

THE CONSEQUENTIALIST/ NONCONSEQUENTIALIST ETHICAL DISTINCTION: A TOOL FOR THE FORMAL APPRAISAL OF TRADITIONAL NEGLIGENCE AND ECONOMIC TORT ANALYSIS†

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While economic analysis has proved useful in areas of law such as antitrust, tax, corporations, and public utility law, it has only been explicitly used in tort cases in the last twenty years.¹ The origin of the use of economic analysis in tort law is reported to be Judge Hand's opinion in *United States v. Carroll Towing Co.*² In *Carroll Towing*, Hand described the question of liability in terms of an equation: there would be liability for the defendant's activities when the costs to the defendant to prevent harm were less than the probability that defendant's activity would cause harm multiplied by the extent of that harm.³ Hand's analysis is identified with the beginning of economic analysis in tort law because it corresponds with the economist's assumptions regarding the nature of man: that man is a rational being who seeks to maximize his self satisfaction or self interest.⁴ According to the economist, Hand correctly realized that defendants acted reasonably under the "reasonable person" standard of care when he acted rationally in comparing his own costs with society's needs and benefits.⁵

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¹ See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 15 (2d ed. 1977) [hereinafter cited as R. POSNER, *ECONOMICS*]; see generally B. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* (1975); G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter cited as G. CALABRESI, *COSTS OF ACCIDENTS*]; J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* (1976); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) [hereinafter cited as Calabresi & Hirschhoff]; Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) [hereinafter cited as Posner, *Efficiency Norm*]; Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979) [hereinafter cited as Posner, *Utilitarianism*]; Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972) [hereinafter cited as Posner, *A Theory of Negligence*]; Shavell, *Strict Liability vs. Negligence*, 9 J. LEG. STUD. 1 (1980).

² 159 F.2d 169 (2d Cir. 1947). See also G.E. WHITE, *TORT LAW IN AMERICA* 218-44 (1980). Posner would argue that economics has been the real basis of the tort decision all along, see R. POSNER, *ECONOMICS*, *supra* note 1, at 12, whereas White views Posner as an advocate, in that he is directing tort law "to return . . . to a deregulated, nondistributional state whose doctrines are intended to harmonize with and facilitate private interactions." G.E. WHITE, *supra*, at 219. White does not agree that the neoconceptualization is a return of economic principles to the foundation of tort law. He never has discovered them to be its ultimate foundation: "While perhaps there are cases which suggest some economic analysis at work, clearly such analysis has never been the ultimate basis of the tort decision-making." *Id.* at 220. See also England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEG. STUD. 27 (1980); but see Posner, *Efficiency Norm*, *supra* note 1.

³ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). The economic interpretation of the Hand formula is elaborated in Posner, *A Theory of Negligence*, *supra* note 1, at 32-36.

⁴ See R. POSNER, *ECONOMICS*, *supra* note 1, at 122; Posner, *Utilitarianism*, *supra* note 1, at 106.

⁵ R. POSNER, *ECONOMICS*, *supra* note 1, at 125.

Just as the economist argues that individuals act rationally when they make decisions using Hand's formula,⁶ the judge reportedly acts rationally if he uses the economist's "wealth maximization" principle as a basis for determining liability.⁷ Economists argue that a liability standard that "maximizes wealth" to society will best reflect the reality of society's rational desire to increase its value.⁸ They insist that judges either do decide or ought to decide cases by selecting outcomes which increase, in dollar terms, value to society.⁹

Before Hand's pronouncement, and before the economists' generalization of economic assumptions for judges' use, traditional negligence law was uniform in its use of "fault" language (described in terms of duties, breaches of duties, and proximate causes).¹⁰ The economic movement is frustrated by this traditional analysis for two reasons. First, the economists do not believe that the language used in the traditional analysis tracks the thought processes of the judge or the individual.¹¹ Second, economists assert that traditional negligence fails as an ethical system.¹² To economists the "ethics" of negligence, identified as a kind of rough utilitarianism, has neither the structure nor the definition to make it usable.¹³ In other words, economists argue that the ethics of negligence lacks a method for calculating the effect of a decision or policy on society.¹⁴

⁶ *Id.* at 3-4. Posner writes:

Economics, the science of human choice in a world in which resources are limited in relation to human wants, explores and tests the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions — what we shall call his "self-interest."

