

# *Contributory Negligence: Conceptual and Normative Issues*

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Peter, a pedestrian, negligently crosses a street without carefully checking the vehicular traffic. Doris, a motorist, negligently speeds and strikes Peter, causing him injuries. In Anglo-American jurisdictions, Peter's recovery against Doris will likely be reduced, if not eliminated, under the doctrine of contributory (or comparative) negligence. And it might seem obvious that a plaintiff who is 'at fault' should not fully recover against a tortious defendant. But the grounds for that conclusion are not at all obvious, once one considers the following problems.

First, in saying that Peter is negligent, do we mean that he acted as he should not have? (That, after all, is ordinarily what we mean when we conclude that Doris is negligent.) Or do we mean only that he should incur some of the costs of his conduct? That is, even if it is not the case that he should have acted differently, perhaps he should forfeit some of the legal damages to which he would have been entitled had his conduct not contributed to his own harm. (This, I will argue, is the important but neglected concept of plaintiff 'strict liability' or strict responsibility.)

Secondly, is the *substantive* criterion of contributory fault essentially the same as the criterion of fault towards others? And, at a deeper level, are victim and injurer fault based on similar rationales? For example, fault towards others might reflect the actor's egoism and insufficient concern for the interests of others. Does self-regarding fault reflect a similar lack of concern for others? Yet here, all of the relevant interests affected are the victim's. In what sense, then, does contributory negligence reflect insufficient concern? Alternatively, consider a utilitarian criterion of fault. Does such a criterion apply similarly to other-regarding and to self-regarding harm? (I will suggest serious reasons for doubt.) More promising is a moral parity approach, holding victims to the same standard to which they hold injurers, but this approach, too, has its difficulties. In the end, should we give

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up on the effort to develop a similar standard, and frankly acknowledge that victim 'negligence' is a radically different concept from injurer negligence?

Surprisingly, the non-economic literature on contributory fault is sparse, and pays these questions little attention.<sup>1</sup> My analysis in this essay is exploratory. I try to clarify and differentiate some important concepts, and to identify salient normative dimensions to the problems. Because I seriously doubt that the economic interpretation is sufficient to explain, much less justify, much of existing doctrine,<sup>2</sup> I have chosen not to examine the economic perspective here.

My methodology is both interpretive and normative. I attempt to elucidate and analyze the concepts underlying contributory negligence doctrine in Anglo-American law, and to place those concepts within the broader conceptual, doctrinal, and normative framework of tort law. To a large extent, the analysis is idealized: I examine the extent to which the parties' moral claims ground their legal rights and remedies, without careful regard to practical and institutional constraints.<sup>3</sup> However, some of the analysis might suggest reasons for altering or refining current legal doctrine.

To focus the analysis, I assume the following:

1. Both the defendant's negligence and the plaintiff's negligence causally

<sup>1</sup> Recent non-economic scholarship on tort theory, especially corrective justice scholarship, has focused almost exclusively on the justification of negligence and strict liability doctrines, and has given little attention to the plaintiff's conduct, including contributory negligence and assumption of risk. For example, Richard Epstein's early strict liability theory slights the topic of contributory negligence. RICHARD EPSTEIN, *A THEORY OF STRICT LIABILITY* (1980), 83-131 (rejecting contributory negligence as a separate defense, but distributing many current contributory negligence cases within the categories of causal defense (e.g., based on the victim's 'compulsion'), statutory defense, assumption of risk, and victim trespass). George Fletcher, in elucidating his non-reciprocal risk argument, only briefly mentions the doctrine, concluding that a victim who imposes excessive risks on others may justifiably be barred because it is then no longer the case that the tortious injurer has imposed nonreciprocal risks on the victim. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 549 (1972). Fletcher also nonetheless acknowledges that the reciprocity paradigm cannot explain why a victim is considered contributorily negligent when he imposes risks only on himself: *id.* at 549 n. 44. Finally, Stephen Perry's recent writings suggest that corrective justice should be understood as posing the following comparative inquiry: among those who are causally responsible for a harmful outcome, who should pay?: Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 499, 512-13 (1992). This approach might entail reduction or forfeiture of damages due to contributory fault. To date, however, Perry has not fully spelled out the rationale for the comparative judgment.

<sup>2</sup> Some criticisms of the economic approach include Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L. J. 697, 703-21 (1978); Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985). In any event, I am interested in pursuing a different interpretation, one that is under-developed in the existing literature.

<sup>3</sup> Moreover, I focus much more on what constitutes victim negligence and victim strict responsibility and on whether such conduct should affect recovery at all than on the question of how to compare the injurer's tortious conduct to the victim's negligence or strict responsibility under a comparative fault regime.

contributed to the plaintiff's harm in a legally sufficient way.<sup>4</sup> This includes the notion of cause-in-fact: a reasonable precaution by either party would have avoided the entire harm that actually occurred.

2. The judgment that the plaintiff is negligent is based only on the risks of harm he creates to himself, not the risks of harm he creates to others. (Later in the chapter, I relax this assumption.)

Finally, two matters of terminology. For simplicity, I use the term 'contributory negligence' as a shorthand for either traditional contributory negligence, which was a complete bar to recovery, or modern comparative negligence, where plaintiff's negligence reduces but need not bar recovery. I also use the terms 'negligence' and 'fault' interchangeably.

### I. CONTRIBUTORY NEGLIGENCE OR CONTRIBUTORY STRICT RESPONSIBILITY?

Consider first the question whether contributory negligence entails that the plaintiff should have acted otherwise. As I will explain, the concept of *injurer* fault does entail that the injurer should have acted otherwise, since injurer fault means conduct that is *deficient* relative to a standard of reasonable care. We then face the following question: Does contributory negligence rely on a similar *deficiency view* of fault?

We may conceptualize an injurer's ex ante options as follows:

- (1) Do not engage in the tortious activity (e.g., do not act negligently);
- (2) Engage in the tortious activity (e.g., act negligently) but pay for the harm that you cause;
- (3) Engage in the tortious activity (e.g., act negligently) but *do not* pay for the harm that you cause.<sup>5</sup>

To say that a defendant is negligent is to say, at least, that society prefers option (1) to option (2). That is, the defendant should have acted otherwise, by taking the precaution of not engaging in the tortious activity. This interpretation supposes that defendants should not treat negligence as a legitimate option, as simply a form of pricing, per option (2). To put the

<sup>4</sup> Conventionally, both the defendant's negligence and the plaintiff's negligence must be causes-in-fact and proximate causes of the harm: RESTATEMENT (SECOND) OF TORTS (1963), § 465. Thus, ordinarily, the following propositions must hold: if Doris had acted with due care, the harm to Peter would not have occurred; if Peter had acted with due care, his harm would not have occurred; and the type of harm that occurred was reasonably foreseeable (or was sufficiently direct).

<sup>5</sup> I proposed this tripartite manner of conceptualizing an *injurer's* liability in Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL'Y. 849, 875-81 (1992). 'Tortious activity' encompasses activity that creates strict as well as fault liability—e.g., it includes the faultless manufacture of a defective product.

matter in remedial terms, faulty conduct (including negligence)<sup>6</sup> is conduct that society would enjoin, if that were feasible. In practice, of course, a plaintiff ordinarily obtains only the remedy of damages. Still, the point of that remedy is to respect, in some tangible way, the victim's right not to be negligently injured. By contrast, cases of strict liability are instances where society does not necessarily prefer (1) to (2), or where we actually prefer (2); thus, we would not enjoin the activity, but we do insist that the defendant pay for the harm he has caused.<sup>7</sup>

On this *deficiency view* of negligence, a victim has a primary right against the injurer not to be negligently injured. The duty of the injurer to pay damages resulting from the negligent act is secondary to the injurer's primary duty not to act negligently. This view asserts that the injurer's conduct was deficient relative to a standard of reasonable care—specifically, the injurer could and should have taken a specified precaution that, *ex ante*, would be expected to avoid the injury. The deficiency view of negligence is abstract, and is consistent with a variety of negligence criteria and a variety of normative bases for negligence. But it does rule out some views—including both the economic test of negligence (as usually described)<sup>8</sup> and, perhaps, the prevailing English view of negligence.<sup>9</sup>

How does the deficiency view of negligence apply to victims? When we conclude that a victim is contributorily negligent, do we mean that he should have acted otherwise? Or do we believe that his conduct is permissible or even justifiable?

