intentionally or negligently ceases to be meaningful in assessing culpability.⁵⁶ Further, on Posner's account, no categorical or intrinsic distinction appears to exist between differing kinds of harm; for example, injury to human life versus economic harm to crops.

DE, however, proposes that *how* actors bring about effects makes a great deal of difference in assessing culpability. Choosing to cause evil or harm purposefully, either as a means or an end, involves a choice that differs in ethically significant ways from choices that cause factually similar consequences merely as foreseeable but unintended effects. By failing to appreciate this distinction and give it meaningful application in assessing liability, economic efficiency theory ignores a crucial fact about human agency and ultimately undermines a "fault" based notion of culpability. Such a view disregards common sense appreciation about what makes intentional harming especially egregious compared to negligent harming.⁵⁷

Further, *DE* often bases its determination of the reasonability of intended good versus unintended harm on the distinction between diverse types of goods

52. 130 Eng. Rep. at 911-13 (1828).

53. Posner, *supra* note 51, at 206.

54. *Id.* at 211.

55. *Id.* at 210. For a more detailed analysis and critique of Posner's treatment of this case see John Finnis, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229, 233-35 (David G. Owen ed., 1995).

56. Although Posner's economic analysis may take into account the statistical probability of a consequence occurring, this does not correlate directly to an actor's state of mind as such. Intention and negligence cannot be exhaustively captured on the basis of the causal probability of their effects. Sometimes intended results may be entirely less probable than similar effects brought about negligently. See Lyons, *supra* note 4, at 495-96 nn.97-99 and accompanying text.

57. For a more developed argument against utilitarianism and its failure to appreciate the distinction between intention and foreseeability, see Lyons, *supra* note 4, at 504-06.

and differing orders of value.⁵⁸ These differences often provide a normative background for justifying the intentional pursuit of one good at the cost of an unintended but foreseeable harm to another kind. For example, while extreme conditions of hunger or poverty may in rare circumstances justify significant risk of *unintended* harm to basic goods of human life, such as health and safety, in the normal course of affairs, *intentional* injury to these goods is not commonly understood to be permissible or justified, regardless of the economic consequences. Posner's analysis ignores such basic insights concerning distinct orders of instrumental goods and intrinsic human goods (such as life, health, and dignity) and subsumes all goods under the application of a univocal economic calculus.

In sum, if the legality of all conduct is judged based on effects, and if all effects can be calibrated and compared on a single conception of economic value, then distinctions in actors' states of mind and differences among types of good become irrelevant for purposes of evaluating conduct. If this is the case, *DE* is rendered meaningless. Accordingly, any comprehensive utilitarian interpretation of the Hand Formula (or the *Restatement* test) along the lines proposed by Posner would render untenable any attempt to correlate *DE* with negligence.

3. Rejection of Negligence Analysis as Utility-Based

Multiple rationales, however, exist for rejecting economic efficiency as an appropriate meta-theory of negligence, and critiques of Posner's and similar attempts to interpret the negligence standard on such a theory abound. While exhaustive examination of all these critiques is unnecessary and exceeds the scope of this Article, it can generally be noted that a significant number of scholars agree that economic interpretation neither accurately describes how the negligence standard has been applied in the case law nor does it provide an adequate normative reading of how the negligence standard *should* be applied.⁵⁹

The implausibility of an exclusively economic interpretation as an adequate account for the "pattern" of negligence is most obviously suggested by arguing along the same lines of reasoning employed above to show economic theory's incompatibility with *DE*. As pointed out, the distinction between intentional misconduct and negligence is founded precisely upon the disparate manner in

58. For further discussion of this point see *infra* Part II.B.2.

59. Goldberg, *supra* note 39, at 553 ("In its ambition and reductionism, interpretive economic deterrence theory, at least in the influential version posited by . . . Posner, is perhaps rivaled only by the vulgar Marxist thesis that each facet of the law is an expression of the class struggle."); Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 J. PHIL. & PUB. AFF. 317, 336 (1977) ("The purely economic man is indeed close to being a social moron."); see also, e.g., Kenneth W. Simons, *Deontology, Negligence, Tort and Crime*, 76 B.U. L. REV. 273, 283-85 (1996) (critiquing efficiency cost-benefit utilitarian theories of negligence); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES L. 145, 152 (2003) (questioning the interpretation of Hand's formula); Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1643 (1997) (critiquing the history and meaning of the Hand formula).

which unlawful effects causally originate from an actor's mental state.⁶⁰ To a significant degree, it is *these differences* in actors' mental states that justify differing assessments of culpability and punishment.

Accordingly, under the common notions of mens rea or fault in the law, there is little question that similar consequences arising from differing states of mind would often call for differing assessments of culpability and punishment. However, by determining liability solely on the basis of a utilitarian weighing of *consequential* harms and benefits, economic theory eliminates that decisive role for causal states of mind in appraising culpability. In so doing, it implausibly abolishes fundamental distinctions between intentional and negligent conduct that have played a crucial historical and theoretical role in legal thought and practice.⁶¹

Further inadequacy of the economic interpretation is manifest in its claim that the function of negligence law is to deter uneconomical accidents. In discussing negligence liability, Posner observes that with the rise of fault-based culpability in common law tort, "unless the injurer was blameworthy (negligent) and the victim blameless (not contributorily negligent) . . . [a]ccident costs were 'externalized' from the enterprises that caused them to workers and other individuals injured as a byproduct of their activities."⁶² Thus, unless the owner is shown to be at fault or negligent, injuries to workers or third parties must go uncompensated and be born by the injured.

In developing the precise meaning of fault or negligence in such contexts, Posner explains that the very notion of "fault" should be understood to apply to *uneconomical* behavior:

Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.⁶³

Elsewhere, Posner elaborates:

[T]he association of negligence with purely compensatory damages has promoted the erroneous impression that liability for negligence is intended solely as a device for compensation. *Its economic function is different; it is to deter uneconomical accidents.* As it happens, the right amount of deterrence is produced by compelling *negligent* injurers to make good the victim's losses.

60. See *supra* note 24 and accompanying text.

61. See *supra* note 24 and accompanying text.

62. Posner, *supra* note 49, at 29.

63. *Id.* at 33.

Were they forced to pay more . . . some economical accidents would also be deterred But that the damages are paid *to the plaintiff* is, from an economic standpoint, a detail. It is payment *by the defendant* that creates incentives for more efficient resource use. The transfer of the money to the plaintiff affects his wealth but does not affect efficiency or value.⁶⁴

For Posner, then, the *purpose* of tort law is not to compensate individual parties for their injuries. Rather, its object is to deter uneconomical conduct—that is, conduct which, as Posner avers with seeming Victorian frugality, is blameworthy because “we do not like to see resources squandered.”⁶⁵ As it turns out, the right means of deterring uneconomical conduct is to require the actor to pay damages in an amount equal to the economic inefficiency—although it is not essential that the payment be made *to* the injured party.

It is essential to note in this context that a theory based on economic efficiency denies that the costs of *economical* injuries should be paid in tort by the actor causing those harms. Posner is quite clear that no tort liability in negligence exists for an actor causing *economical* accidents. *Fault* just means *uneconomical*. Thus, in circumstances of economically efficient conduct, the costs of injury must be externalized to the sufferers.

Accordingly, when Posner asserts that “[w]hen the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability,”⁶⁶ he is not contradicting himself but raising for consideration the incoherence of any view of negligence that would call for that result. In Posner’s view, there would in such circumstances, of course, be no negligence for which to pay tort judgments. Posner’s intent is to clarify that if the law were to impose damages against the enterprise under such circumstances, it would incoherently create liability without imposing any deterrent upon the enterprise’s conduct. As he states, “A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the ground that it will induce the enterprise to increase the safety of its operations.”⁶⁷ For Posner the

64. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.9, at 78 (1972) (emphasis added, first and second).

65. Posner, *supra* note 49, at 33.

66. *Id.*

67. *Id.* at 32-33. Posner here appears to neglect the likelihood of punitive damages in such a case. Precisely in those situations where a defendant knowingly continues to injure based on an economic efficiency rationale, juries may find the actor’s conduct especially reprehensible and impose damages in excess of the actual monetary harm suffered by the plaintiff. *See also infra* note 71 and accompanying text.

Under some forms of strict liability, as opposed to negligence, such costs might be internalized. However, as strict products liability analysis moves more and more in the direction of incorporating aspects of negligence analysis for determining liability, it is difficult to see how under Posner’s view of tort liability any rationale justifies such internalization. *See generally* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 *VAND. L. REV.* 593 (1980).

correct interpretation of negligence demands that if injury is caused in an *economical* accident, no need exists to compensate the injured parties; such accidents are not wasteful and hence are not negligent.

The flaw with Posner's account, however, is simply that it does not square with common sense pre-theoretical notions concerning the primary purpose of negligence law: that a tortfeasor pays money to an injured party because that party has *personally* suffered unjustified harm.⁶⁸ In other words, it is primarily the harm to the individual that drives tort law, not society's general interest in deterring inefficient behavior and promoting wealth maximization (though, of course, causal overlap may sometimes exist between these effects).⁶⁹ While other reasonable and beneficial results may flow to society by achieving this goal, Posner's view itself ironically shows confusion between the intended purposes and the side effects of the law.

The economic argument would entail, for instance, that no recovery should be given persons injured or killed by accidents if a defendant can show that the injury was economically efficient overall. In reality, however, attempts to rebuff wrongful death or personal injury claims by assertions of economic efficiency have been taken by juries, not as exculpating, but specifically as a basis for imposing punitive damages.⁷⁰ This point is corroborated in the controversial *McDonald's* coffee case, where, despite significant evidence of economic justification for serving coffee at temperatures high enough to cause third-degree burns, a jury awarded compensatory and punitive damages to the plaintiff.⁷¹

Additionally, in other areas of the law involving negligence-like analysis, judicial and legislative limitations expressly restrict application of utilitarian cost-benefit analysis and impose non-utilitarian normative standards. Such limitations include, for example, judicial restrictions on the range of economic benefits and burdens that may be taken into consideration by a jury⁷² and

68. Patrick Kelley, *Infancy, Infirmary and Insanity in the Law of Torts*, 48 AM. J. JURIS. 179, 213 (2003) ("The ordinary tort remedy of compensatory damages, its traditional justification, and the terminology and operation of the tort liability system, then, all suggest that the practical point of tort liability, from the internal point of view, is to redress private wrongs.").