Id. at 3.

⁷ Posner, *Utilitarianism*, *supra* note 1, at 103 and 120.

⁸ *See id.* at 119-24.

⁹ *See id.*; R. POSNER, *ECONOMICS*, *supra* note 1, at 18-19.

¹⁰ *See* W. PROSSER, *PROSSER ON TORTS* 143 (4th ed. 1971) [hereinafter cited as W. PROSSER].

¹¹ *See* R. POSNER, *ECONOMICS*, *supra* note 1, at 3-10.

¹² *See* Posner, *Utilitarianism*, *supra* note 1, at 119-21. But is it fair to say that economics is "competing" with another system, or is the issue incorrectly framed? The economist argues that economics describes the "true" underlying rationality of torts law. If this be the case, then economics does not compete, it simply "is" the way courts decide cases. Putting aside whether this "is" in fact the case, certainly the language used by the economist "is" neither universally nor even most often used by the torts judge. Nor is the language of economics used in instructing juries on how to decide cases. The economist argues that it ought to be used by both the judge and jury to decide cases. In this way, its language system competes with traditional formulations. *See generally* G.E. WHITE, *supra* note 2, at 218-44; Englard, *supra* note 2. My view that these torts language systems are competing language systems is supported by Posner. *See* Posner, *Utilitarianism*, *supra* note 1, at 119-36. It also stems from the analysis of debates between Professor Prosser and Professor Green over Prosser's "proximate cause" analysis and Green's substituting duty/risk analysis. *See* Green, *Duties, Risks, Causation Doctrines*, 41 *TEX. L. REV.* 42 (1962). One might also question with some justification where the strict liability analysis is in this paper. I agree that strict liability is a potent force in tort analysis, but in order to provide a focused comparison of the economic system with an existing system, I have chosen duty/breach because of its longer tradition. Fault analysis also seems to be creeping its way back into the strict liability system and therefore much of what is said of negligence could also be said of an unreasonably dangerous defective product. *See also* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 *COLUM. L. REV.* 1531, 1536-38, 1571-73 (1973) (discussion of some of the consequentialist aspects of products liability adjudication).

¹³ Posner, *Utilitarianism*, *supra* note 1, at 119-36.

¹⁴ *Id.* at 113.

Traditional negligence law also has had difficulty in deriving specific policies or guidelines from its general utilitarian principles.¹⁵

The economist's second criticism is the primary focus of this paper. Economists were and are demonstrably mistaken in their claim of ethical superiority. There is, in any "real" ethical system, the need to be future-oriented; to predict future consequences in the light of the decisionmaker's best guess about the needs and desires of future participants in the system.¹⁶ The limitations placed on ethical systems that must operate in the judicial arena make it impossible for any ethical system to be consistent, definite and complete. Real world ethical systems need to allow for changing values and changing valuation procedures. Should they ever be totally definite and complete, societies' growth and evolution would be too easily stifled.

Analysis of economists' ethical criticism of traditional negligence also calls into question their criticism that the traditional language of decisionmaking does not correspond to actual thinking processes. The language of tort decisions is the language of prediction which can never be a totally "rational" process. To require that a decisionmaker be only rational about the future, and neither intuitive, religious, or emotional, in any way, is to require the decisionmaker to cease to be human. Additionally, total rationality assumes the existence of both perfect information and perfect measuring devices. Many "reasonable" people are either unable or unwilling to make such assumptions about either the information or the measuring devices they are given. It is this combination of the lack of perfect information and inability to make accurate measurements along with the inherent future looking orientation of the tort decisions that makes the language of the traditional analysis the preferred language. A standard that requires "reasonable" behavior as opposed to purely rational decisionmaking from both the defendant and the decisionmaker takes these arguments into account. While this second point about the preferability of the traditional negligence analysis is not the primary focus of the paper the ground work for this judgment is laid in the analysis and comparison of the formal ethical characteristics of "negligence" and "economic" analysis.¹⁷

To make this judgment concerning the ethical superiority of traditional negligence or economics analysis, however, criteria for judging must be established. After criteria has been developed the criteria will be used to analyze the ethics of negligence through an examination of its elements: duty, breach, and proximate cause. Then, the ethics of economics will be analyzed in comparison with the negligence language. Finally, the paper will compare the results of these two analyses concluding that economics provides no more certainty, definiteness, nor completeness than does the traditional language.