Reconsider the preference options above. When a plaintiff is deemed contributorily negligent, does society prefer option (1)(no contributory negligence) to option (2)(contributory negligence but the plaintiff 'pays for' or absorbs the relevant costs)?<sup>10</sup> Or are we instead indifferent? Or do we even prefer (2) to (1)? In other words, when we say that a plaintiff was contributorily negligent for not taking a specified precaution, do we believe that the plaintiff should have acted otherwise, and that a damage reduction is simply one way of enforcing that moral duty? (That is, in theory, it would be best if the plaintiff were enjoined not to act as he did.) Or do we believe that the plaintiff has a legitimate option not to take the precaution, with the caveat that he must suffer a damage reduction as an appropriate price

<sup>6</sup> 'Fault' in this sense encompasses negligence, recklessness, and unprivileged intentional torts. *See id.* at 868.

<sup>7</sup> Private necessity, abnormally dangerous activities, and strict products liability for manufacturing flaws are all instances of 'strict liability' in this sense.

<sup>8</sup> However, the economic view's utilitarian criterion of faulty behavior, considered alone, is consistent with the deficiency view: *see generally* Simons, *supra*, note 5, at 876–7.

<sup>9</sup> *See infra*, note 21.

<sup>10</sup> To capture the concept of contributory fault, the preference options must be slightly reworded; in (2) and (3), the phrase 'pay for the harm you cause' means 'forfeit some or all of the damages to which your fault contributes'.

for exercising that option? (That is, the plaintiff's conduct is permitted—or even to be encouraged.)<sup>11</sup>

Applying the deficiency view to contributory negligence suggests the following preliminary analysis. A true negligence theory of contributory *fault* supposes that the plaintiff should have acted otherwise, by taking a specified precaution; and if we do not so suppose but still believe that the plaintiff should be disentitled from full recovery, then the plaintiff's dis-entitlement must rest on a kind of *strict* responsibility. On such a *plaintiff's strict responsibility* theory, we are indifferent between the plaintiff taking the precaution, on the one hand, and the plaintiff not taking the precaution but suffering a reduction of damages, on the other; while on a negligence theory, we prefer that the plaintiff take the precaution. I use the term 'plaintiff's strict responsibility' as a conceptual term of art, a default category for any faultless plaintiff conduct that reduces the plaintiff's recovery.<sup>12</sup> Precisely which, if any, types of plaintiff's faultless conduct should have such a legal effect is a separate, and difficult, question, which I explore below.<sup>13</sup>

Courts have not explicitly articulated a 'plaintiff strict responsibility' rationale, but I believe that it underlies many judicial findings of 'contributory negligence'. Consider the controversial seat-belt defense. Many courts have concluded that the trier of fact can view a plaintiff's non-use of an available seat belt as a form of contributory negligence or avoidable consequence that reduces the plaintiff's damages, to the extent that the non-

<sup>11</sup> Similarly, when injurers are found strictly liable, their activity is permitted, or even to be encouraged: e.g., RESTATEMENT (SECOND) OF TORTS (1976), § 520 cmt. b (explaining rationale for strict liability for abnormally dangerous activities).

<sup>12</sup> Jules Coleman uses the phrase 'plaintiff's strict liability' in a different sense—to describe situations in which tort law leaves the loss on the plaintiff, especially the common situation in which a rule holding a defendant liable only if he is at fault permits the nonfaulty defendant to cause harm to the plaintiff without liability: JULES L. COLEMAN, *RISKS AND WRONGS* (1992) 226–33. In my sense, 'plaintiff's strict responsibility' refers to a legal rule, based on the plaintiff's conduct, that leaves some of the loss on the plaintiff even though the defendant has acted tortiously. See also Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1066 (1972) (identifying assumption of risk as a form of plaintiff's strict liability).

<sup>13</sup> One might object that the distinction between the plaintiff's contributory negligence and the plaintiff's strict responsibility is not meaningful because, in either case, the legal consequence (forfeiture of some damages) is the same. But this objection is unpersuasive. First, a plaintiff's strict responsibility rule could have a different remedial effect than a plaintiff's contributory negligence rule—for example, assumption of risk as a form of the plaintiff's strict responsibility might result in no recovery, while contributory negligence might result in comparative apportionment. And even if the remedial effect is the same, the distinction between options (1) and (2) does illuminate the substantive criterion of plaintiff's fault, by clarifying the difference between a negligence theory and a strict liability theory. The plaintiff is negligent if, but only if, he should have acted otherwise; he is strictly responsible if that is not, or need not be, the case. And a negligence theory, unlike a strict responsibility theory, requires identifying precautions that should have been taken, and identifying the substantive ideal by which we judge what the injurer 'should' have done.

use increases the severity of his injury. But a surprising number of courts have refused to allow juries to consider non-use of a seat belt as contributory fault.<sup>14</sup> One reason for these courts' hesitancy might be a judgement that non-use of seat belts is widespread, and, in part for that reason, is not negligent behavior that we would wish to change. And it might seem improper to reduce a plaintiff's recovery on the basis of conduct that we cannot say should have been otherwise.

One could, however, defend reducing the damages of a plaintiff who fails to use his seat belt without being committed to the view that such non-use is conduct that ought to have been otherwise. An alternative, *plaintiff's 'strict liability' or strict responsibility rule* would be this: although the plaintiff has done nothing faulty in failing to wear a seat belt, he should 'pay' for his self-directed risky behavior to the extent of suffering a reduction in recovery against the defendant.<sup>15</sup> In other words, the defendant should not be required to 'subsidize' the plaintiff's risky behavior.<sup>16</sup>

Courts have explicitly recognized only one category of nonfaulty victim behavior that can preclude recovery—assumption of risk, a doctrine that rests on consent.<sup>17</sup> This failure to recognize the possibility of other categories of plaintiff's strict responsibility is surprising. For it seems that other instances of victim non-recovery or reduced recovery, instances that do not fit within assumption of risk doctrine, are better analyzed as a form of plaintiff's strict responsibility. Of course, we would then need to define and justify appropriate categories of plaintiff's strict responsibility. I explore these questions further below.

This preliminary analysis remains incomplete, however. For it overlooks a crucial asymmetry between the negligent defendant's duty to the plaintiff and the negligent plaintiff's 'duty' to the defendant. A plaintiff has a pri-

<sup>14</sup> See, e.g., *Swajian v. General Motors Corp.*, 559 A.2d 1041 (R.I. 1989). Some courts are troubled by whether failure to use a seat belt should be classified as contributory fault or avoidable consequences. In this chapter, I generally do not distinguish contributory fault that causally contributes to the accident itself from avoidable consequences or mitigation of damages.

<sup>15</sup> In a literal sense, of course, it is not the case that the victim is 'strictly liable' or must 'pay' the injurer. If the victim declines to sue the injurer, the injurer has no legal claim against the victim. Accordingly, the phrase 'victim strict responsibility' is preferable to 'victim strict liability', the phrase more often used in the literature. See Calabresi & Hirschoff, *supra*, note 12, at 1066. Both phrases are intended to draw an important contrast with 'victim fault', i.e., to denote a reason other than the victim's fault for the victim's nonrecovery or reduced recovery. I thank David Owen for emphasizing the potential confusion engendered by the 'victim strict liability' formulation.

<sup>16</sup> Of course, further argument is needed in order to define and defend any victim strict responsibility criterion, such as this criterion of liability for 'risky' behavior.

<sup>17</sup> See generally Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. Rev. 213 (1987). The consensual nature of assumption of risk explains why the seat-belt defense is not best analyzed as an instance of assumption of risk. For the passenger who declines to wear a seat belt does not consent to another motorist not using due care: *id.* at 221 n.30.

mary right that a defendant not act in a negligent manner, a right that ideally would be protected by injunction and that, as a second-best remedy, is protected by damages. But a defendant has no independent primary right of that sort against a negligent plaintiff. Rather, a defendant has only a *conditional* right—a primary right that the plaintiff not act negligently, or a secondary right that the plaintiff bear some portion of the harm that the plaintiff negligently causes, but, in either case, a right that the defendant can exercise *only if* the plaintiff is vindicating his primary or secondary rights against the defendant. If the plaintiff chooses not to seek any remedy, the defendant has no legal right against him.