69. "A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court." *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 222 (N.Y. 1970).

70. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1037-38 (1991); Amelia J. Uelmen, *Toward a Trinitarian Theory of Products Liability*, 1 J. CATH. SOC. THOUGHT 603, 607-10 (2004) (analyzing large punitive damage award in cost-efficient product liability actions); see also Green, *supra* note 46, at 1640-42 (discussing the Ford Pinto case and economic efficiency theory).

71. For a detailed analysis of the *McDonald's* case see *infra* notes 141-155 and accompanying text.

72. *Cipollone v. Liggett Group, Inc.*, 644 F. Supp. 283, 286 (D.N.J. 1986) (rejecting defendant's attempt to introduce benefit of production of cigarettes to society by distribution of profits, employment opportunities, benefits to suppliers, taxes paid, and charities aided by manufacturer).

federal statutory regulations, such as that imposed upon the FDA under the Delaney Clause providing that “no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal.”⁷³

Further, assertions of economic efficiency as the traditional pattern for common law negligence is belied by the inherent complexity of the mathematical analysis demanded. Consider the following example provided by Posner, purported to be applicable in cases where a court employs cost-benefit analysis to resolve liability in the context of the relatively simple case of whether a driver who crossed over a center divider line was negligent in doing so:

In other words, a potential injurer may try to adhere to a level of care y^* , but his realized care will be $y = y^* + \epsilon$, where ϵ is a random error term with a zero mean. Although $E(y)$, the injurer’s expected care, is y^* , occasionally ϵ will be negative and y will fall below y^* . If an injury occurs when $y < y^*$, a court that ignored the stochastic element of care, as it would be likely to do, would find the injurer negligent.⁷⁴

Such subtlety militates against any claim that it captures the historical approach of the case law—a function traditionally entrusted to lay juries.⁷⁵

Finally, corroborating each of these specific objections, numerous opponents of economic efficiency theory argue broadly that it unjustifiably eliminates other important human values that the law has traditionally protected. While such critiques willingly concede that economic factors may often be relevant in a jury’s deliberations, nothing supports the conclusion that economic efficiency is or ought to be the *raison d’être* of negligence.⁷⁶ In the social circumstances of

73. 21 U.S.C. § 348(c)(3)(A) (2004). The FDA attempted to avoid the absolute bar to allowance of additives causing cancer imposed by the plain language of the statute by employing a safety standard of one in a million lifetime risk as acceptable. This attempt meets with varying success in the courts and has arguably been lessened by Congressional amendment. However, even under application of that FDA lifetime risk benchmark, it is obvious that a strict utilitarian cost-benefit analysis has been abandoned. Limiting conduct only to risks at that allowable level may in fact be uneconomical. See, e.g., Cary Coglianese and Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1357 n.436 (2004).

74. LANDES & POSNER, *supra* note 48, at 72-73.

75. In *Todd v. Societe BIC, S.A.*, 9 F.3d 1216 (7th Cir.1993) (en banc), the court of appeals was presented with the issue of whether a BIC child-resistant lighter was a defective product under a consumer expectations test and a risk-utility test relating to the damages caused by a child who played with the lighter. In discussing the risk-utility test, Posner, concurring in part and dissenting in part, referred to the complexity of the cost-benefit analysis discussed in the majority opinion and concluded that “the respective costs and benefits of child-resistant cigarette lighters raise difficult questions that a jury could not responsibly answer Is a comprehensive national program of protecting children from the menaces of everyday life to be formulated and administered by—juries?” *Id.* at 1225-26 (Posner, J., concurring in part and dissenting in part). Here Posner’s rhetorical question itself suggests his doubts about a jury’s ability to assess the “menaces of everyday life.” Arguably, that would be precisely the sort of danger a jury would be expected to consider under a common law conception of its role as fact finder.

76. See, e.g., F. Patrick Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 468-69 (1978) (“Which is more

modern life, other values are entitled to at least as much, if not more, legal protection:

We may ask whether market behavior is not itself simply a special case of human behavior—whether it too, is only one of a number of different forms of human choice, which in turn depend upon many different forms of human valuation and motivation. Human values and goals may take wealth maximization into account, but they may not be exclusively or even primarily concerned with it. Human action and human decision may rest only in part on the type of reasoning acceptable to Landes and Posner's reductive vision. Ironically, then, the greatest problem with wealth maximization as a theory of human practical reason may be that it is insufficiently rich.⁷⁷

In sum, a thoroughgoing economic interpretation of negligence repudiates fundamental premises and nuances of fault-based legal systems by destroying the distinct import of differing relations between mental states and consequences of conduct. It is precisely these distinct relations that to a large extent constitute and differentiate forms of legal culpability. By collapsing these distinctions, economic theory dispenses with rudimentary notions of culpability. Further, such a view unjustifiably dismisses other human values protected by the law (not to mention common sense) and implausibly reduces culpability determinations to questions of mere pecuniary value. It is difficult to understand how any theory that undermines such basic presuppositions of the law could plausibly make the claim to capture its "pattern."⁷⁸

4. Hand's Understanding of the Formula

In further support of the argument against a reductive economic interpretation of negligence, evidence from Learned Hand's own writings strongly suggests that he did not view the "formula" as a mathematical directive.⁷⁹ Rather, a strong case can be made that he intended the formula to be taken as a metaphor

important—efficiency or expectation . . . ? If the society had such a limited economy that efficiency were necessary for the subsistence of its members, then efficiency would be at least a prima facie candidate to prevail. . . . A denial of expectations, on the other hand, would be equally offensive in both a hand-to-mouth and an "affluent" society because such a denial results in the negation of the right of persons to be viewed as ends rather than as mere factors of production involved in achieving an efficient society [T]he entire notion of individual rights becomes highly problematic if social benefit, no matter how slight, can justify a denial of any such right.").

77. J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1475-76 (1987) (reviewing LANDES & POSNER, *supra* note 48).

78. See Posner, *supra* note 51, at 211.

79. See, e.g., Villanova v. Abrams 972 F.2d 792, 796 (7th Cir. 1992) ("An algebraic formulation of legal rules . . . has value in expressing rules compactly, in clarifying complex relationships, in identifying parallels between diverse legal doctrines, and in directing attention to relevant variables that might otherwise be overlooked. It is not, however, a panacea for the travails of judicial decision-making. In practice, the application of standards that can be expressed in algebraic terms still requires the exercise of judgment, implying elements of inescapable subjectivity and intuition in the decisional calculus.").

or rubric that succinctly highlights the need in negligence analysis to juxtapose considerations of competing rights and values and the demand for a *prudential normative* resolution to the question of when injuries to certain human goods are permissible or not.⁸⁰

Hand, for example, expressly rejects the view that such determinations can be reached by mathematical calculus. In his earliest statement on the issue in *Conway v. O'Brien*, Hand observes:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is cosigned [sic] to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.⁸¹

As indicated in this text, Hand believes such decisions can only be made by “reasonable persons” applying commonly accepted norms defining the rights of persons, consistent with existing law, and taking into consideration the complex question of exactly which norms apply to particular circumstances of each case and how they apply. This notion is expressly captured by Hand’s later recognition that “the kernel of the matter . . . is this choice between what will be gained and what will be lost. The difficulty here does not come from ignorance, but from the absence of any standard, for values are incommensurable.”⁸² Elsewhere, Hand implicitly restates his repudiation of a quantifiable, mathematical approach, declaring that “the same question . . . often arises in the law of torts . . . indeed all questions which depend upon what conduct is ‘reasonable.’ In all these [cases] the court balances the interests against each other, and awards priority as seems to it just.”⁸³

80. *U.S. Fid. & Guar. Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982) (“Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that B, P, and L all be quantified, which so far as we know has never been done in an actual lawsuit. Nevertheless, the formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors.”).

81. 111 F.2d 611, 612 (2d Cir. 1940). As one court has observed citing *Conway*: “Judge Hand did not assign numbers to the variables or factors or attempt to apply the formula mathematically.” *Krummel v. Bombardier Corp.*, 206 F.3d 548, 554 n.2 (5th Cir. 2000).

82. *LEARNED HAND, THE SPIRIT OF LIBERTY* 161 (1963).

83. *Republic Aviation Corp. v. NLRB*, 142 F.2d 193, 196 (2d Cir. 1944). Other statements by Hand reaffirm this basic view of his position that the “formula” was not meant to encapsulate an economic theory of negligence. See *Barbarino v. Stanhope S.S. Co.*, 151 F.2d 553, 555 (2d Cir. 1945) (“[W]hen we . . . fix any standard of care two conflicting interests must be always appraised and balanced: that of the person to be protected, and that of the person whose activity must be curtailed. It is true that the interest of the person to be protected must also be discounted by the improbability that it will be invaded . . . nevertheless, in the end no decision can be reached except by choosing between two human

Learned Hand's rejection of a utilitarian interpretation of his negligence formula rebuts Posner's attempt to reduce all legally relevant value to economics. By recognizing that many goods are incommensurable and that reasonable action often calls for choices between intended goods and unintended effects, Hand's understanding of his formula presents no obstacle for seeing the operation of double effect analysis in the law of negligence. Hand's view of his formula entails none of the premises that require one to conclude along Posner's line of reasoning that "intentionality is neither here nor there."⁸⁴

5. *The Restatement (Second) of Torts* and the Meaning of "Value"

The Restatement (Second) of Torts' clarification of its "balancing" test similarly indicates that no mere economic model exhausts the values that must be "weighed" in determining whether conduct is reasonable. Evidence of the non-reductive character of the *Restatement's* negligence standard is captured in the *Restatement's* broad definitions of "utility of the actor's conduct"⁸⁵ and the parallel definition of "magnitude of risk."⁸⁶ Both of these *Restatement* concepts, and their elaboration in official commentary, rely on the related *Restatement* concepts of "interest" and "the value which the law attaches to such an interest."⁸⁷

The connection between these ideas is aptly illustrated in section 291's commentary on the "weighing" of utility and risk—precisely the issue under consideration:

interests, one of which must be sacrificed. Such choices are the very stuff of law"); *McGhee v. United States*, 154 F.2d 101, 105 (2d Cir. 1946) ("The standard of care in any situation is determined by balancing the risk against the cost of precaution. In the end that always demands a choice between values, and the most vital national interests precluded precautions that might have been proper, if less had been at stake."); *In re Lee Transit Corp.*, 37 F.2d at 67, 69 (2d Cir. 1930) ("[I]n such matters the real appeal is to the average opinion as to what conduct is proper."); see also Wright, *supra* note 59, at 157-58 (arguing that Hand's own description illustrates a rejection of a utilitarian approach to negligence analysis).