The principle spokesman for the economic movement, Professor, now Judge, Richard Posner provides some criteria for judging ethical systems.¹⁸ He defends economics

¹⁵ *Id.* at 114.

¹⁶ This is an assumption that I share with all utilitarians. See generally J. THIROUX, *ETHICS*, 20-38 (1971).

¹⁷ See *infra* text accompanying notes 50-51. Professor Englard makes these same arguments more fully in his critique of Posner, see Englard, *supra* note 2, at 51-55. Perhaps my comparison of economics and traditional negligence as formal ethical systems adds strength to these arguments.

¹⁸ Posner, *Utilitarianism*, *supra* note 1, at 110-11. Posner compares economics with utilitarianism and it is in this context that he claims ethical superiority. He comments on the use of various criteria for judging superiority of ethical systems:

on two grounds: first that it meets certain formal criteria such as "logical consistency, completeness, definiteness, and the like;"¹⁹ and second, that it does not yield "precepts sharply contrary to widely shared ethical intuitions."²⁰ Only the first of Posner's two grounds presents a useful basis for judging the superiority claim of economics. Posner's second criterion is vague and the wording of the criterion reveals its unworkable ambiguity. "Precepts sharply contrary to widely held intuitions" is a standard which provides too many definitional problems to make the criterion meaningful. The proponents of any ethical system of analysis could easily respond to criticism under this criterion by arguing that, as fully understood, decisions reached under their systems are not "sharply" contrary (or not contrary at all) to "widely" held intuitions. Philosophers have expressed logical difficulties with such criteria because of the impossibility of knowing which intuitions are shared, which ones are "widely" held, or which positions are sharply contrary to such widely held intuitions.²¹ Accordingly, until some effective way of measuring ethical intuitions is found, Posner's second ground for comparing the economic analysis to the traditional negligence formulation is rejected. Instead, the criterion of formal consistency, completeness, and definiteness will be used to judge these competing systems.²²

In order to focus and somewhat simplify the comparison of economics and traditional negligence on formal grounds, I have chosen to use the philosophers' tool of

The procedure for choosing between competing positive theories is straightforward. A positive theory generates empirically testable hypotheses and is supported or refuted by the results of the tests. This procedure is unavailable in the case of a normative theory. What is to take its place? One approach, that of Rawls for example, is to deduce an ethical theory from one or a few basic assumptions (e.g., that a just system is one that people would choose in the "original position"). The assumption cannot be validated save by reference to [view the legal system through the lens of one of the humanities or social sciences. If one approaches the system from a philosophical perspective, one will probably reflect the low esteem in which philosophers today hold utilitarianism. If one approaches it from an economic perspective, one is likely to employ the concepts and methods of economics more systematically, explicitly, and perspicaciously than the legal scholar of an earlier generation would have done.]

Id. at 110. The position of this paper is that the philosopher is more careful and systematic than the economist.

¹⁹ *Id.*

²⁰ *Id.* Posner offers a third criterion and then rejects it. The third criterion is to measure how a society that accepts a system competes with other societies having other systems. He writes: "Or third that a society which adopted the theory would not survive in competition with societies following competing theories. The third is a very controversial criterion, and one that I shall not pursue in this paper as it does not afford a basis for drawing sharp distinctions between the economic and utilitarian approaches." *Id.* at 110-11. I reject this third criterion for the same reason.

²¹ See generally K. BAIER, *THE MORAL POINT OF VIEW* (1958); L.J. BLINKLEY, *CONTEMPORARY ETHICAL THEORIES* (1961); W. FRANKENA, *ETHICS* (1973); A.I. MELDON, *ETHICAL THEORIES* (1967); P. TAYLOR, *PROBLEMS OF MORAL PHILOSOPHY* (1967); J. THIROUX, *ETHICS THEORY AND PRACTICE* (1979).