But now we have a problem. The conditional nature of the defendant's right against the plaintiff seems to undermine the deficiency view of contributory negligence itself. For the defendant's rights against the plaintiff arise only if the plaintiff seeks a remedy against the defendant. That seems like a very weak sense of 'fault', a very weak sense in which the plaintiff 'should have done otherwise'. If the plaintiff had not chosen to sue, perhaps it would no longer be the case that the plaintiff 'should have done otherwise'. Indeed, limiting a plaintiff's remedy because of his 'fault' might always be an instance of plaintiff strict responsibility, not of plaintiff negligence; for it seems that we are indifferent to whether a plaintiff acts negligently except in so far as he sues, yet it is not the case that we are indifferent to whether a defendant acts negligently except in so far as the plaintiff sues.

This objection is powerful. To meet it, we need a defensible concept of fault that can explain the sense in which a victim's purely self-regarding conduct is deficient, but that does not depend on whether the victim chooses to seek a remedy against the injurer, or even on whether the victim interacts with an injurer. The basic idea is this. When we define an *injurer's* conduct as faulty, we mean that she should have acted differently; and that moral duty helps ground a legal duty of the injurer to the victim, to be liable to an injunction or for damages. When a *victim's* conduct is faulty, we mean that he should have acted differently; but now the moral duty grounds a different, more limited legal duty. Rather than justifying a direct, unconditional legal right in any other party, the moral duty of the victim justifies only a limitation upon the victim's legal rights against the injurer.<sup>18</sup>

On this account, we deem the victim's conduct deficient, apart from whether the victim chooses to sue the injurer. At the same time, that deficiency is only relevant in private law if the victim does bring a lawsuit, for a simple reason: the victim's moral duty does not otherwise affect any

<sup>18</sup> For a careful account of the relation between moral and legal rights, see J. Raz, *Legal Rights*, in 2 *PHILOSOPHY OF LAW* (Jules L. Coleman (ed.), 1994), 67.

other private individual's interest to a sufficient degree to warrant legal intervention.<sup>19</sup>

This account still leaves us with a troubling question. How often is contributory negligence really an instance of deficient conduct, i.e., conduct that we believe should have been otherwise, even if the victim had not chosen to pursue a remedy? Often, a victim is morally entitled to act as he wishes if his conduct does not affect others<sup>20</sup>—as, perhaps, when he chooses not to use a seat belt. In such cases, if we still believe that his imprudent conduct should limit his legal remedies, that belief must rest on what I have called a 'victim strict responsibility' rationale. Thus, in the end, victim strict responsibility rather than victim contributory negligence might be the ground for reducing a victim's legal remedies much more often than would first appear.

## II. SUBSTANTIVE RATIONALES FOR LIMITING PLAINTIFF'S RECOVERY

Thus far, I have focused on some critical conceptual issues. We have seen that the deficiency view of negligence, together with the conditional nature

<sup>19</sup> If the victim's moral duty does not create a direct legal or even moral right in another party, is it really a *moral* duty? On several defensible moral views, it is. Kant recognized moral duties to oneself, and many utilitarians would insist that the duty to maximize utility applies to choices among one's own interests as well as to choices between one's interests and another's.

<sup>20</sup> This condition is important, however. Sometimes the victim's conduct *does* affect or harm others, in such a way that the victim is not morally entitled to act as he wishes. I am not referring to the 'harm' the victim causes the injurer simply by increasing the injurer's potential damages to the victim—'harm' for which the injurer can receive full compensation simply by paying less in damages to the victim. Rather, I refer to two special ways that the victim's imprudence can affect the injurer, two forms of harm for which the injurer cannot so easily be compensated. Specifically, the victim's negligence sometimes causes the injurer to take special precautions (e.g., an evasive driving maneuver). And the victim also harms the injurer by implicating the injurer in the accident: if a driver's vehicle collides with a negligent pedestrian, the pedestrian victim has, through his fault, caused the driver to help bring about an accident that may cause the driver to feel guilty or, at least, 'responsible' in a non-moral sense. (For further discussion, see Simons, *supra*, note \*, at 1709–10.)

The possibility that the victim will harm the injurer in one of these two special ways has an interesting consequence: it helps explain why the seat belt defense and mitigation of damage cases are more likely candidates for a 'victim strict responsibility' analysis than are cases where the victim's negligence contributes to the accident itself. In the latter case, these two special types of harm are much more likely. Hence, it is more likely that we really do prefer that the victim not act negligently as compared to acting negligently but suffering a reduction in his legal remedy. By contrast, we are more often indifferent about whether a victim mitigates his damages as compared to not mitigating his damages but suffering a reduction in his legal remedy. For example, a pedestrian's inattention that contributes to an accident might induce a motorist to take extra precautions, or it might cause the motorist to feel implicated as an agent of the pedestrian's harm. By contrast, a passenger's failure to wear a seat belt (or to see a doctor after the accident) does not induce others to take extra precautions, nor does it implicate the negligent motorist so directly as an agent of the harm that would have been avoided by wearing the seat belt (or by seeing the doctor).



of the injurer's right against a negligent victim, help define the meaning of contributory negligence. But these concepts do not go very far towards explaining why or to what extent a contributorily negligent plaintiff's remedy against a tortious defendant should be limited. Nor do they tell us whether the formal doctrinal criteria for victim and injurer negligence should be identical, similar, or distinct.

In the first part of this section, I explore the merits of some substantive rationales for limiting a contributorily negligent plaintiff's recovery. In doing so, I also evaluate whether the rationales justify identical or distinct formal criteria for victim and injurer negligence.<sup>21</sup> First, I consider a skeptical argument, based on a Kantian view of why negligence is a moral wrong. If the wrongfulness of injurer negligence is premised on the injurer's unjustifiable egoism, the argument goes, then we *cannot* explain why the victim's recovery should be limited. Secondly, I consider a utilitarian account of deficient conduct, an account which initially appears to justify similar treatment of victim and injurer negligence. Both arguments, I will suggest, are problematic. Thirdly, I consider a more promising moral parity approach, under which the victim is required to hold himself to as high a standard of conduct as the standard to which he holds the injurer. Fourthly, I examine a 'forfeiture' rationale: perhaps the reason for reducing the victim's recovery is that he justifiably forfeits his rights. Under this rationale, the legally relevant moral deficiency in a victim's conduct is quite different from the moral deficiency in an injurer's conduct; consequently, the law should employ very different criteria to define victim and injurer negligence. Fifthly, I explore whether the rationale for limiting the plaintiff's recovery changes if one relaxes the simplifying assumption that the plaintiff poses risks only to himself, and one instead assumes that he also poses significant risks to others. Finally, in the second part of this section, I examine more carefully the substantive rationales for limiting a plaintiff's recovery under a *plaintiff's strict responsibility* approach.

#### A. The Negligence Criterion: Injurer v. Victim

Under current doctrine, the formal criteria defining plaintiff's negligence and defendant's negligence are essentially the same.<sup>22</sup> Although in many

<sup>21</sup> In evaluating different understandings of negligence, I mean to include only theories consistent with the deficiency view, i.e., the view that the party should have acted differently. By contrast, consider the apparent view of the English courts that negligence consists merely in creating a reasonably foreseeable risk of harm to others, perhaps without regard to the cost of precaution. See Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURIS. 147, 169–70 (1988). This view *seems* to impose liability even if it is not the case that the defendant should have acted otherwise. If my characterization is correct, then this view is, in my terminology, a strict liability approach, not a negligence approach.

<sup>22</sup> See RESTATEMENT (SECOND) OF TORTS (1963), § 464; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (5th edn.,

cases the actual legal treatment of victims is more lenient, this is often due to differences in the factual situations of victims and injurers.<sup>23</sup> Still, courts occasionally intimate that creating an unreasonable risk to others is more faulty than creating an unreasonable risk to oneself.<sup>24</sup> Is this view justifiable? And should courts even more explicitly differentiate the formal criteria of injurer negligence and contributory negligence? Note that, if the formal rules differ, then precisely the same default (e.g., the same degree of inattention) could be judged differently depending on whether it happens to result in harm to oneself or in harm to another.