84. See *supra* note 53 and accompanying text.

85. RESTATEMENT (SECOND) OF TORTS § 292 (1965) ("Factors Considered In Determining Utility of Actor's Conduct. In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important: (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct; (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct; (c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.").

86. *Id.* § 293 ("Factors Considered In Determining Magnitude Of Risk. In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important: (a) the social value which the law attaches to the interests which are imperiled; (b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member; (c) the extent of the harm likely to be caused to the interests imperiled; (d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.").

87. See *infra* note 90 and accompanying text.

Weighing risk against utility of conduct which creates it. The magnitude of the risk is to be compared with what the law regards as the utility of the act. If legal and popular opinion differ, it is the legal opinion which prevails. The point upon which there is likely to be such divergence between the two is usually in respect to the social value of the respective interests concerned. If the legal valuation differs from that attached to the respective interests by a persistent and long-continued course of public conviction, as distinguished from a novel and possibly ephemeral opinion, courts should and often do re-examine their valuation and make it conform to the settled popular opinion.⁸⁸

Contrary to an univocal, unvarying economic interpretation of the notion of “interest” and “valuation” expected on Posner’s view of negligence, the terms as employed suggest a much more varied texture. Consider, for example, the *Restatement (Second) of Torts* broad definition: “§ 1. Interest: The word ‘interest’ is used throughout the Restatement of this Subject to denote the object of any human desire.”⁸⁹ Commentary to this section elaborates the relation between this multivalent concept and how the law comes to attach “value” or protection to such interests.⁹⁰ Without any mention of economic considerations, the *Restatement* provides simply that the law’s valuation—the determination of whether legal protection will be extended to interests in the form of rights⁹¹ and the extent of that legal protection⁹²—is a process guided by stable community consensus and opinion.

Thus, without begging the question about what society values, there is no hint in the *Restatement* commentary that economic efficiency alone provides the

88. RESTATEMENT (SECOND) OF TORTS § 291 cmt. d (1965).

89. *Id.* § 1 (emphasis added).

90. *Id.* § 1, cmt. a (“As defined in this Section, the word ‘interest’ is used to denote anything which is the object of human desire. It carries no implication that the interest is or is not given legal protection, that is, that the realization of the desire is regarded as of sufficient social importance to lead the law to protect the interest by imposing liability on those who thwart its realization.”); *id.* § 1, cmt. d (“Legally protected interests. If society recognizes a desire as so far legitimate as to make one who interferes with its realization civilly liable, the interest is given legal protection, generally against all the world, so that everyone is under a duty not to invade the interest by interfering with the realization of the desire by certain forms of conduct.”).

91. *Id.* § 1, cmt. b (“‘Interest’ as distinguished from ‘right’. In so far as an ‘interest,’ as defined in this Section, is protected against any form of invasion, the interest becomes the subject matter of a ‘right’ that either all the world or certain persons or classes of its inhabitants shall refrain from the conduct against which the interest is protected, or shall do such things as are required for its protection.”).

92. “Thus the interest in bodily security is protected against not only intentional invasion but against negligent invasion or invasion by the mischances inseparable from an abnormally dangerous activity. Every man has a right, as against every other, not to have his interest in bodily security invaded in any of these manners. On the other hand, the interest in freedom from merely offensive bodily contacts is protected only against acts done with the intention stated as necessary in that part of the *Restatement* which deals with liability for such contacts Therefore, there is a right to freedom from only such contacts as are so caused, and there is no duty other than a duty not to cause offensive touchings by acts done with the intention there described.” *Id.* § 1, cmt. d.

basis for legally “valuing” interests or limiting the protection of that interest. Rather, the text expressly indicates—without any reference to economic analysis—that the object of legal protection may be *any human interest*, that is, any human desire shared by the community: “Thus emotional tranquility, for which the great mass of mankind feels a keen desire, is as much an ‘interest,’ as ‘interest’ is defined in this Section, as is the interest in the possession of land or the security of one’s person.”⁹³

Just as consideration of Hand’s specific description of his understanding of the negligence formula undercuts any claim that it is rooted in a reductive economic utilitarianism, so too a straightforward reading of the relevant *Restatement* provisions leads to no such conclusion. Instead, the considerations relevant to weighing the intended goods of conduct in contrast to the unintended but foreseeable harms, is open to the recognition and protection of a wide variety of goods and human desires that appears to have no utilitarian underpinning, and thus, presents no obstacle to the application of double effect analysis.

6. Jury Instructions and Negligence Theory

Having argued in the preceding sections that neither the Hand formulation nor the *Restatement (Second) of Torts* necessarily entails utilitarian economic analysis, attention should be given to the apparent discrepancy between these formulations and the very general character of the negligence instruction presented to jurors.⁹⁴

In this context, some historical analysis is helpful. It appears likely that the “weighing” or balancing concept in negligence was first explicitly introduced by Professor Henry Terry early in the twentieth century.⁹⁵ Terry described the determination of negligence as dependent upon a consideration of five separate factors:

- (1) The magnitude of the risk;
- (2) The value or importance of that which is exposed to the risk, which may be called the “principal object”;
- (3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct,—is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk;
- (4) The probability that the collateral object will be attained by the conduct which involves risk to the principal [object]: the utility of the risk; and
- (5) The probability that the collateral object would not have been attained without taking the risk: the necessity of the risk.⁹⁶

93. *Id.* § 1, cmt. a.

94. See *supra* notes 40 and 41 and accompanying text.

95. See, e.g., Green, *supra* note 46, at 1627-28 (describing the influence of Terry’s article on Francis Bohlen, reporter for the first *Restatement of Torts*). Green then shows the influence of the first *Restatement* on Learned Hand’s formulation of negligence in *Carroll Towing*. *Id.* at 1629.

96. Terry, *supra* note 38, at 42-43.

At first glance Terry's formulation seems technical and overly complex. Once the anachronistic specter of economic efficiency has been exorcised, however, it becomes manageable. The text, at least on a sympathetic reading, encapsulates—admittedly in formal, cumbersome language—all those considerations that a reasonable person might contemplate when determining the reasonableness of some proposed conduct.

First, one would consider, to the extent reasonably possible, if the proposed conduct seeking to achieve some intended good (the collateral object) would foreseeably cause some harm (the principal object) and, if so, how serious that harm might be.⁹⁷ Second, it would be appropriate to consider how likely it is that one's intended good would in fact be achieved by the proposed conduct and how important that good was in comparison to the risked harm.⁹⁸ Finally, the actor might consider whether there existed any alternative way of bringing about that good more safely, that is, without causing (or lessening) the risked harm.⁹⁹

As Learned Hand counseled, however, no mathematical quantification and analysis can resolve all such considerations.¹⁰⁰ Varying and incommensurable interests in the real world, limitations of practical reason, and the inability to foresee all the consequences of conduct make any such expectations unrealistic. Resolution instead demands consideration of the competing interests and rights of the parties and requires the jury to apply its best sense of fairness and justice as dictated by community standards.

This is supported by Hand's observation that "a solution always involves some preference, or choice between incommensurables, and it is cosigned [sic] to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied."¹⁰¹ In appraising a party's negligence (or lack thereof), a jury uses the test of a "reasonable person" to determine, according to the "common standards" of fairness and justice, balancing all interests economic and non-economic, whether the interest(s) pursued by the actor and the manner in which he or she pursued it, warranted, under all the circumstances, the risk of foreseen harm to the plaintiff's interest(s).¹⁰²

97. *Id.* From an intentionality point of view, it would make more sense to describe the intended effect of conduct as the principal object and the unintended, foreseeably risked harm as the collateral object. Because, however, Terry is focusing precisely on the negligently caused harm, it makes sense for him to call that negligently inflicted harm the "principal" object and the intended good the "collateral" object.

98. *Id.*

99. *Id.*

100. *See supra* Part II.A.4.

101. *Conway v. O'Brien*, 111 F.2d 611, 612 (2d. Cir. 1940).

102. "The balancing test, per se, may remain, as such phraseology may adequately be used to characterize a theory-neutral, normatively pluralistic account of the reasonable person standard." Hetcher, *supra* note 47, at 869. "[O]rdinary usage also permits a more general sense of the words 'weigh' and 'balance' to mean simply that rational actors may take account of numerous factors in their practical reasoning with regard to a particular issue. There is nothing intrinsically utilitarian or consequentialist in practical reasoning." *Id.* at 882.

Interpreted in this light, it becomes clear that the very generality and open-endedness of the negligence inquiry—as opposed to the narrow utilitarian sense envisioned by Posner—is perfectly encapsulated in the common jury instruction: “Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.”¹⁰³ By means of such an instruction, the court directs a jury to consider everything that a reasonable person would consider in determining whether defendant’s conduct was not simply economical, but *reasonable*. As one legal commentator expresses this common sense connection between the jury’s function and Hand’s balancing test: “Stripped of rhetoric . . . the so-called Hand factors are simply the core factors of any account of negligence. These factors will be present under any theoretical conception of the reasoning processes engaged in by jurors.”¹⁰⁴

7. Synopsis

It is of course possible (and perhaps probable) that proponents of economic efficiency theory will go beyond Hand and the *Restatement’s* broad understanding of the notion of value and attempt to impose upon all questions of legal value a filter of economic analysis. The preceding discussion has illustrated, however, that neither of these influential articulations of the negligence formulation endorses, much less necessitates, such a reduction.