²² I cannot resist making brief reference here to some studies in the "psychology of preference" that may provide some basis for comparing how "acceptable" each system is to society's intuitions. Though these studies do not answer whether the ethical directives of economics are "sharply contrary" to widely held intuitions, they do suggest that there is significant deviation between decisions dictated solely by objective probability theory and studied human decisions. See Kahneman & Tversky, *The Psychology of Preferences*, *SCIENTIFIC AMERICAN* (January 1982). Researchers Kahneman and Tversky's studies will be referred to more fully later in the paper in relation to the formal criteria. See *infra* notes 141, 142, and 144.

ethical categorization.²³ Philosophers have categorized ethical systems according to their consequentialist and nonconsequentialist characteristics.²⁴ Simply speaking, nonconsequentialists are those ethicists who are not concerned with the outcomes of their decisions when deciding what they ought to do. Consequentialists, on the other hand, are concerned with the ultimate result of their decisions.²⁵ Professor MacCormick, who studies these categories in his article *On Legal Decisions and Their Consequences: From Dewey to Dworkin*,²⁶ defines this division of decisionmaking ethics as follows:

One can conceive of two extreme positions. On the one extreme, the only justification of a decision would be in terms of all its consequences, however remote — in terms, that is, of its productivity of the greatest net benefit, taking together all consequences and judging them by some suitable criterion of benefit and detriment. On the other extreme, the nature and quality of the decision, regardless of consequences however proximate, would be alone allowed as relevant to its justification or its rightness.²⁷

The categorization process, then, is an examination of an ethical system's justifications. A system is consequentialist if it appeals to the effects on society when measured against some standard or principle;²⁸ it is nonconsequentialist when the justifications are found in rules or absolutes the system provides concerning how one ought to act.²⁹

Philosophers have found this simple categorization helpful to the analysis and comparison of various philosophical ethical systems.³⁰ One commentator, Professor Jacques Thiroux, asserts that there will inevitably be formal deficiencies and inconsistencies in ethical systems where the systems are overly consequentialist or overly nonconsequentialist.³¹ The consequentialist, at the extreme, excludes any possibility of rational justification of a decision, since the ramifications of any ethical decision stretch forward into infinity. In other words, future consequences are unknowable since the future is fundamentally unknowable. The nonconsequentialist, at the other extreme, ignores that the nature and quality of decisions and acts are themselves constituted by the consequences the decider intends, foresees, or hopes to bring about. Also, the nonconsequentialist ignores the extent to which care for one's neighbor requires that one seriously consider the foreseeable outcomes of one's acts and decisions before finally acting or deciding. This is obviously more important the more momentous the act or decision under consideration.³²

²³ J. THIROUX, *supra* note 16.

²⁴ While philosophers have long recognized two schools of thought in ethics, Thiroux is the first that I know of to call them consequentialist and nonconsequentialist schools. Traditionally, ethical theorists have been divided by the labels teleological and deontological. See W. FRANKENA, *supra* note 21.

²⁵ J. THIROUX, *supra* note 16, at 21.

²⁶ MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239 (1983).

²⁷ *Id.* at 239.

²⁸ J. THIROUX, *supra* note 16, at 21. The various schools of egoism (universal, individual and personal) as well as act and rule utilitarianism are categorized as consequentialist systems. *Id.*

²⁹ *Id.* at 40. Thiroux categorizes Divine Command Theories and Kant's Categorical Imperative ethics as nonconsequentialist ethics. *Id.*

³⁰ *Id.* at 21-56; see also Posner, *Utilitarianism*, *supra* note 1, at 104 n.9. Posner seems to find this categorization somewhat helpful. See generally D. REGAN, *UTILITARIANISM AND COOPERATION* (1980).

³¹ J. THIROUX, *supra* note 16, at 49-50.

³² MacCormick, *supra* note 26, at 239-40.