### 1. A Kantian View: Injurer Egoism v. Victim Non-egoism?

Consider first the following Kantian view of negligence: negligent behavior is wrongful because the negligent injurer places her own interests above the interests of potential victims.<sup>25</sup> This view of negligence as unjustifiable egoism does not easily carry over to a victim's negligence, as the following example suggests.

Suppose Doris is deliberately speeding in order to arrive home earlier, and Peter is similarly refusing to look to his side because he wants to hurry across the street as quickly as possible. Both Doris and Peter are aware of the unreasonable risks of their conduct, but they each prefer so acting to the alternative of complying with tort law's demand of due care. In the following sense, their situations are asymmetrical. Doris has unreasonably

1984), 453. Section 464(1) of the Restatement (Second) provides: 'Unless the actor is a child or an insane person, the standard of conduct to which he must conform for his own protection is that of a reasonable man under like circumstances.' Comment (a) then states: 'The rule stated in Subsection (1) is essentially the same as that stated in § 283 standard of conduct required of the actor for the protection of others. The standard of conduct which determines the negligence of a defendant and the contributory negligence of a plaintiff is thus the same. . . . [H]owever, the application of this standard to particular facts may lead to different conclusions as to whether the same conduct is negligence or contributory negligence.'

<sup>23</sup> For example, victims are more likely to face emergencies and thus to be excused for their choices. The alleged negligence of victims is more likely to involve an affirmative duty to act, since victims are more often passive in their contribution to harm; thus, judges and juries might be more sympathetic to the victim's unreasonable decision not to rescue himself (i.e., not to rescue the injurer from causing the victim harm). Also, victims might more frequently be unaware of the unreasonable risks they run, which may be viewed as a lower level of fault than consciously creating such a risk.

<sup>24</sup> See, e.g., *Rossman v. La Grega*, 270 N.E.2d 313, 317 (N.Y. 1971) ('between one whose negligent act does harm to others and one whose negligent act does harm to himself . . . the same mechanistic standard ought not to be applied undifferentially as to both') (cited in VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (2d edn., 1986), 6).

<sup>25</sup> In describing this view as Kantian, I follow a familiar interpretation of Kant as speaking to the moral duty of a person not to treat the interests of others only as means to his selfish ends. On a more complex reading, Kant's legal theory is independent of his moral theory, and it is the legal theory that is most relevant to the legal duties of injurers. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995), 50, 84–113. Nevertheless, I believe that Kant's moral theory remains a valuable explanation of the injurer's moral duty not to act negligently. Although additional argument is then necessary to show how that moral duty grounds a legal duty, the additional argument need not derive from Kant.

placed her own interests ahead of the interests of others. Peter has unreasonably placed certain of his own interests (arriving more quickly at a destination) ahead of other of his own interests (including personal safety). From this Kantian perspective, our disapproval of Doris is easier to explain: we are protecting the interests of others, and she is selfishly elevating her own interests over theirs.<sup>26</sup> Our disapproval of Peter is more puzzling. Why not permit him to rank his own interests however he likes, since he will suffer the harm? After all, by definition there can be nothing unduly 'self-serving' about his ranking of some of his own interests over other of his own interests.<sup>27</sup>

This distinction between defendant egoism and plaintiff non-egoism, which Gary Schwartz has helpfully articulated,<sup>28</sup> might appear to justify a systematically different criterion of negligence for defendants and plaintiffs. On closer inspection, however, the distinction is problematic, both factually and normatively. Factually, 'egoism' describes some cases of defendant negligence, but by no means all. For suppose a defendant treats the risk of harm she imposes on others with as much (or as little) concern as she would treat a risk of harm to herself?<sup>29</sup> This possibility is greatest when the defendant does not advert to the risk; forgetful or inattentive persons might possess that characteristic whether they are engaging in activities risky to

<sup>26</sup> This disapproval could be based on utilitarian as well as Kantian principles. The utilitarian approach itself has a strongly egalitarian and Kantian component, in so far as an injurer must give the same weight to the interests of others as she gives to her own: see, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986), 291–2. For further discussion of a possible utilitarian criterion, see the next section.

<sup>27</sup> Here, I am emphasizing that aspect of Kantian morality that prohibits treating *others* only as means. A broader Kantian perspective might explain Peter's wrong as well as Doris's, for Kantian morality recognizes duties to self as well as to others.

We might distinguish cases of inadvertent negligence. Suppose both Doris and Peter were unaware that they were acting negligently, or were unaware of the risks that they were posing (to others or to self). For example, both were inattentive. Here, their fault seems more similar. For example, each might well have acted differently if aware of the risk. Thus, a similar criterion of negligence might properly be applied to each in such a case.

We might also distinguish cases of advertent but good faith negligence. Suppose both Doris and Peter have tried, in good faith, to act with due care, but each fails—for example, Peter is clumsy, or Doris is absent-minded. Here again, their fault seems similar, and it may be sensible to apply a similar criterion of negligence. At least, the egoism/non-egoism distinction does not justify different criteria.

<sup>28</sup> Schwartz, *supra*, note 2, at 722–3.

<sup>29</sup> Compare Richard Epstein's argument for strict liability: a strict liability rule, by requiring injurers to internalize all costs of their activities, requires them to treat harms to others as they would treat harms to themselves: EPSTEIN, *supra*, note 1, at 12–14. The problems with this argument are similar to the problems with the 'egoism' argument discussed in the text. For criticisms of Epstein, see George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 *LAW & PHIL.* 63, 66 (1983); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 *CHI.-KENT L. REV.* 407, 420–2 (1987); Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 *CHI.-KENT L. REV.* 451, 453–60 (1987); Perry, *supra*, note 21, at 148–59. For Epstein's response, accepting some of the criticisms, see Richard Epstein, *Causation—In Context: An Afterword*, 63 *CHI.-KENT L. REV.* 653, 657–64 (1987).

others or risky to themselves. But even when the actor does advert to the risk, the actor often creates risks both to the actor and to others, and often treats them with similar amounts of concern. Suppose a drunk motorist, Mary, is driving very late at night on a relatively deserted road, thus creating risks mainly to herself. If she happens to strike a pedestrian, the 'egoism' explanation of her liability rings false, for she is not treating the pedestrian's safety or concerns any more lightly than she is treating her own.<sup>30</sup> Moreover, sometimes both the risks and the costs of the defendant's decision whether to take a precaution are largely incurred by others; in such a case, 'egoism' cannot explain liability for an unreasonable choice. (Consider a therapist's decision not to detain a patient who threatens to harm another, or a doctor's decision not to give full warnings about medical risks to a patient.)

Normatively, as well, the distinction between defendant egoism and plaintiff non-egoism is problematic. Suppose negligent defendants usually *are* 'egoistic', i.e., they would act more prudently were they to suffer any resulting harm themselves. That, of course, is not true of negligent plaintiffs, for they *do* suffer the harm themselves. But it does not follow that we have more reason to criticize or sanction the negligence of defendants than the negligence of plaintiffs. Consider two problems. First, the 'egoism' argument seems to imply the following unpalatable result. Suppose a negligent defendant would not act differently if he knew for certain that he (rather than the victim) would be *legally liable* for the harm. In this situation, just as in the situation where he would not act differently if he knew that he (rather than the victim) personally would suffer the physical harm, it seems that he is *not* acting 'egoistically', for in neither situation is he giving undue weight to his own interests at the expense of others. Indeed, if 'egoism' were a critical determinant of negligence, then an injurer who satisfied this criterion would not be negligent—a most dubious result.

Secondly, the 'egoism' perspective fails to provide normative direction on a crucial question: what constitutes insufficient concern? Is any degree of preference for one's own interests over the interests of others wrongful? This would be an extremely stringent moral constraint.<sup>31</sup> Moreover, the view that people should show the same degree of concern for the interests of others as for their own interests is also problematic from the other direction. For suppose a victim shows less concern for his *own* interests than for the interests of others. It hardly follows that he is contributorily negligent.

<sup>30</sup> To be sure, the drunk motorist might also obtain a selfish and non-reciprocal benefit—the convenience of being able to transport herself after drinking. If so, the egoism justification can help explain why the conduct is faulty. Conversely, in a small number of cases a plaintiff might act strategically, engaging in risky behavior only because he believes he might obtain a tort recovery. In such a case, 'egoism' underlies his *contributory* fault.