This, of course, is not to assert that economic analysis is in all circumstances irrelevant and unrelated to liability determinations. Community conceptions of what is fair and right often undoubtedly involve economic considerations, especially when the conflicting interests of the parties involve benefits and harms that can be easily measured in economic units, for example, injuries to “interests” in fungible goods or property.¹⁰⁵ Thus, the critique of economic analysis developed here should be understood as rejecting only the universal

103. Cal. B.A.J.I. Civ. 3.10 (2004); *see also* Ill. P.J.I. Civ. 10.01 (2000) (“When I use the word ‘negligence’ in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.”); N.Y. P.J.I. Civ. 2:10 (3d. 2000) (“Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.”). *See generally* Kelley & Wendt, *supra* note 40, app. at 629-30, 640-41, 658.

104. Hetcher, *supra* note 47, at 882.

105. *Hegyes v. Unjian Enter., Inc.*, 286 Cal. Rptr. 85, 110 n.4 (Cal. Ct. App. 1992) (Johnson, J., dissenting) (“Economic analysis limits it [sic] focus to a single societal value—economic efficiency—rather than the full scope of values Nonetheless, it is an important value and one worth weighing when deciding the overall merits of a given common law legal rule.”).

reductive claims made by a law and economics *theory* of negligence.¹⁰⁶

Further, even when the conflicting values at issue are not strictly fungible, protecting some interests over others may result in economically efficient behavior precisely because the economic valuations at stake themselves *result* from society's pre-economic appraisal of the relative importance of the interests. In such cases, protecting one human interest over another may *incidentally* conform to economic efficiency even though the interests themselves are not legally valued primarily *because of* their economic worth.¹⁰⁷

As already suggested, however, this lends no support to the conclusion that negligence will track norms of economic efficiency in *all* cases, as when, for example, death, serious bodily injury, or basic personal integrity are at stake. Economic valuation does not exhaust the community's esteem for all interests.¹⁰⁸

B. Negligence and Normative Limits

If the preceding section is correct in its conclusion that economic efficiency does not and should not function as the exclusive criterion for balancing or weighing goods and harms in negligence, it may be helpful to offer at least one example of an alternative account of the types of values that may properly inform a jury's "weighing" of competing "utility" and "risk."

In general, consistent with Hand's observations, the *Restatement*, its commentary, and the common negligence jury instruction,¹⁰⁹ no a priori limitation exists on the values that may inform that balancing analysis. Determinations of negligence require consideration of *whatever* values a reasonable jury (as a sampling of persons whose views and judgments embody community standards) believes is appropriate, given the circumstances of a particular case, for legal protection. Upon consideration of these values, the jury is called upon to

106. See, e.g., James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1043 (1985) ("It is hard to understand the radical break that economic analysis represents. If one follows out the logic of an economic approach to tort law, then I never have any *rights*, at least in the way that we have been accustomed to thinking about them. All I have instead is an entitlement to have some court go through a cost-benefit calculation to determine whether the activity I am engaged in is economically worthy of protection.").

107. One scholar has illustrated this point by suggesting that the criminalization of rape could be justified by showing that it maximized society's interest in sleep. "A reasonable person would probably respond that this explanation is ridiculous—rape is prohibited by our society because it offends our most deeply held beliefs about personal dignity and autonomy, not because it maximizes the hours we sleep." Balkin, *supra* note 77, at 1474-75. This example specifically responds to Landes' and Posner's peculiar attempt to illustrate the economic efficiency of laws against rape. See LANDES & POSNER, *supra* note 48, at 157-58.

108. *Hudson v. Lazarus*, 217 F.2d 344, 346 (D.C. Cir. 1954) ("Legal 'compensation' for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm."). See also Linda L. House, Note, *Section 1983 and the Collateral Source Rule*, 40 CLEV. ST. L. REV. 101, 105 (1992) ("[L]egal compensation is not truly adequate compensation. Particularly in personal injury cases, a plaintiff can never really be made whole.").

109. See *supra* Part II.A.4-6.

make its best judgment concerning whether the unintended harm was reasonably justified in light of the good intended. No mathematical formalistic principle can resolve the tension between all such clashes.

Such a view is supported by growing recognition in tort scholarship that reductionist theories like those of Posner are misguided. Rather than offering a single heuristic principle for interpreting all tort decisions as affecting maximization of a single value or goal, a growing consensus understands negligence, as a part of tort law generally, to embrace a wide set of component goals, for example, deterrence, economic efficiency, and social justice.¹¹⁰ In such circumstances, it is the job of the court (jury and judge) to “exercise judgment by achieving an ineffable balance among diverse and sometimes antithetical considerations with respect to any given decision.”¹¹¹

1. Equal-Negative Rights and Negligence

As indicated by Hand’s observations above, however, “[i]n all these [cases] the court balances the interests against each other, and awards priority as seems to it just.”¹¹² Thus, in a very general sense, while no single concrete qualitative value exhausts negligence determinations, there is at play in Hand’s mind a general conception of fairness that guides and informs the incommensurable value decisions.¹¹³ Such a heuristic principle, unlike Posner’s theory, does not reductively *eliminate* the uniqueness of the individual values, but can still provide a framework for choosing between them.

Describing one articulation of such an over-arching, justice-based conception of negligence analysis, Richard Wright asserts:

Tort law falls within the domain of corrective justice Corrective justice aims at securing each individual’s person and existing stock of resources against conduct by others that would be inconsistent with the equal negative

110. See, e.g., Goldberg, *supra* note 39; Galligan, *supra* note 39; Perkins v. Entergy Corp., 756 So. 2d 388, 402 n.26 (La. Ct. App. 1999); Green, *supra* note 46, at 1643 (“[T]ort law may be an amalgam of efficiency, corrective justice, pragmatism, all leavened with whatever the contemporary cultural, political, and social attitudes happen to be.”).

Such an interpretation also explains, in a way that economic analysis cannot, why certain types of conduct may not be subject to liability although from an economic point of view such conduct could often be considered inefficient. Examples such as the general avoidance in negligence of imposing an affirmative duty to aid or a duty to avoid purely economic harm explicitly confirm that other ethical and non-utilitarian considerations or conceptions of “duty” must inform and specify the balancing of goods and harms.

111. See Goldberg, *supra* note 39, at 580.

112. Republic Aviation Corp. v. NLRB, 142 F.2d 193, 196 (2d Cir. 1944).

113. Goldberg makes a similar point: “Must we, or ought we concede that all we can say of any given tort decision, or any given tort doctrine, is that, if well-rendered, it will reflect the attainment of an unarticulated and unarticulable balance among various considerations—including some that are diametrically opposed? I suggest that, to make such a concession is to give up on the idea of law. . . . I would conjecture that most lawyers and citizens . . . expect the law to aspire to coherence—a demand rooted in elemental notions of fairness, predictability, and efficacy.” Goldberg, *supra* note 39, at 580.

freedom of all . . . the freedom from unjustified interference with one's use of one's existing resources to pursue one's projects or life plan¹¹⁴

Such a description illustrates how, without restricting any particular factors that a jury may consider, a general normative limit in negligence exists that delineates those harms that can foreseeably but unintentionally be imposed upon others and those that cannot. Positing this limitation in the concept of "equal negative freedom," Wright argues that this boundary is defined by the demand that no individual be treated merely as a means to another's goals.¹¹⁵ Stated otherwise, an actor's conduct may not permissibly interfere with other people's freedom to pursue their own *personal* ends if the actor's conduct foreseeably entails an attitude or point of view that treats the others' goods as *purely* instrumental means to the actor's own interests. Any risk that an actor imposes on others, therefore, must be a risk that an actor believes can be reasonably imposed on him and other members of society in generally similar circumstances.

[J]ustice requires that others who interact with you in ways that may affect your person or property do so in a way that is consistent with your right to equal negative freedom, and vice versa. It does not prohibit all adverse impacts, or risks thereof, on others' persons and property. Such a prohibition would greatly decrease each person's external freedom rather than enhancing it. It rather allows a person to engage in conduct which creates risks to others' persons and property, but if and only if the allowance of such conduct by everyone in similar circumstances will increase everyone's equal freedom, rather than increasing some persons' external freedom at the expense of others' external freedom.¹¹⁶

Arthur Ripstein makes a similar point referring specifically to the limit of the "restraint" on conduct imposed under the negligence standard:

[T]he reasonable person is the one who exercises appropriate restraint in light of the interests of others. The reasonable person is a construct to strike a balance between different interests. Decisions about such matters invariably import substantive judgments about what is important to a person's ability to lead a self-directing life. Such matters will occasionally be controversial, though most such interests—freedom of action and association on the one hand, and bodily security and security of possession on the other—will not.¹¹⁷

114. Richard W. Wright, *The Standards of Care in Negligence Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 249, 256 (David G. Owen ed., 1995).

115. *Id.*

116. Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 *AM. J. JURIS.* 143, 166 (2002).

117. Ripstein, *supra* note 29, at 663.

In Wright's and Ripstein's view, liability is restricted to situations when a reasonable person would regard conduct as *unfairly* interfering with another's reasonable freedom to pursue his or her own ends. In this context, "unfairly" does not denote any particular quantitative, mathematical limitation, but refers to a prudential determination based on notions of personal respect and reasonability. Thus interpreted, negligence law introduces a limitation upon permissible, lawful risk exposure to others based ultimately not on economic efficiency, but on respect due to their independent status as persons living in community.¹¹⁸

Respect for the interests of others, however, does not entail a duty always to refrain from conduct creating a risk of foreseeable harm, even serious harm, to others. Rather, as recognized by both Wright and Ripstein, harm is permissible as a risked unintended side-effect of conduct whenever pursuit of one's own interests respects or is "proportionate" or "fair" in comparison to the rights of others to reasonably pursue their interests: "[R]eciprocity . . . grows out of an idea of private persons pursuing their separate ends, and supposes that standards of conduct are reciprocal just in case they enable each person to pursue his or her ends as much as is compatible with others pursuing their own ends."¹¹⁹

In short, the dividing line between permissible and impermissible risk of unintentional harm lies precisely at that point where the risk in question respects or fails to respect others' reciprocal rights as persons seeking their own ends. As Ripstein restates this concept in respect to negligence analysis, "[i]n the idiom of responsibility, norms of conduct mark the line between what a person has done and what is (merely) a by-product of her action."¹²⁰

2. Parallel Standards of Reasonability in Negligence and Double Effect

Having offered good reasons for rejecting utilitarian economic efficiency as an appropriate model for understanding the reasonableness standard in negligence, and having described at least one alternative interpretation suggested by a rights-based analysis, it is appropriate to return to the link between negligence and *DE* and the reasonability criterion at play in each.