Thiroux's criticisms provide a key to the analysis and comparison of economics with traditional duty/breach language. Where each system makes ultimate appeals to consequentialist arguments the indefiniteness of the ultimate standard and uncertainty provided for the unknowability of future consequences will call the system into question.³³ Where the system's ultimate appeals are to rules and absolutes and thus are overly nonconsequentialist, the proponent's articles of faith will be faulted for lack of rational justification and will be criticized for their incompleteness.³⁴ In response to these criticisms the nonconsequentialists inevitably smuggle into their system consequentialist arguments.³⁵ This in turn subjects the nonconsequentialist system to attacks not only for incompleteness but also for inconsistency.³⁶ Some degree of logical inconsistency is therefore necessary to any ethical system that tries to deal fairly with disputes and also produce rules by which to govern behavior.³⁷ In judging and comparing Posner's economic ethics with negligence, this categorization process is extremely helpful. It exposes logical inconsistency, incompleteness, and indefiniteness that exist in each competing system.

At least one commentator has contended that before starting any critique of a proposed ethical system the critic should attempt to discover what is the existing ethical system of law.³⁸ This is necessary so that the new system's effect upon existing systems can be adequately predicted.³⁹ Thus, a discussion of the ethical category of the negligence system as it has traditionally been described is a useful starting place. Evidence for the earlier assertion that ethical systems inevitably rest on beliefs and intuitions about the future is found in the specific workings of the elements of the traditional negligence system. Such evidence further supports Thiroux's observation that an unbalanced, overly nonconsequentialist system will invariably include many consequentialist features.

I. THE ETHICS OF NEGLIGENCE

As has been noted earlier, the basic distinguishing feature of conventional tort law is that it is based on "fault," while the economic basis of liability does not concern itself explicitly with fault.⁴⁰ In Prosser's widely quoted treatise on torts, the fault system is described as requiring that a defendant be found "blameworthy" before liability will be imposed.⁴¹ "Blameworthiness" is described as an ethical shortcoming on the part of the

³³ See J. THIROUX, *supra* note 16, at 49-50.

³⁴ *Id.* at 46.

³⁵ *Id.* at 47. Thiroux asks, "[e]ven without this doctrine, when you push any ethical system back far enough, asking why one should do these things, won't your answers have to bring in consequences for yourself, others, or all concerned?" *Id.*

³⁶ *Id.* at 49.

³⁷ Posner seems to argue that proponents of other ethical systems generally are incapable of deriving specific policies or guidelines for human behavior. He recognizes the inherent inconsistencies in Rawls' work, in the Kantian theorists, in Fried and Epstein, and in Dworkin's theories. He, however, claims that economists can improve the consistency and definiteness of the torts decision-making system. Posner, *Utilitarianism*, *supra* note 1, at 114-15.

³⁸ D.H. HODGSON, *CONSEQUENCES OF UTILITARIANISM* 110 (1967). Hodgson studies rule utilitarianism and compares it with the common law system. The conclusions of my analysis of economics are similar to Hodgson's conclusions concerning rule utilitarianism. The similarities are perhaps necessary because Posner's ethic shares the features of other rule utilitarian systems.

³⁹ *Id.* at 142-66.

⁴⁰ R. POSNER, *ECONOMICS*, *supra* note 1, at 18.

⁴¹ See W. PROSSER, *supra* note 10, § 32.

defendant.⁴² Defendants' "blameworthiness" reportedly underlies society's feelings that defendants ought to pay for or correct the harm they have caused.⁴³

As a result of this intuition — that a defendant ought to correct the harm he caused the plaintiff — fault-based liability has been saddled with the description of being "a corrective justice" system.⁴⁴ This label "corrective justice" suggests that liability is determined by a nonconsequentialist ethic. Where the "corrective justice" label is used to point out the rule-oriented and backward looking features of the traditional system it is an accurate label. "Corrective justice" is however a misleading and oversimplistic label if it implies that the only and ultimate justification for liability is backward looking, rule-oriented, and nonconsequentialist.⁴⁵ The "traditional" system clearly is not solely concerned with the past behavior of the parties.⁴⁶ The "negligence" based system is more complicated than that.