<sup>31</sup> A prominent modern critique of utilitarianism emphasizes the undue stringency of such a view: see DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* (1989), 264–68, 273–83; DWORKIN, *supra*, note 26, at 292–3.

A parent who drives more cautiously when his children are on board is not necessarily contributorily negligent for driving less cautiously when he is alone. A generally altruistic or self-denying attitude does not make one contributorily negligent. Rather, to the extent that contributory negligence consists in unreasonable weighing of interests, it involves the plaintiff making an unreasonable choice to favor certain of his own interests over other of his own interests.<sup>32</sup>

The basic problem that this analysis highlights is the difficulty of establishing a baseline level of due concern, a baseline for determining whether the victim's concern or the injurer's concern is insufficient. The discussion also demonstrates that the factual scenarios for both victim and injurer negligence differ so much in the potential altruistic, egoistic, or indifferent motivations that any single explanation of the difference between victim and injurer fault is bound to fail. In the end, I believe that the 'egoism' approach does not justify a more tolerant judicial attitude towards victim negligence across the board. Rather, it might justify a more precise differentiation according to the varying factors in these different scenarios. For example, courts might make some allowance for injurers or victims who act altruistically (e.g., rescuers) or who do not personally benefit from failing to take a greater precaution (e.g., professionals in some situations).

Still, the 'egoism' perspective brings to light one important distinction between victim and injurer negligence: when the victim chooses to endanger his own personal safety rather than jeopardize another of his interests, we should be cautious before concluding that his choice is negligent. That is, a victim often faces a very difficult choice: suffer a risk of harm to his own person or property, or instead sacrifice some other personal interest (such as the interest in speedily reaching a destination, or in saving the costs of paying attention). The victim has chosen to risk suffering harm, even personal injury. The fact that the victim has made that painful choice gives serious reason for caution before characterizing the choice as negligent. The motive of self-protection is strong: a victim's failure to respond to that motive sometimes evidences a powerful countervailing value. To put the matter a little differently: epistemic modesty suggests caution before characterizing as 'unreasonable' a choice between two difficult options, both of which potentially harm one's own interests. On the other hand, if a victim's negligence is premised on his obtaining socially disvalued personal benefits of the sort that would also render an *injurer* negligent, then such sympathy and leniency are less warranted. A pedestrian who seeks the thrill of dodging speeding cars deserves less sympathy than a merely inattentive

<sup>32</sup> The example of a parent might be misleading, because the parent understandably might treat his children with more than due care. But the analysis would equally apply to a driver who is less cautious when he poses no risk of injury to others (e.g., in a deserted parking lot) than when he does pose risk to others (e.g., when driving near pedestrians).

pedestrian, for such joy-seeking risking of physical harm is socially disvalued, whether it involves risks to self or to others.

## 2. Utilitarian Criterion

In a formal sense, a utilitarian analysis<sup>33</sup> can quite easily adopt a uniform standard for victim and injurer negligence. Consider the familiar Learned Hand formula, which is often interpreted as a utilitarian metric of socially reasonable and unreasonable conduct. Formally, the Learned Hand formula applies as easily to a victim as to an injurer. An injurer is negligent if the burden of taking a precaution (a cost that is typically absorbed by the injurer) is less than the expected value of the harms that the precaution would avoid (harms that are typically absorbed, initially, by others—namely, victims). A victim is negligent if the burden of taking the precaution (again, a cost typically absorbed by the relevant actor—in this case, the victim) is less than the expected value of the harms that the precaution would avoid (harms that are now absorbed by the same actor, the victim).

Once we look beneath the surface symmetry, however, a serious problem arises. The essential justification of utilitarianism as a moral doctrine is that it explains what actions or policies are good by reference to aggregating and maximizing net utility across persons. But how can the Learned Hand doctrine (understood in utilitarian terms) apply to a single person? Do we mean that the best action for him is the one that maximizes his own utility? Although that might seem to be a simple implication of utilitarianism, it is not. For, on a utilitarian view, it is one matter to determine what each person's net 'utility' or 'good' is, and quite another to aggregate and maximize utility across persons. We might let each individual define for himself what counts as 'utility', and at the same time employ a utilitarian maximizing criterion to aggregate 'utility', so defined, over persons.<sup>34</sup> For example, a religious person deciding which self-regarding action is in his own best interest

<sup>33</sup> By 'utilitarian analysis', I refer to one component of the economic approach to tort law—that the measure of 'good' action (e.g., of due care) requires a consequentialist analysis of the net utility of the action (e.g., an analysis of whether the costs of taking a precaution outweigh the benefits). The other important component of the economic approach is this: the main function of liability rules is to induce optimal or 'utilitarian' conduct, so understood. The two components are independent. One might, for example, endorse a utilitarian criterion of what constitutes contributory negligence but reject the second component, believing that contributory negligence rules are unlikely to affect victims' behavior. Of course, the second component is also utilitarian in a broader sense of *maximizing* the good. Still, it is worth analyzing separately the first component, a utilitarian *measure* of the good.

<sup>34</sup> A number of important distinctions are embedded here. One can distinguish between prudence or rational choice as decision-procedures for an individual person, on the one hand, and utilitarianism as a social choice mechanism, on the other: see David Lyons, *Utilitarianism*, in *ENCYCLOPEDIA OF ETHICS* (Lawrence C. Becker & Charlotte B. Becker (eds.), 1992), 1261–8. More finely, one can distinguish between utilitarianism as an actual personal decision-procedure and as a criterion of rightness: BRINK, *supra*, note 31, at 256–62. And one can further distinguish between subjective and objective utilitarianism: *id.* at 211–90.

might not choose between his options in the way that a Learned Hand calculation suggests. Yet utilitarianism can certainly accommodate highly varied individual judgements of the good.

The economic approach to law usually presupposes a subjective theory of value: individuals are in the best position to decide what is in their own best interest.<sup>35</sup> It is therefore strange that the economic approach to the Learned Hand formula, as applied to contributory negligence, seems to adopt an objective theory of value, in so far as a victim might prefer to act in a way that the formula identifies to be 'inefficient'.

One reply is that the contributory negligence defense *does* aggregate utility across persons, for the plaintiff's duty arises only in so far as he would otherwise cause harm to another (by obtaining a remedy against a defendant). So the plaintiff's utilitarian calculus is not purely internal, after all. That calculus encompasses not only the internal burden of taking a precaution, but also the cost of not taking a precaution. And, although it is the plaintiff who most immediately incurs the latter cost, in the form of an injury to self, the defendant also incurs the cost, in the form of legal liability to the plaintiff for that injury.<sup>36</sup>

But I remain unconvinced. On a plausible subjective version of utilitarianism, the judgement that plaintiff is contributorily negligent depends only on the plaintiff's own internal calculus. So the question remains why the plaintiff's valuation is not considered conclusive in evaluating his utility. If the plaintiff judges that the burden of taking a precaution exceeds the expected loss in terms of self-injury (and if, as is not always the case, he is aware of the relevant burden and expected loss), then he would seem by hypothesis to obtain more expected utility from not taking a precaution than from taking a precaution. To be sure, the defendant suffers disutility from being required to pay damages to the plaintiff. And, more generally, a world without a contributory negligence defense is obviously more costly to injurers than a world with such a defense. But these are secondary issues. We first must decide whether the plaintiff has, on some justifiable utilitarian criterion, acted *wrongly*. If he has not, then we need some other theory (perhaps a form of plaintiff's strict responsibility) to explain why his conduct should require some forfeiture of damages.

We might, to be sure, apply an objective form of utilitarianism to both victim and injurer negligence. But even if adequate reasons are provided for adopting this more controversial form of utilitarianism in both contexts, a gap might remain. For such an objective theory of value might disvalue a person's causing harm to others more than his causing harm to himself, for some of the reasons discussed in the 'egoism' section, above, just as it might

<sup>35</sup> See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983), 10.