In addition to the other basic requirements of *DE*—that a good be intended, that the action be permissible in its own right, and that the harm be unintentional—permissibility under *DE*, as in negligence, requires a determination of whether the intended good is "sufficiently reasonable" or "proportionate" when

118. Wright, *supra* note 114, at 259 ("To have sufficiently secure expectations, one's right in one's person and property must be defined by an objective level of permissible risk exposure by others which, under the moral categorical imperative . . . must be equally applicable to all and objectively enforced.").

119. Ripstein, *supra* note 29, at 661. An analogous point is reflected in the following *Restatement* commentary distinguishing the duty not to intentionally cause offensive contacts from the duty not to cause unintentional offensive contacts: "[T]he interest in freedom from . . . offensive bodily contacts is protected only against acts done with the intention stated as necessary in that part of the *Restatement* which deals with liability for such contacts. . . . Therefore, there is a right to freedom from only such contacts as are so caused, and there is no duty other than a duty not to cause offensive touchings by acts done with the intention there described." *RESTATEMENT (SECOND) OF TORTS* § 1 cmt. d (1965).

120. Ripstein, *supra* note 29, at 661.

balanced against the foreseeable unintended evil. Specifically, this element of *DE* provides that the importance of the intended good effect must reasonably justify the causing of the unintended evil effect.¹²¹ In parallel to the negligence analysis, *DE* insists that the actor consider whether the “utility” of the conduct, or in Terry’s terms the “value or importance of the . . . object” intentionally chosen,¹²² justifies the unintended risk of foreseeable harm created by such conduct. Under *DE*, if the unintended harm is not justified in light of that intended object, such action is not permissible.

As explained above, however, the proportion between the intended good and the unintended harm cannot coherently refer to a utilitarian commensuration.¹²³ Such a consequentialist analysis ultimately undermines *DE*’s reliance on the distinction between intention and mere foreseeability as bearing meaningful ethical import.¹²⁴ Further, it eliminates the possibility of distinct orders of value that create the possibility of rational *choice* between alternative courses of action.¹²⁵ In *DE*, determinations of permissibility demand a balancing of intended values and rights versus unintended harms to other values and rights. Akin to Hand’s discussion of incommensurables and the *Restatement*’s “interest” as the object of *any* human desire,¹²⁶ *DE* is founded on the view that questions of permissibility cannot be reduced to a mathematical calculus. Rather, such decisions require choice among alternative values guided by normative limitations of reasonability and ethical fairness.

In particular, *DE* hinges on two normative distinctions between types of goods that appear fundamental in resolving questions of permissibility in the context of conduct involving risk of unintentional harm to basic human goods such as life, physical integrity, and basic human dignity—the types of harm most often at issue in *DE* considerations.¹²⁷ First, when intentionally pursuing otherwise legitimate goods that instrumentally support basic human goods (for example, instrumental goods such as food, shelter, transportation, clothing), one should not engage in conduct that in a reasonably foreseeable manner risks significant harm to intrinsic human goods.¹²⁸ *Significant harm* here logically

121. See Mangan, *supra* note 6 and accompanying text.

122. See Terry, *supra* note 38, at 43.

123. See *supra* Part II.A.2.

124. *Id.*

125. See, e.g., Germain Grisez, *Against Consequentialism*, 23 AMER. J. JURIS. 21, 43 (“[G]iven the commensurability required by the consequentialist’s theory of judgment, no one can do what one ought not, since no one can deliberately prefer the lesser good. The reason for choosing the greater good—assuming the goods are commensurable—is not merely a good reason, it is a sufficient reason.”).

126. See *supra* Parts II.A.4, 5.

127. See, e.g., McIntyre, *supra* note 7 (referencing commonly discussed *DE* scenarios).

128. For the commonplace distinction between basic or intrinsic goods and instrumental goods see, for example, DAVID S. ODERBERG, *MORAL THEORY* 44-45 (2000): “Some goods—the possession of money, for instance—are purely instrumental. But no *basic* good is solely instrumental in character; each good . . . is basic precisely because it itself is a component of the happy life. If any one of them is turned away from, rejected or compromised in *general* life goes badly”

entails reference to any permanent or serious injury, or curtailment of physical or psychological well being. It denotes substantial destruction of the very conditions necessary for an individual's pursuit and attainment of essentially personal ends, that is, basic human goods.¹²⁹

However, this normative limitation upon choice recognizes that pursuit of instrumental goods often carries with it, as a reality of the contingent state of the world, the possibility of causing unintentional harm to fundamental human goods. Under concrete conditions, obtaining instrumental goods necessarily subjects inherent goods to unavoidable risks. Because instrumental goods are by their nature directed at human existence in its various basic requirements as an end, it is reasonable, and therefore ethically required, that pursuit of such goods be constrained by the purpose for which they are sought. A limitation restricting intentional pursuit of instrumental goods under normal conditions to conditions when there is no "reasonably foreseeable risk of significant harm" to human life, safety, or dignity preserves the inherent relation between these distinct types of goods.¹³⁰

A second norm applicable under *DE* analysis in determining the permissibility of unintended harm is more complex and functions inversely to the first: when conduct is intended to protect some fundamental human good (either in oneself or another), one may unintentionally (but not intentionally) cause reasonably foreseeable risks of significant harm to either instrumental or intrinsic human goods (of an identical or different type).¹³¹

In contrast to the incompatibility of such conduct with an economic efficiency model of value, the permissibility of causing unintentional harm to instrumental goods for the sake of the intentional conservation of intrinsic goods presents no difficulty for *DE*.¹³² Insofar as instrumental goods are human goods only to the extent that they are rationally subordinated to basic, fundamental goods as their end, *DE* proposes that instrumental goods may unproblematically

129. *Id.*

130. As seen in the negligence discussion, however, "reasonably foreseeable risk of harm" is not a standard that admits of exact quantification; rather, it must be determined by reasonable persons in the context of the social, environmental, and political conditions of their community. Thus, the possibility of significant harm may be acceptable under more foreseeable levels in some circumstances than others. See generally Terry, *supra* note 38.

131. This assumes that the actor or person being protected has done nothing culpable to create the risked threat or danger to life, health or dignity. Whether the same or different rules apply when the actor has created the risk of harm to himself presents a special case outside the scope of consideration here. This parallels the discussion in criminal law of whether a defendant who has created the conditions leading to his or her assertion of the defense of necessity is entitled to do so. Cf. MODEL PENAL CODE § 3.02 cmt. 4, 20 (discussing approach of the Model Penal Code and New York to situations where the actor himself creates the circumstances leading to the assertion of the necessity defense).

132. John C.P. Goldberg, *Tort*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 28 (Peter Cane & Mark Tushnet eds., 2003) ("The economic approach . . . entitles actors to disregard the well-being of others simply because it is more expensive to society to take steps to avoid injuring them than to cause them injury.").

cally be sacrificed to preserve inherent human goods.¹³³

In the case of risking unintentional harm to fundamental human goods, however, the risked harm cannot be understood as rationally subordinated to the intended good. When, for example, a strategic bomber destroys a military installation with foreseeable risk of injury or death to civilians,¹³⁴ the value of the lives protected by the bomber at home is not ethically superior to the value of those non-combatant lives in the enemy country. Rather both the good intended (preservation of lives of family and friends at home) and the foreseeable harm (death of non-combatants) are instances of goods that are ultimately irreducible to one another on a utilitarian scale. Each life functions as an end in itself, and resolution of a conflict of values in such a situation cannot be achieved by application of a mathematical formula. No moral calculus can rationally justify an ethical *requirement* that one or more innocent lives be intentionally destroyed for the “value” of preserving one or more other innocent lives. Each life, as an intrinsic good, functions as an irreducible, incommensurable object and thus, in that very irreducibility, is “proportionate” to any other instance of fundamental human value.¹³⁵

In precisely such circumstances, however, *DE* becomes relevant. Rather than prohibiting all harmful conduct in such circumstances, *DE* proposes that the right to intentionally preserve a fundamental good in oneself or another—

133. As illustrated by the legal privileges of public and private necessity, it is also true that instrumental goods may even be *intentionally* sacrificed for the sake of intrinsic human goods. Cf. RESTATEMENT (SECOND) OF TORTS, §§ 196-97 (1965). Such examples illustrate cases where neither the law nor *DE* prohibits all intentional causing of harm.

In fact, with respect to instrumental goods, it may sometimes be the case that intentional causing of harm is less culpable than a negligent causing of harm. For example, physical pain—which is not in itself contrary to a basic human good—may on occasion permissibly be caused intentionally, for example, a dentist probing a patient’s gum seeking to produce pain in order to determine if the tissue has been properly anesthetized. That same pain, however, if caused unintentionally by the dentist could be a sign of lack of due care for the patient and thus would arguably lead to culpability. In such cases, however, the intentionally caused harm is permissible and preferable to the negligently caused harm, because it does not represent a case where the harm violates of a basic good of the patient but instead represents an instrumental good that is justified by the circumstances. Of course, in other situations, where no justification for the intentional harming of instrumental goods exists, intentional harming would generally be worse than mere negligent harming: for example, if a dentist intentionally caused pain for its own sake without justification versus causing similar pain negligently in the course of some legitimate procedure.

134. Based on distinctions between the intentions of the actors, many discussions of *DE* propose that a strategic bomber’s conduct would often be permissible while that of a terror bomber’s would not. See, e.g., McIntyre, *supra* note 7, at 219 (“The terror bomber aims to bring about civilian deaths in order to weaken the resolve of the enemy: when his bombs kill civilians this is a consequence that he intends. The strategic bomber aims at military targets while foreseeing that bombing such targets will cause civilian deaths. When his bombs kill civilians this is a foreseen but unintended consequence of his actions. Even if it is equally certain that the two bombers will cause the same number of civilian deaths, terror bombing is impermissible, while strategic bombing is permissible.”).

135. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 120 (1980) (“To choose an act which in itself simply . . . damages a basic good is thereby to engage oneself . . . in an act of opposition to an incommensurable value . . . which one treats as if it were an object of measurable worth that could be outweighed by commensurable objects of greater (or cumulatively greater) worth.”).

assuming no culpability of the actor in creating the necessity of that decision—may sometimes justify a choice that has the unintentional but foreseeable risk of harming inherent goods in others or in oneself.¹³⁶

In keeping with the autonomous nature of persons, an actor has an inherent right to protect those fundamental goods in himself or in others when they become threatened. In view of that right—absent some special duty of the actor—imposition on others of *unintended* harms of a proportionate magnitude to protect such a good cannot be regarded as unfair or unreasonable. Thus, while a civilian has a right not to be *intentionally* killed by combatants, it is not equally true that a non-combatant has a moral right not to be *unintentionally* killed when other conditions of *DE* are satisfied.

DE, of course, imposes significant limitations upon an actor's right to cause such unintended harm. First, emphasizing the role of the intended/foreseen distinction, such conduct can only be taken when the harm to the other is unintended.¹³⁷ To choose such harm intentionally and purposefully would be to intentionally destroy a fundamental good. Such an intention would therefore entail a contradictory attitude with respect to the very rationale of the "good" the actor offers to justify his or her conduct. By *intentionally* destroying a fundamental good in order to intentionally preserve a fundamental good, an actor subjectively identifies himself with destruction of that type of good and, in so doing manifests an inherently selfish, irrational, and arbitrary volitional attitude toward basic goods themselves. In short, intentionally causing such harm violates *DE's* proscription against intentionally doing evil to achieve good.¹³⁸

Further, *DE* would also prohibit conduct whenever the extent of the unintentional causing of harm was not "reasonably ordered" to the good intended.¹³⁹ Thus *DE* would not permit any unnecessary harm, that is, harm over and above that reasonably required to preserve the intended good. If a threatened and reasonable good could be permissibly protected by less harmful means, *DE*

136. *Id.* ("[U]nsought but unavoidable side-effects accompany every human choice, and their consequences are incalculable. But it is always reasonable to leave some of them, and often reasonable to leave all of them, out of account . . . [T]o indirectly [unintentionally] damage any basic good (by choosing an act that directly and immediately promotes that basic good . . . or some other basic good . . .) is obviously quite different, rationally and thus morally from directly and immediately damaging a basic good . . .").

137. See Mangan, *supra* note 6 and accompanying text.

138. This principle is confirmed in the law in its unwavering refusal to allow self-preservation as an exculpating rationale for *intentionally* killing another innocent person, even in order to save one's own life, regardless of whether the killer seeks to be justified under the defense of necessity or excused under duress. See, e.g., *United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991) ("We are persuaded that duress is not a valid defense to . . . first degree murder. We believe that, consistent with the common law rule, a defendant should not be excused from taking the life of an innocent third person because of the threat of harm to himself."); *State v. Tate*, 194 N.J. Super. 622, 627 (N.J. Super. Ct. Law Div. 1984) ("[W]hen deliberate homicide was involved . . . common law courts did not allow necessity as a justification for the criminal act.").

139. See, e.g., Lyons, *supra* note 4, at 486 n.64 and accompanying text.

would prohibit as unreasonable the causing of superfluous injury. Similarly, if the probability of successfully preserving the intended good was remote and the probability of harm great, causing that harm, even unintentionally, would generally be presumptively unjustified.

In sum, in applying *DE* analysis, no economic or other utilitarian calculus can resolve all conflicts created by the clash between values presented in the practical options open to the actor. Rather, only normative standards reasonably respecting the ethical values at stake can provide actors with guidelines for determining the reasonability of choice. Limiting the causing of foreseeable harm to fundamental goods only when unintentional and only when required for the preservation of proportionate fundamental goods reasonably respects such limitations. Stated differently, *DE* provides a normative limitation on one's right to cause harm to another and, at the same time, delineates the parameters of one's ethical right to be free from harm caused by others. As Ripstein had appropriately remarked concerning negligence, but which applies equally to *DE*, "In the idiom of responsibility, norms of conduct mark the line between what a person has done and what is (merely) a by-product of her action."¹⁴⁰

III. CASE ILLUSTRATIONS

Having illustrated significant overlap between *DE* and negligence analysis, it will be useful before concluding this Article to illustrate these parallels concretely. Consideration of a sampling of negligence cases illustrates that similar culpability determinations may be reached under either mode of analysis.

A. *Liebeck v. McDonald's Restaurants*¹⁴¹

In February of 1992, eighty-one-year-old Stella Liebeck purchased a cup of coffee at a McDonald's "drive-thru" and shortly afterward spilled it on herself while attempting to add cream and sugar. The scalding liquid caused third-degree burns to her legs and groin.¹⁴² Ms. Liebeck instituted a civil action against McDonald's after rejecting a settlement offer of \$800. At the conclusion of trial, the jury determined that Ms. Liebeck had been 20% at fault and McDonald's 80%. Accordingly, the jury reduced the damage award from \$200,000 to \$160,000 and awarded Ms. Liebeck \$2.7 million in punitive damages.¹⁴³

During litigation of the case, it was disclosed that McDonald's coffee was brewed at somewhere between 195 to 205 degrees and served at 180 to 190 degrees—more than 20 degrees hotter than comparable eateries. The evidence

140. Ripstein, *supra* note 29, at 661.

141. *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Ct. Aug. 18, 1994).

142. Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1.

143. *Liebeck*, 1995 WL 360309 at *1.

further established that McDonald's had received notice of 700 burn cases in the decade prior to Ms. Liebeck's claim¹⁴⁴ and paid out approximately \$750,000 in settlements.¹⁴⁵ McDonald's admitted it was aware that its coffee caused serious burns, including testimony from a McDonald's quality assurance supervisor who conceded knowing that the coffee could scald the throat and esophagus.¹⁴⁶ Although the cups bore the phrase "CAUTION: CONTENTS HOT," this phrase could barely be distinguished from the trim on the cups, and McDonald's considered it a "reminder" not a warning.¹⁴⁷

In defense of its conduct, McDonald's submitted evidence that the high temperature of the coffee provided optimal taste and was preferred by customers. Consumer studies had revealed that "morning coffee has minimal taste requirements, but must be hot."¹⁴⁸ In any event, McDonald's indicated that it had no intention to alter its coffee brewing practices stating, "[t]here are more serious dangers in restaurants."¹⁴⁹ In further justification of its conduct, an expert for McDonald's testified that the number of burns was "basically trivially different from zero"¹⁵⁰ and "statistically insignificant" when considered in light of the amount of coffee sold by the corporation.¹⁵¹

The reports of the proceedings and statements describing the jurors' evaluation of the case suggest that McDonald's made precisely the argument expected under an economic efficiency analysis: the marginal costs of providing a cooler cup of coffee (customer dissatisfaction and lower sales) justified the statistically small number of burn costs that could foreseeably be caused by such conduct.¹⁵²

The jury, however, concluded that rather than exculpating McDonald's, the evidence justified finding it liable and imposing punitive damages. In rejecting McDonald's defense, the jury appeared to place great weight on testimony provided by McDonald's itself. One juror stated afterwards that the case revealed "callous disregard for the safety of the people."¹⁵³ Another juror indicated that comments about the statistical insignificance of customer burns implied that McDonald's thought that such injuries, like those suffered by Ms. Liebeck, were of little importance because they did not occur often. The juror stated, "There was a person behind every number and I don't think the corporation was attaching enough importance to that The facts were so overwhelm-

144. Consumer News, *Large Award Chills Restaurant Serving Hot Coffee*, 7 LOY. CONSUMER L. REV. 2 (1994).

145. Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 125 (2001).

146. *Id.* at 124.

147. *Id.* at 125.

148. Gerlin, *supra* note 142.

149. *Id.*

150. McCann, *supra* note 145, at 125.

151. Gerlin, *supra* note 142.

152. *See, e.g., supra* notes 63-66 and accompanying text.

153. Gerlin, *supra* note 142.

ingly against the company. They were not taking care of their customers.”¹⁵⁴

The jury’s culpability judgment against McDonald’s illustrates a positive liability determination under application of either negligence or *DE* analysis. McDonald’s was not intentionally burning its customers, nor did the burning of the customers contribute as a means to the end that McDonald’s had in selling such hot coffee. Rather, McDonald’s was intentionally selling hot coffee, acting in view of its legitimate right to provide consumers the type of morning coffee they wanted, and in view of the economic benefit that the company received from such sales. Burns were a foreseeable but unintended risk of that conduct.

In this case, the jury’s conclusion that McDonald’s conduct was wrongful cannot be warranted by appeal to a utilitarian economic efficiency. Rather, jury questioning revealed that it was quite likely the fact that McDonald’s advanced the utilitarian argument that provided the basis for imposing punitive damages.¹⁵⁵ In short, jury members’ statements implied that they believed that McDonald’s intentional pursuit of a legitimate business goal—profit maximization and consumer satisfaction—could not justify the threat of significant unintended harm to the rights of its customers to be free from reasonably foreseeable significant harm. While the occurrence of such incidents may have been rare, the risk was thought to be of sufficient foreseeability and magnitude in light of the good intended to demand that McDonald’s compensate the injured customer.

The jury’s determination, viewed under either negligence analysis or *DE*, illustrates that the conduct of McDonald’s, though in itself intentionally directed at a permissible end, could not justify the unintended, albeit foreseeable, risk of harm, despite its apparent justification as an economical accident.

*B. Chicago, Burlington & Quincy Railroad Company v. Krayenbuhl*¹⁵⁶

In *Krayenbuhl*, a four-year old child’s ankle was severed while playing on a railroad turntable located on private property.¹⁵⁷ The turntable was equipped with a locking device that either was not in place the day of the accident or was defective and had been removed by the children. The railroad was on notice as to all these facts.