The ethics of "negligence" have been justified by a number of arguments. In *The Common Law*,⁴⁷ Oliver Wendell Holmes described the fault requirement as follows:

Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of a series of extraordinary, although natural, events? The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so ⁴⁸

Holmes gave a series of justifications for the fault principle. First, he relied on principles when he reasoned that "[t]he general principle of our law is that loss from an accident must be where it falls"⁴⁹ Combining this principle with the supporting principle that "[s]tate interference is an evil, when it cannot be shown to be a good,"⁵⁰ Holmes justified the fault based system by pointing out that government interference is decreased if fault needs to be shown in addition to causation. Second, Holmes found support for the fault system in the definition of words commonly associated with analysis of the notion of fault. Accordingly, he pointed out that fault requires an act, and

[t]he requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen A man need not, it is true, do this or that act — the term *act* implies a choice, — but he must act somehow.⁵¹

In other words, Holmes argued that the definition of "act" entails an analysis of choice which in turn entails a fault analysis. Third, Holmes justified the fault system by appealing to public policy. Thus he stated that "the public generally profits by individual

⁴² *Id.* §§ 4, 75.

⁴³ *Id.* § 75; O.W. HOLMES, *THE COMMON LAW* 107-09 (1881).

⁴⁴ See Englard, *supra* note 2, at 27.

⁴⁵ D.H. HODGSON, *supra* note 38, at 142-65.

⁴⁶ *Id.*

⁴⁷ O.W. HOLMES, *supra* note 43.

⁴⁸ *Id.* at 92.

⁴⁹ *Id.* at 94.

⁵⁰ *Id.* at 96.

⁵¹ *Id.* at 95.

activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."⁵² Finally, Holmes appealed to intuition or what he described as a *sense of justice*, when he contended that "[t]he undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these [above] objections, but, as it is hoped the preceding discussion has shown, to the still graver one of offending the sense of justice."⁵³

Holmes's arguments are neither very precise nor very consistent. They are typical, however, of the rather loose and mixed system of justification for negligence law.⁵⁴ In making definitional, intuitional, principle, and policy arguments Holmes was both non-consequentialist and consequentialist.⁵⁵ His definitional arguments are essentially non-consequentialist justifications because it is faith in the "inherent" meaning of words that gives these arguments their persuasive power.⁵⁶ Somehow the use of a word over time fixes a word's meaning and makes the definition of the word a tool for getting at "truth."⁵⁷ His appeal to intuition was also primarily a nonconsequentialist argument because intuitions are unverifiable and are, therefore, based on the belief that they are widely shared.⁵⁸

⁵² *Id.*

⁵³ *Id.* at 96.

⁵⁴ Posner, *Utilitarianism*, *supra* note 1, at 114-15. Posner writes that many writers of the ethics of law can be faulted for this same inconsistent indefinite analysis:

Difficulty in deriving specific policies or guidelines from ethical premises is not, of course, unique to utilitarianism; it is characteristic of ethical discussion generally. Rawls' work, as we shall see, strikingly illustrates this point. And among contemporary Kantian legal rights theorists, one has only to compare Fried and Epstein, who starting from seemingly identical premises regarding human respect and autonomy, derive quite different policy implications. If Dworkin is a "genuine" Kantian, and not simply a utilitarian of the egalitarian school, the point is made even more dramatically. However, the fact that utilitarianism is no more indefinite than competing theories of moral obligation may not reconcile one to utilitarianism, especially one who happens to favor limited government. Suppose, for example, that Bentham and many other utilitarians are right that lacking any real knowledge of the responsiveness of different individuals' happiness to income we should assume that every one is pretty much alike in that respect. Then we need only make one additional, and as it happens plausible, assumption — that of the diminishing marginal utility of money income — to obtain a utilitarian basis for a goal of seeking to equalize incomes. For, on these assumptions, it is easily shown that an equal distribution of income and wealth will produce more happiness than any other distribution, unless the costs of achieving and maintaining such a distribution equal or exceed the benefits in greater happiness. The qualification is of course critical, but it places the burden of proof on the opponent of income equalization in an area where proof is notoriously difficult to come by.