<sup>36</sup> I thank Steve Marks for articulating this objection.

value one's personal commitments more than his more general social obligations.<sup>37</sup>

Thus, the case has yet to be made that the same utilitarian criterion applicable to injurer negligence should apply equally to a victim's self-regarding negligence. Moreover, even if utilitarian theory does apply to victim negligence, the theory confronts this prominent criticism—that utilitarianism demands too much of people, requiring us to weigh the interests of all other persons as highly as we weigh our own interests.<sup>38</sup> The demanding nature of utilitarian aggregation seems especially troubling in so far as contributory negligence apparently obliges a victim to rescue a tortious injurer. Of all the people in the world who could help out the injurer, why burden the victim? To be sure, this complaint can be exaggerated. For the victim is not really 'required' to rescue the injurer; rather, his making reasonable efforts to do so is a condition of his obtaining a full legal remedy against the injurer. Still, the obligation, even in this conditional form, is unusually severe, in the context of tort law's general aversion to imposing duties to rescue.<sup>39</sup>

### 3. Moral Parity

Another approach, which I will call *moral parity*, asserts that what victims can legitimately expect of injurers, injurers can legitimately expect of victims.<sup>40</sup> In so far as a victim is seeking a remedy based on the injurer's deficient behavior, the injurer has two *prima facie* arguments: first, that the victim should be held to a similar standard of behavior; and secondly, that the victim's failure to do so should limit his recovery. The first claim is a plausible argument, one grounded in fundamental equitable principles. It is most plausible when the behaviors of victim and injurer are indeed most comparable—for example, when each has failed to pay attention *and* when each has posed risks both to self and to others. (Consider, for example, a collision between two vehicles, with each driver paying insufficient attention.) Problems quickly arise, however, whenever a dissimilarity is introduced. Some degree of inattention by a victim, for example, might be a lesser moral lapse than the same degree of inattention by an injurer, if the victim's inattention is likely to produce only self-regarding harm and the injurer's is likely to produce harm to others. (Consider a collision in which the vehicle of a daydreaming driver strikes a daydreaming pedestrian.) In

<sup>37</sup> See BRINK, *supra*, note 31, at 264–8, 273–83.

<sup>38</sup> See *id.* at 264–8.

<sup>39</sup> See SIMONS, *supra*, note \* at 1737–44, for a more extended discussion of whether contributory negligence imposes an unduly burdensome duty to rescue.

<sup>40</sup> Ernest Weinrib seems to endorse a similar view of contributory negligence in his new book: see WEINRIB, *supra*, note 25, at 169, note 53 (arguing that contributory negligence 'expresses an idea of transactional equality: the plaintiff cannot demand that the defendant should observe a greater care than the plaintiff with respect to the plaintiff's safety'). For a discussion and rejection of the 'moral parity' approach, see Schwartz, *supra*, note 2, at 722–3.



such cases, the parity argument might have little independent justificatory force.

Moreover, it is unclear how this equitable 'parity' principle applies when the injurer's tort liability is strict or is based on intentional or reckless behavior. I doubt that the principle should be taken to its logical extreme, so that, for example, the victim is strictly responsible for the harms he causes so long as the injurer's liability is strict. But why is parity an appropriate principle for negligence but not for strict liability?<sup>41</sup>

If the victim has not satisfied the standard of care to which he is holding the injurer, moral parity suggests that his default should limit his recovery. But how should the recovery be limited? If we pursue the argument of moral parity literally, perhaps a simple splitting of liability makes sense, with the victim recovering half of his damages. However, a pure comparative fault apportionment (according to relative fault) also has several advantages. It allows consideration of the degree to which each party actually deviated from a standard in a given case, even if the standard (for example, requiring a reasonable degree of attention) is formally the same for both victims and injurers. More significantly, it allows variation in the underlying standard itself (for example, requiring a lesser degree of attention from victims who reasonably foresee risk only to themselves than from injurers who reasonably foresee risk only to others).

#### 4. Forfeiture of a Remedy

The question before us is why the victim's moral duty to act differently translates into the injurer's legal right to condition the victim's remedy. Perhaps the answer is that an actor who should have acted differently justifiably *forfeits* the right to obtain a full remedy. One version of the forfeiture rationale is that any plaintiff who seeks a legal remedy must have

<sup>41</sup> Perhaps strict liability principles are special: they trump the parity principle, because they are designed to provide victims broader redress than a negligence principle provides. A related argument, which Wendy Gordon has suggested to me, is this: if a victim shows very little regard for his own interests in safety, then the injurer is entitled to show a similarly slight regard for those interests, at least to the extent of entitling the injurer to provide a lesser damage remedy. This argument, while promising, may prove too much. Suppose a victim shows essentially no regard for his own interests—for example, he engages in extraordinarily reckless and dangerous acts. It does not follow that a potential injurer is entitled, in his basic actions, to create much greater risks to such a victim than to a more prudent potential victim. Perhaps the argument makes only the more limited claim that the victim's low regard for his own interests warrants at least a partial forfeiture of his tort remedy. But even this limited claim is problematic. First, the fact that the victim values his own health or safety much less than society believes he should might be a reason for the law to compensate him as fully as possible, as a way of treating his life as valuable. Secondly, when a victim chooses an activity that endangers himself, he obtains independent value from the exercise of choice. But when an injurer treats the victim with similarly low regard, the victim has made no choice and thus obtains no such value. (I thank Clay Gillette for this last point.)

clean hands; a contributorily negligent plaintiff does not.<sup>42</sup> If forfeiture is a persuasive rationale, then we should examine much more carefully the reasons why *any* right-holder—whether his claim is in tort or contract, or in private or constitutional law—should suffer a loss or limitation of remedy because of his own conduct.<sup>43</sup>

Under a forfeiture approach, we might give up any attempt to reconcile the criteria of victim and injurer negligence. At least two strong arguments support giving up this attempt. First, the victim's legal duty not to be negligent, unlike the injurer's duty, is distinctly conditional, depending entirely on the victim's decision to seek a remedy from the injurer. Secondly, the victim might pose risks of harm entirely to himself, so it is not at all obvious that formally equal criteria (e.g., 'pay a reasonable degree of attention') have equal moral significance whether applied to victims or to injurers.

If we do give up the attempt, then the criteria of victim and injurer negligence could vary quite dramatically.<sup>44</sup> Victims might be considered negligent only for conduct that, if engaged in by injurers, would be considered gross negligence. Indeed, the concept of victim negligence could be extremely narrow: for example, victims might be considered negligent only in so far as their conduct creates unreasonable risks to *others*.

In the end, perhaps only the convenience and familiarity of the label 'negligence' rather than an incisive analysis of underlying rationales explain why current doctrine employs similar criteria for contributory negligence and injurer negligence.

##### 5. Pure and Impure Victim Negligence: Risks to Self and Risks to Others

To clarify the analysis, I have assumed to this point that the victim's failure to take a reasonable precaution poses risks of harm only to himself, not to others. But many actual instances of victim negligence are not so pure. In what I will call 'impure' instances of victim negligence, the victim's failure to take a reasonable precaution poses risks to others as well as to himself. Imprudent conduct by pedestrians, for example, is a relatively pure type of victim negligence (though even here, the pedestrian's lack of care can cause injuries to others, e.g. to bicyclists and motorists who swerve to avoid the pedestrian, or who strike the pedestrian and then suffer further harm themselves). Imprudent conduct by motorists who happen to suffer

<sup>42</sup> See PROSSER & KEETON, *supra*, note 22; 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, *THE LAW OF TORTS* (2d edn., 1986), 276–9 (criticizing this rationale).

<sup>43</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS (1979), § 350 ('damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation').

<sup>44</sup> To warrant the name 'negligence', however, I would still insist that victim negligence satisfy the deficiency criterion and constitute a failure to take a precaution that a reasonable victim would have taken.

only injury to themselves is a more impure type of victim negligence, since the motorist's lack of care typically poses significant risks to others.

When we relax the assumption that victim negligence is pure, two questions arise. First, if the very same default—such as inattentive driving—creates both risks to self and risks to others, should both types of risk be considered when determining the victim's contributory fault? Secondly, if the answer is yes, does the circumstance that the victim created risks to others as well as to self strengthen or weaken the substantive rationale for limiting the victim's recovery?