Appealing a jury’s verdict in favor of the plaintiff, the defendant-railroad argued that application of the so-called “doctrine of the turntable cases” was erroneous.¹⁵⁸ The doctrine asserted that “where a turntable is so situated that its owner may reasonably expect that children too young to appreciate the danger will resort to it, and amuse themselves by using it, it is guilty of negligence for a failure to take reasonable precautions to prevent such use.”¹⁵⁹

154. *Id.*

155. *See supra* notes 153-154 and accompanying text.

156. 91 N.W. 880 (Neb. 1902).

157. *Id.* at 881.

158. *Id.* at 882.

159. *Id.* at 881-82.

Interpreting this doctrine, the trial court had concluded that when an owner is on notice that young children might be found on premises subject to this danger, the owner “is bound to take such precautions to keep them from such premises, or to protect them from injuries likely to result from the dangerous condition of the premise while there, as a man of ordinary care and prudence, under like circumstances, would take.”¹⁶⁰

Upholding the district court’s application of the doctrine, the Nebraska Supreme Court nevertheless conceded the propriety of defendant’s reference to *Loomis v. Terry*,¹⁶¹ stating that:

The business of life is better carried forward by the use of dangerous machinery; hence the public good demands its use, although occasionally such use results in the loss of life or limb. It does so because the danger is insignificant, when weighed against the benefits resulting from the use of such machinery, and for the same reason demands its reasonable, most effective and unrestricted use, up to the point where the benefits resulting from such use no longer outweigh the danger to be anticipated from it. At that point, the public good demands restrictions.¹⁶²

In considering the defendant’s appeal, the court noted that while it was possible to conceive of ways to make turntables absolutely safe, such practices would indeed make their use impractical.¹⁶³ The court agreed that the freedom to operate trains must be permitted up to the point where good obtained from such use “no longer outweighs the danger to be anticipated from it.”¹⁶⁴ The court noted that a permissible level of danger can involve “occasional[] . . . loss of life or limb.” At the point, however, when the danger to be anticipated from the operation of the railroad exceeds that threshold, the court indicated that the public good would “demand[] restriction.”¹⁶⁵

Applying these principles derived from *Loomis* to the case before it, the Nebraska Supreme Court affirmed the jury verdict for the plaintiff. The court held that the railroad’s failure to have a lock on the turntable was negligent because “the interference with the proper use of the turntable occasioned by the use of such lock is so slight that it is outweighed by the danger to be anticipated from an omission to use it”¹⁶⁶

Krayenbuhl appropriately illustrates the distinction between reasonable and unreasonable levels of foreseeable risk at play both in negligence and *DE* and highlights considerations relevant to determinations of culpability in cases

160. *Id.* at 882.

161. 17 Wend. 496, 500 (N.Y. Sup. Ct. 1837) (“The business of life must go forward, and the fruits of industry must be protected.”).

162. *Krayenbuhl*, 91 N.W. at 882-83.

163. *Id.* at 883.

164. *Id.*

165. *Id.*

166. *Id.*

involving instrumental goods. It is clear, for example, that the railroad had no intent to injure members of the public, nor did the injuries contribute as a means to benefits achieved from the intentional operation of a railroad. The question instead is simply whether the intended good achieved by the operation of the railroad, or the manner of that operation, was reasonable in light of that foreseeable risk of unintended harm.

In explicitly identifying a reasonable and acceptable risk level incident to the provision of railroad service—the occasional loss of life or limb—the court acknowledges that intentional pursuit of important goods can permissibly create general risks of significant harm under conditions of low foreseeability.¹⁶⁷ In such cases, the remotely foreseen risk is permissible because the value to human society of operating locomotives carries with it unavoidable risk of danger to human life. The foreseeable injuries caused by virtue of that risk, however, are judged permissible because the activity creates only a remote risk of harm that does not generally bear on any particular individual.¹⁶⁸

Under the facts of this particular case, however, where children who know no better are subject to a *higher* probability of serious harm, that is, where “injuries [are] *likely* to result from the dangerous condition,”¹⁶⁹ the owner has a duty to restrict his use of railroad facilities and exclude such persons from the property or otherwise protect them from harm through reasonably prudent means. In such a case, the injury caused to a child would be unacceptable under both a negligence analysis and *DE* because the intended good—unrestricted operation of the railroad turntable—would not be sufficiently reasonable in view of the reasonably foreseeable risk of significant harm to the rights of the children presented under the circumstances.

C. *Cordas v. Peerless Transportation*¹⁷⁰

In *Cordas*, a negligence action was instituted by a mother and child injured by a runaway taxi-cab after the driver had abandoned the vehicle in an effort to escape the lethal threats made by his passenger. The passenger had committed a robbery and commandeered the cab in an attempt to flee the scene of the crime. The plaintiffs in this case argued that:

[T]he value of the interests of the public at large to be immune from being injured by a dangerous instrumentality such as a car unattended while in motion is very superior to the right of a driver of a motor vehicle to abandon same while it is in motion even when acting under the belief that his life is in danger and by abandoning same he will save his life.¹⁷¹

167. *Id.* at 882.

168. *Id.*

169. *Id.* (emphasis added).

170. *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198 (N.Y. City Ct. 1941).

171. *Id.* at 200.

The evidence presented at trial indicated that the cab driver, immediately before jumping from the vehicle, took the car out of gear (presumably putting it into neutral), pulled the emergency brake, and jammed on the foot brakes.¹⁷²

Dismissing the plaintiffs' complaint for failure to state a claim in negligence, the court noted that the driver's actions could not be "legally construed as the proximate cause of plaintiff's [sic] injuries . . . unless nature's first law [of self-preservation] is arbitrarily disregarded. . . . '[W]here it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself.'"¹⁷³ The court further noted that while such an act might be negligent under normal circumstances, it would not necessarily be negligent in emergency situations, that is, "if performed by a person acting under an emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication."¹⁷⁴

On the facts of this case, the cab driver had no intention of physically harming the plaintiffs, nor did that foreseeable harm play any role as a means to the safety obtained by abandoning the vehicle. Rather, the harm caused to the plaintiffs was nothing other than an unintended but foreseeably risked side-effect of abandoning a moving vehicle. In determining whether creating such a risk was unlawful, however, the court specifically and categorically rejected the rule advanced by the plaintiffs that would require an actor to sacrifice his own life rather than create substantial threats to "the public at large."¹⁷⁵ The court held instead that the right to create such risks is consistent with the right of every person to seek to preserve his or her own life.¹⁷⁶

This analysis confirms the fundamental similarity of negligence to *DE* by illustrating that intentional pursuit of certain types of goods may in some circumstances justify causing unintended, albeit foreseeable, harms to fundamental human goods.¹⁷⁷

Especially noteworthy for understanding the operation of *DE* reasoning in the law is the court's statement that the driver's actions could not be "legally construed as the proximate cause of plaintiff's injuries" ¹⁷⁸ The notion of proximate cause and its related concept of "cause-in-fact" are introduced in legal analysis precisely to isolate those particular causes of injury that function as appropriate bases for legal culpability and punishment. "Proximate causes" are thus distinguished from the myriad of other causes of occurrences or events

172. *Id.* at 199-200.

173. *Id.* at 201 (citing *Laidlaw v. Sage*, 52 N.E. 679, 690 (N.Y. 1899)).

174. *Cordas*, 27 N.Y.S.2d at 202.

175. *Id.* at 200.

176. *Id.*

177. Other cases cite duress or emergency and risk of harm to third persons to justify such harms. *See, e.g.*, *Lucchese v. San Francisco-Sacramento R.R. Co.*, 289 P. 188 (Cal. Ct. App. 1930); *Thurmond v. Pepper*, 119 S.W.2d 900 (Tex. Civ. App. 1938).

178. *Cordas*, 27 N.Y.S.2d at 201.

that are regarded as lacking in culpability and free from legal liability.¹⁷⁹

Factors determining what constitutes proximate cause may vary. In many contexts, what constitutes a proximate cause cannot be defined merely by its character as a cause-in-fact, that is, as a factor having a direct physical causal connection between conduct and an effect. Rather, the finding of a proximate cause often depends upon policy considerations incorporating notions of justice and fairness:

This limitation [of proximate cause] is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to a greater extent, however, the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.¹⁸⁰

The usefulness of the concept of proximate cause for understanding *DE* and its role in negligence analysis (as suggested by the *Cordas* case) is that it uncontroversibly illustrates in a legally familiar context the fact that sometimes one's conduct—though a direct cause-in-fact of foreseeable “evil”—may not be held to be a culpable cause in the legal sense. “Causation-in-fact” does not in all circumstances carry with it the notion of liability-bearing cause.

In *Cordas*, the cab driver's conduct was undeniably a cause-in-fact of the harmful effect as a sine qua non and substantial factor in effecting the harm. Yet, in view of the absence of intent to cause the harm, combined with a sufficiently reasonable intended good aimed at by the actor's conduct, the court found that the actor's conduct could not constitute a “legal” cause of the unintended, foreseeable harm caused thereby.¹⁸¹

In both negligence and *DE*, one's conduct may causally bring about or be a cause-in-fact of harmful consequences. Nevertheless, such conduct will not be judged a culpable or a “proximate cause” of that harm if the harm is in fact unintended and is judged reasonable in light of the actor's intention to preserve a fundamental good.

*D. Eckert v. Long Island Railroad Company*¹⁸²

In *Eckert*, a three- or four-year-old child was spotted upon a railroad track directly in the path of a negligently operated train. Henry Eckert, plaintiff's

179. “In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would ‘set society on edge and fill the courts with endless litigation.’ As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.” KEETON, *supra* note 22, §41, at 264 (footnote omitted).

180. *Id.* at 264.

181. *Cordas*, 27 N.Y.S.2d at 201.