With respect to the first question, some have given a negative answer. For example, Gary Schwartz argues that courts should ignore risks to others in deciding whether a plaintiff was contributorily negligent.<sup>45</sup> The rationale is that such risks are already considered in any case in which they do result in harm to another, for the 'victim' then becomes an *injurer*. On this reasoning, considering risks to others when assessing plaintiff's contributory fault is an improper form of 'double-counting'.<sup>46</sup>

I find this argument unpersuasive. Imagine a case in which the following is true: the risks that the 'victim' poses only to himself are not quite serious enough to make his failure to take a precaution contributorily negligent; similarly, the risks that he poses to others are not quite serious enough to make his failure to take a precaution negligent; but the combined risks do suffice to make a precaution desirable.<sup>47</sup> All things considered, the precaution should be taken. In such a case, compartmentalizing the risks is a mistake. But this suggests that, in every case, the risk to others is at least relevant, if not dispositive, in determining the plaintiff's own negligence.

Schwartz's concern about 'double-counting' might reflect a fear that a party who is clearly negligent with respect to others but who creates only a very small risk to himself will be found contributorily negligent, a result that Schwartz might believe to be improper. But is it? Suppose that a driver of a large car swerves dangerously around an inattentive pedestrian instead of stopping for the pedestrian. Unexpectedly, the car skids and collides into a concrete abutment. The driver then sues the pedestrian, who claims that the driver was contributorily negligent. *Ex ante*, the risks of *self*-injury from the driver's risky maneuver appear extremely small; by themselves, they would not warrant contributory fault liability. But it does not

<sup>45</sup> Schwartz, *supra*, note 2, at 723–4. John Fleming appears to agree. See JOHN G. FLEMING, *THE LAW OF TORTS* (7th edn., 1987), 242, 248, n. 51 (surveying English and Commonwealth law).

<sup>46</sup> Schwartz, *supra*, note 2, at 724.

<sup>47</sup> Employing the Learned Hand formula, suppose that the marginal cost of taking a precaution is \$50, the expected value of the risks to self that the precaution would avoid is \$40, and the expected value of the risks to others that the precaution would avoid is \$40. (I use this formula for expositional purposes only; I do not assume that the Learned Hand formula is the best elucidation of the concept of negligence, nor that, if it is the best elucidation, it must be understood to express economic efficiency.)

follow that the driver is not contributorily negligent. Here, where the very same precaution (using more care in maneuvering past a pedestrian, or waiting for the pedestrian to cross) would avoid risks to others *and* to self, it would seem entirely proper to consider both types of risks when assessing the plaintiff's contributory fault.<sup>48</sup>

Thus, I believe that all of the risks that a person creates because of his failure to take a precaution—risks to others as well as to self—should be considered in assessing his contributory negligence. Of course, in many cases, adopting my view or Schwartz's contrary view will make no difference to the result, since the magnitude of the risks that a party creates to himself alone often will be dispositive of his contributory negligence.<sup>49</sup>

If I am correct, then we need to consider the second question—whether the impure rather than pure quality of a victim's negligence strengthens the rationale for limiting the victim's recovery. I believe that it does strengthen that rationale. Most generally, recall that the victim's duty not to act negligently is conditional (on the victim seeking a recovery), while the injurer's duty not to act negligently is not. And, as we have seen, it is much easier to justify a remedy against a negligent injurer than to justify a limitation upon a negligent victim's remedy. In cases of impure victim negligence, however, it is often only a fortuity whether the negligence happens to result in injury to self or injury to others. Thus, it is easier to justify limiting the remedy of a negligent victim, who could just as well have been an injurer. (This is perhaps clearest in those cases where the 'victim' is in fact also an injurer, e.g. an automobile collision where the victim's inattention actually causes harm to another as well as to himself.)

Impure victim negligence also strengthens some of the particular substantive rationales for limiting a victim's remedy. Thus, with respect to the 'egoism' argument, impure victim negligence is more likely than pure victim negligence to demonstrate unjustifiable preference for one's own interests—though it is still less probative of such a preference than is pure

<sup>48</sup> Consider this analogy. In determining an *injurer's* negligence liability, most would agree that the fact finder should evaluate the risks to foreseeable plaintiffs in several distinguishable classes, such as the classes of pedestrians and of other drivers. If the negligent driver injures a pedestrian, the pedestrian may, in demonstrating the driver's negligence, point to the risks imposed on other drivers as well as the risks imposed on pedestrians. And an injured other driver may similarly point to the risks to pedestrians. Neither can validly complain of 'double-counting'.

<sup>49</sup> Note the converse problem: should one be liable for negligently harming *another* if the same precaution would have avoided risks to self and risks to others, but neither set of risks is independently sufficient to justify taking the precaution? The solution might be the same—that the risks should simply be aggregated, and that the decision whether a precaution is reasonable should depend on the aggregate risks, whether those risks are to self or to others. But I confess to greater unease here, where the risks necessary to create negligence liability to others are risks to oneself, than in the situation just discussed in the text, where the risks necessary to create a contributory negligence defense are risks to others. Perhaps risks to self have less moral 'weight', for reasons discussed earlier.

injurer negligence (where the injurer poses risks of harm only to others). With respect to the utilitarian argument, impure victim negligence is more clearly socially unreasonable conduct, if one shares my doubt that pure victim negligence is necessarily undesirable from a social perspective. Finally, with respect to the moral parity argument, impure victim negligence greatly strengthens the injurer's claim that the victim's negligence is on a moral par with the injurer's negligence, as I suggested above. For it is often only fortuitous whether and to what extent the victim's default injures himself or instead (or also) injures another.<sup>50</sup>

### *B. Plaintiff's Strict Responsibility*

Earlier, I explained the conceptual distinction between plaintiff negligence (where the plaintiff should have acted otherwise and taken a precaution), and plaintiff strict responsibility<sup>51</sup> where the plaintiff's recovery is reduced even though his conduct might not have been deficient. But we have yet to explore the scope and limits of the victim strict responsibility approach. Once we depart from the constraints of the deficiency approach to negligence, under which we must identify a precaution that a reasonable person would have taken, what is the criterion?

As noted earlier, tort doctrine explicitly recognizes only one category of plaintiff strict responsibility—the plaintiff's voluntary and knowing assumption of a risk. Sensibly, tort law does not recognize a broad category of plaintiff strict responsibility for all harm that a plaintiff could have avoided. The more difficult question, however, is what type of limited categories of plaintiff strict responsibility should be recognized, *beyond* assumption of risk.

One potentially significant category of plaintiff's strict responsibility consists of certain penumbral 'assumption of risk' cases. Assumption of risk would, I believe, have a much more limited scope than it presently enjoys if it were confined to cases in which its consensual rationale clearly applies.<sup>52</sup> But many of the assumption of risk cases that the consensual rationale cannot justify are plausible instances of plaintiff strict

<sup>50</sup> I have here explored whether a victim's creation of risks to others should be considered in determining the victim's negligence, and I have concluded that it should. But the creation of such risks to others also helps demonstrate that the victim is negligent and not merely strictly responsible: at least if the risks to others exceed a certain threshold, their creation helps show that the victim should have acted otherwise.

<sup>51</sup> In their important article, Calabresi and Hirschhoff point out that assumption of risk is a form of plaintiff's 'strict liability' (or what I call plaintiff's 'strict responsibility'): Calabresi & Hirschhoff, *supra*, note 12, at 1066. The authors use the analogy to argue for their own distinctive strict liability principle—the party in the best position to perform the cost-benefit analysis should be 'strictly liable' for the harm 'regardless of whether the other party "ought" to have done what he did': *id.*

<sup>52</sup> Simons, *supra*, note 17, at 247–8. Specifically, I believe that the consensual rationale clearly applies only when the plaintiff prefers the option that the negligent defendant actually

responsibility. Consider, for example, a plaintiff who voluntarily enters into a relationship with a tortious defendant, without consenting to a specific risk.<sup>53</sup> Classic examples include the defendant who lends the plaintiff a car, informing him that the brakes are bad; or the plaintiff who hitches a ride with a drunk driver. Neither plaintiff has fully assumed the risk, on my model, for each plaintiff would have preferred that the defendant had not been negligent (i.e., that he had fixed his brakes, or had not become drunk). But neither plaintiff is necessarily contributorily negligent, either. (If they acted in response to an emergency, for example, their choice to accept the danger might have been reasonable.) Thus, when courts bar recovery in such cases, they are implicitly relying on independent plaintiff strict responsibility policies.

Similarly, some instances that courts denominate 'contributory fault' are better understood as plaintiff strict responsibility. For it is often difficult to say with any confidence that a victim has acted as he should not have, given that the victim himself may incur all of the most tangible costs and benefits of his conduct. This difficulty is especially pronounced when the victim consciously chooses not to take a precaution (such as the use of a seat belt), or when unusual personal values (such as religious belief) explain the victim's choice not to take a precaution. It might not be obvious that the victim should have acted otherwise; nevertheless, we might be warranted in limiting his recovery.

Mitigation of damages cases are especially likely to exhibit these characteristics.<sup>54</sup> The seatbelt non-use cases may here be the paradigm. In another context, a court recently held that a Jehovah's Witness could not rely on her religious objection to a blood transfusion to justify her failure to mitigate damages. The court reasoned that the decedent could not rely on her religious beliefs to justify what would otherwise be unreasonable conduct.<sup>55</sup>

offered to the option that a non-negligent defendant would have offered. A reckless pedestrian who enjoys dodging speeding cars assumes the risk; an inattentive pedestrian who would have preferred that the motorist were not speeding does not assume the risk.

<sup>53</sup> See *id.* at 244–6.

<sup>54</sup> I find it doubtful that failure to attempt to lose weight as directed by a physician is deficient conduct, but courts have held that such a default may be considered a form of contributory fault that mitigates damages: see, e.g., *Tanberg v. Ackerman Invest. Co.*, 473 N.W.2d 193 (Iowa 1991).

<sup>55</sup> *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991). The decedent, badly injured in an automobile accident caused by the defendant's negligence, refused a blood transfusion that would have saved her life. For an extensive discussion of the case, see Note, *Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide*, 67 N.Y.U. L. REV. 1111 (1992). Consider also *Friedman v. State*, 282 N.Y.S.2d 858 (Ct.Cl. 1967), modified, 297 N.Y.S.2d 850 (A.D. 1969). An Orthodox Jewish girl jumped from a stalled chair lift at a skiing facility rather than violate her religious duty not to remain in the lift with an unmarried male. If we assume that a 'reasonable person' would not have jumped from such a height, we might conclude that she acted unreasonably. But we should certainly be hesitant before concluding that her religious beliefs are 'unreasonable'. If we conclude that her religious beliefs

This result is more plausibly defended as follows: although the decedent's decision to honor her religious beliefs is *not* unreasonable, defendant has no duty to subsidize her choice to sacrifice her life in the name of religion.

More generally, perhaps the criteria for plaintiff strict responsibility could be derived by extrapolating the rationales for *injurer* strict liability to victims. Thus, suppose (with George Fletcher) that the defendant's strict liability is based on the defendant's imposition of non-reciprocal risks, or suppose that it is based on the defendant appropriating a non-reciprocal or special personal benefit.<sup>56</sup> The extrapolation approach would employ parallel criteria and limit *plaintiff's* strict responsibility to instances when the plaintiff imposes non-reciprocal risks or obtains a non-reciprocal benefit. For example, perhaps the seat-belt user is obtaining a special benefit by saving the time and trouble of buckling up, even if his not buckling up is a permissible, non-negligent choice; and he must 'pay' for appropriating that benefit, by absorbing some of the costs of his behavior.<sup>57</sup>

However, I doubt that the extrapolation approach is sufficient. Some of the rationales for injurer strict liability do not readily apply to victims—for example, a victim's self-regarding risk is not easily viewed as non-reciprocal. Moreover, plaintiff strict responsibility can be justifiable for reasons other than consensual assumption of risk or extrapolation from injurer strict liability policies. Consider again the Jehovah's Witness blood transfusion case. The patient's choice to decline the transfusion does not, in my view, reflect a full consent to the risk, since he would have preferred not to have been placed in that predicament by the tortfeasor's negligence.<sup>58</sup> Still, fairness principles plausibly justify a rule entitling the patient to decline a blood transfusion but precluding some or all of his recovery.

The failure of courts and commentators to develop arguments for plaintiff strict responsibility outside the assumption of risk context might reflect a lack of imagination. However, it might also reflect a stronger commitment to negligence as the appropriate standard of care for victims than for injurers. There is indeed evidence of such a commitment even within the nominal bounds of negligence doctrine itself. The most striking example is

do not justify her imposing the costs of her behavior on the injurer, then it is more forthright to reduce her recovery on grounds of contributory strict responsibility, rather than contributory negligence.

<sup>56</sup> See Simons, *supra*, note 5, at 863 (discussing *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910)).

<sup>57</sup> Or, in the products liability context, both the manufacturer of a product with a flaw (that due care would not prevent) and the consumer of the product might be considered strictly 'liable', i.e., they might divide the cost of the resulting harm, since each profits both from the product generally and from the manufacturer's decision not to take extraordinary care to avoid all product defects.

<sup>58</sup> Moreover, his choice might justify a limit upon recovery even if the patient had insufficiently specific knowledge of the risks and consequences of refusing treatment to satisfy the broader traditional assumption of risk doctrine.

the courts' greater willingness to individualize the 'objective' test of negligence for victims than for injurers.<sup>59</sup> For example, many courts adopt a dual standard for mental capacity.<sup>60</sup> When a *victim's* contributory fault is at issue, some courts will examine his actual mental capacity to determine whether the particular individual lacked the capacity to take the precaution. But when an *injurer's* fault is at issue, courts are more likely to apply an objective test. Thus, courts tend to conform the contributory negligence test to the party's genuine blameworthiness, eliminating some of the strict liability that inheres in the usual objective test of negligence. Part of the explanation might be a greater reluctance to hold victims to a standard of strict responsibility.

A final strict responsibility issue deserves brief mention here. If a plaintiff *is* held strictly responsible, should 'payment' for his risky choices mean a *complete* loss of the damage remedy that he would otherwise obtain? Note that this is the effect of traditional assumption of risk doctrine: in jurisdictions where assumption of risk doctrine retains its traditional vitality, it serves as a complete bar to recovery. However, I do not believe that the concept of plaintiff strict responsibility necessarily entails this result. More particular conceptions of plaintiff strict responsibility might suggest otherwise. Thus, the view that obtaining a special benefit from not taking care warrants strict liability might only entail that the plaintiff suffer a partial reduction in damages. For example, suppose we believe that a driver failing to use a seat belt falls into this category; it does not follow that his recovery must be completely barred to the extent that the omission caused his own harm.

### III. CONCLUSION

These ruminations about contributory fault suggest some surprisingly undeveloped and fertile issues for future inquiry. When a plaintiff has been negligent in the sense that he should have acted otherwise, should the same criterion of negligence apply that would apply if he were creating risks only to others? Indeed, are there any persuasive reasons *not* to apply a radically different criterion of negligence? Moreover, should the plaintiff's recovery be diminished, outside the category of assumption of risk, even when the plaintiff has not been negligent? What are the justifiable criteria and limits of such plaintiff strict responsibility?

We have also seen a number of reasons for caution before concluding that a victim's self-regarding conduct is negligent. For example, a victim

<sup>59</sup> HARPER, JAMES, & GRAY, *supra*, note 42 at § 2210.

<sup>60</sup> HARPER, JAMES, & GRAY, *supra*, note 42 at § 2210; VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (2d edn., 1986), 6.



often deserves special sympathy in the light of his special predicament, choosing between two evils, the immediate costs of which he must personally bear. Indeed, it might appear that the law is unfair or unduly onerous when it places significant demands on a victim with respect to his own self-regarding behavior. On the other hand, we should not forget that the victim's duty to use reasonable care is merely conditional: it applies only in case the victim seeks a remedy against the tortfeasor.

Any final resolution of these difficult issues, issues about the scope and criteria of plaintiff's negligence and plaintiff's strict responsibility, will depend in part on one's substantive views about the nature and purpose of tort liability. In this chapter, I have been largely agnostic about such views. Under any view, however, the issues resist easy analysis. The reasons that justify a victim's remedy when the injurer has been negligent simply do not suffice to justify limiting the victim's remedy when the victim has been negligent.