182. 43 N.Y. 502 (1871).

decedent and husband, seeing the tragedy about to unfold, ran to the tracks, snatched up the child, and tossed the child safely to the far side of the tracks. Eckert himself, however, carried forward by momentum, was unable to stop short and attempted to vault the tracks. Unfortunately, Eckert failed to clear the track, was struck by the train, and died from his injuries.¹⁸³

In answer to a negligence action brought by Eckert's wife, the defendant-railroad asserted contributory negligence against Eckert.¹⁸⁴ The defendant argued that because Eckert could have foreseen the risk of harm or death created by his conduct, he was negligent. As the dissent in *Eckert* explained, restating the railroad's position:

One who with liberty of choice, and knowledge of the hazard of injury, places himself in a position of danger, does so at his own peril, and must take the consequences of his act. This rule has been applied to actions for torts as well as to actions upon contract, under almost every variety of circumstance.

....

... The testator had full view of the train and saw, or could have seen, the manner in which it was made up, and the locomotive attached, and the speed at which it was approaching, and, if in the exercise of his free will, he chose for any purpose to attempt the crossing of the track, he must take the consequence of his act.¹⁸⁵

The majority opinion, however, rejected the dissent's analysis and affirmed the jury verdict in favor of Eckert's wife.¹⁸⁶ The court found that under the relevant rule of law, the evidence supported the finding that Eckert was not negligent.¹⁸⁷ Distinguishing the facts of the case before it, the court agreed that Eckert's conduct would have been grossly negligent if his purpose in acting had been merely for the protection of property or for some other private purpose.¹⁸⁸ Given that the purpose of conduct was to save the life of another, however, similar reasoning did not apply:

The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and

183. *Id.* at 503-04.

184. This case appears to represent an early tacit adoption of the modern rescue doctrine as a way to avoid defendants' assertion of contributory negligence against the plaintiff. *Cf.* *Dillard v. Pittway Corp.*, 719 So. 2d 188, 193 (Ala. 1988) ("The rescue doctrine arose as a way to establish causal relation between the action of the defendant and the harm to a rescuer and to prohibit the negligent defendant from using the affirmative defenses of assumption of the risk and contributory negligence against the rescuer.").

185. 43 N.Y. at 507 (Allen, J., dissenting).

186. 43 N.Y. at 505.

187. *Id.* at 505-06.

188. *Id.* at 506.

voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless.¹⁸⁹

The majority opinion in *Eckert* ties together many of the elements of negligence and *DE* discussed above.¹⁹⁰ First, the opinion rejects the application of contributory negligence to the decedent's conduct, illustrating that under the law actors will not always be regarded as culpable for causing foreseeable, seriously harmful consequences. Under certain circumstances, intended ends may justify acceptance of significant foreseeable but unintended harm risked by their conduct.

As explicitly confirmed by the court's discussion, the criterion for determining culpability in such situations depends upon the nature of the good intended compared to the nature of the unintended, foreseeable harm caused.¹⁹¹ In the case of purposeful conduct aimed at protecting interests in property or goods other than human life itself, a correlative risk of significant harm to fundamental human goods, either in oneself or in others, would be unreasonable and therefore unjustified. When, however, the intended good is preservation of life itself or some other fundamental good, not only may one risk foreseen significant harm to property, one may without culpability risk reasonably foreseeable significant harm to oneself or others.¹⁹²

Eckert also confirms the limitations on *DE* suggested above regarding unnecessary harm and considerations of the likelihood of attaining one's intended end. The foreseen level of unintended harm must be within reasonable boundaries and must be necessary to attain one's goal. Unreasonable harm is not permissible. In this context, an actor must also take into account the degree of probability that one's intentional conduct will achieve its intended goal. When risking one's own life to save another would be futile, or when the foreseen but

189. *Id.*

190. Terry in his early formulation of the negligence formula explicitly considered *Eckert* under the various elements of his test. See Terry, *supra* note 38, at 43-44.

191. "Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself." 43 N.Y. at 505-06.

192. RESTATEMENT (SECOND) OF TORTS § 472 cmt. a (1965) reflects exactly the same conclusions: "[A] plaintiff may run a greater risk to his own personal safety in a reasonable effort to save the life of a third person than he could run in order to save . . . animate or inanimate chattels Whether a plaintiff is acting reasonably in exposing himself to a particular risk in order to protect a third person from harm depends upon the comparison between the extent of the risk and the gain to be realized by encountering it, which includes two things: first, the likelihood that the rescue will be successful and, second, the gravity of the peril in which the third person has been placed. It may be reasonable for a plaintiff to take a very considerable risk in order to save a human life."

unintended harm to another created by an effort to preserve one's own life would have little probability of leading to one's survival, such conduct would often be, as the court suggests, "rash or reckless" and therefore unreasonable and impermissible.¹⁹³ As the likelihood of securing the intended good diminishes, justification for causing the risk of unintended harm also decreases.

E. Synopsis

In sum, under either negligence or *DE*, identical conclusions regarding permissibility and impermissibility of conduct may be reached. In *Liebeck* and *Krayenbuhl*, conduct intentionally aimed at a permissible end is judged impermissible because the good the actor intends does not justify the unintended but foreseeable risk of harm attendant upon that conduct. As illustrated in *Cordas* and *Eckert*, however, some instances of intentional conduct are permissible in spite of their unintentional, foreseeable risk of harm.

CONCLUSION

Substantial overlap exists between the legal standard applied for determining culpability under negligence and the conditions provided under double effect analysis. Under each mode of reasoning, substantive distinctions are recognized between intentionally causing harms and causing similar harms when they are unintended, albeit foreseeable side-effects. When faced with situations where an actor contemplates conduct that foreseeably risks causing harm, both theories propose that the determination of whether an action is permissible requires consideration of the normative nature of the values and interests that the actor intentionally seeks to bring about compared to those that are unintentionally threatened.

One important issue suggested by these considerations is the proper treatment under the law and *DE* of unintended effects that are foreseen with relative *certainty*. In negligence, as has been shown, when harm is not purposefully intended, culpability depends not simply upon the probability or foreseeability of harm, but also on the relative value of the intended good effect compared with that foreseeable harm. The foregoing analysis of *DE* and negligence, however, suggests the artificiality of categorically distinguishing situations where an unintended harm is foreseen with less than substantial certainty from those where harm is substantially certain to follow.

Critics of *DE* assert that when harmful effects are foreseen with substantial certainty, any sort of "balancing" between those harms and what is intended is precluded. These commentators assert that the law treats cases with side-effects that are foreseen with relative certainty in a completely different manner than it does harms foreseen with less than certainty.¹⁹⁴

193. 43 N.Y. at 505.

194. See, e.g., 57A AM. JUR. 2D *Negligence* § 30 (2004) ("An act committed intentionally may give rise to an action in negligence if one or more harmful consequences of the act are unintended, but if

Based on the considerations entertained above, it is not apparent on its face why double effect analysis—confirmed in a practical way in the general application of the negligence standard—should cease to apply in legal contexts simply because one moves from a *less than* certain probability of causing an unintended harm to situations where such an effect is foreseen with *substantial* certainty.¹⁹⁵ Opponents of *DE* should be required to explain what warrants the claim that an entirely different set of ethical and legal criteria should *in all circumstances* be applied merely because of the differing degrees in probability of foreseeable but unintended effects.¹⁹⁶

Regardless of the resolution of this broader question, however, the preceding Article argues that the “weighing” of conflicting values in double effect analysis and negligence is not achieved—as proposed by law and economics theory—by imposing a consequentialist-utilitarian reduction of all value to a single concept of “good” and eliminating the relevance of traditional state-of-mind distinctions between intention and foreseeability. Instead, each mode of analysis recognizes that distinct culpability determinations flow naturally and plausibly from an appreciation of the traditional legal distinctions made between various types of goods and harms, and upon whether such goods and harms come about as the result of an actor’s intention or are merely foreseeable.

Under both negligence analysis and the principle of double effect, the stan-

there is substantial certainty that an injury will result from an act . . . that act is an intentional act, not a negligent act.”); Madeline V. Dvorocsik, Note, *Maritime Losses Resulting from Reckless Conduct: Are They Fortuitous?*, 75 TEX. L. REV. 1133, 1140 (1997) (“One who acts with ‘the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.’”). See also Lyons, *supra* note 4, at 512-16 for a critical discussion of the RESTATEMENT (SECOND) OF TORTS section 8A’s treatment of foreseeability with substantial certainty as if there were intent.

195. The lack of justification for this treatment of substantial certainty as intent is strengthened when one considers that substantial certainty itself is a malleable concept modulating from certainty to state of mind considerations bordering on recklessness. See, e.g., Theresa J. Fontana, *Proving Employer Intent: Turner v. PCR, Inc. and the Intentional Tort Exception to the Workers’ Compensation Immunity Defense*, 25 NOVA L. REV. 365, 378-79 (2001):

Presenting evidence in support of an objective finding of intent requires an understanding of what “substantial certainty” means. The court recedes from equating substantial certainty with virtual certainty, and explains the concept as something greater than gross negligence but less than being virtually sure. In *Turner*, the court hinted that substantial certainty may be something closer to “culpable negligence.” Citing *Eller v. Shova*, the Supreme Court of Florida defined culpable negligence as “reckless indifference” or “grossly careless disregard” of human life. The court considers culpable negligence greater than gross negligence, but it is clear the distinction involves a matter of degree.

Id.

196. In fact, contrary to the argument of opponents of double effect who assert that the law “presumes that a person intends the natural and probable consequences of his or her actions,” see *supra* note 1, the law in fact often dispenses with this presumption and distinguishes an actor’s intent as “desire” or “volition” from the causing of harms that are merely foreseen with substantial certainty. For arguments supporting the operation of the principle of double effect in the legal context of conduct in which harmful effects are foreseen with “substantial certainty,” see generally Lyons, *supra* note 4, especially at 493-99 and 408-28.

dard for determining whether conduct aimed at some intended good justifies causing a foreseeable harm presupposes: 1) that under the circumstances the harmful consequence could not itself be intended as a means or an end, and 2) that the foreseen harm not be unreasonable in light of the intended good. If the intended good is reasonable when contrasted to the unintended harm under relevant norms, no culpability will be found; if, however, the foreseeable harm is unreasonable in light of the intended good, such conduct will be deemed culpable.

In short, reflection upon the differing nature of the culpability assessments that arise out of the law's settled distinction between negligent wrongdoing and intentional wrongdoing, rather than providing a basis for rejecting applicability of the principle of double effect in the law, confirms a place for that principle in legal reasoning and theory.