Id. The usual excuse given for why a closer, more precise analysis isn't given for negligence is found in W. BLUM & H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE PROBLEM: AUTO COMPENSATION PLANS 8-9* (1965): "The whole concept of fault, even in our torts system, is so closely tied to views of personal responsibility — and hence to values that have deep cultural and religious roots — that we must limit our decision of it to narrow confines." *Id.* The reason given sounds like the reason often given for not talking politics at the dinner table — because Mom always said so — or more fairly because Mom knew it would be divisive or because Mom knew that dealing with ethics involved predicting the future, which was largely a matter of faith.

⁵⁵ J. THIROUX, *supra* note 16, at 57-66; see generally D.H. HODGSON, *supra* note 38, at 133-38.

⁵⁶ J. THIROUX, *supra* note 16, at 39-50.

⁵⁷ *Id.* at 57-66.

⁵⁸ *Id.* at 57.

Holmes's appeals to principle and policy, however, are consequentialist.⁵⁹ The argument from "principle" is consequentialist because principles, as opposed to absolutes or "rules," exist to serve some unspecified utilitarian goal and are not ends in themselves.⁶⁰ In other words, principles are "near" absolutes. People try to observe them in every case, but they realize that there may be some justifiable exceptions to a principle when some greater truth is served.⁶¹ The principle is powerful only if there is agreement that the principle cited leads to the truth, or in utilitarian terms, to society's good.⁶² Holmes's appeal to policy is likewise consequentialist in that it entails projection of the effects upon society of certain decisions.⁶³

Revealing the inconsistent and imprecise in Holmes's arguments, however, does not mean that there is nothing that can be derived from them. It is at least clear from Holmes's description that both appeals to consensus morality and consequences to society ought to have play in the ethics of tort law. Holmes's inconsistency and indefiniteness is in fact both predictable and understandable in the light of MacCormick's warnings about overly consequentialist and overly nonconsequentialist systems.⁶⁴ Holmes's imprecision and inconsistency is inevitable. It exists in his failure to specify whether the fault system is ultimately justified by the good consequences it produces — deterrence of bad behavior and compensation for the injured — or because fault is "inherent" to finding liability.

Holmes's set of justifications are directed only in a general way at the underlying ethic of the traditional negligence language.⁶⁵ The specific elements of the prima facie case for "negligence" or fault-based liability need further analysis to see if the arguments given for the elements provide ethical consistency and completeness for the system.⁶⁶ The most widely studied and followed analyses of the prima facie case of negligence law was handed down by Professor William Prosser.⁶⁷ While Prosser will be the main authority used for what currently describes "fault" law, the *Restatement (Second) of Torts* will also be consulted from time to time where it provides insight into the ethical system of negligence law.⁶⁸ Both Prosser and the Restatement use the structure of a prima facie

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 65.

⁶² As Thiroux describes it, consequentialist theories based on certain guiding principles inevitably lead to the problems of uncertainty and relativism. *Id.* at 57.

⁶³ The word "policy" then is the label consequentialist judges have used to cover the forward-looking and legislative aspects of their jobs.

⁶⁴ MacCormick, *supra* note 26, at 239.

⁶⁵ Holmes did attempt to break out torts from the rest of the common law system of justification, and in this sense he is more precise than Hodgson in his analysis of the ethic of the common law. See D.H. HODGSON, *supra* note 38, at 110. Analysis of the parts of the negligence decision will further improve the accuracy with which one can label the ethics of the traditional negligence formulation.

⁶⁶ While other commentators have centered their ethical analysis on one of the elements of negligence, the duty element, in the context of nonfeasance, I have found no research which looks at the ethics of the prima facie case or of the process of duty and breach. Leon Green has noted the paucity of information about the substance of negligence and its rationale, and has suggested that the process is the important part: "In other words, we have a process for passing judgment in negligence cases but practically no 'law of negligence' beyond the process itself." L. GREEN, JUDGE AND JURY 185 (1930).

⁶⁷ W. PROSSER, *supra* note 10.

⁶⁸ RESTATEMENT (SECOND) OF TORTS (1965) [hereinafter cited as RESTATEMENT].

case to direct the decisionmaking process.⁶⁹ The use of a *prima facie* structure in itself supports a nonconsequentialist deduction. Requiring a *prima facie* case to be established by the plaintiff to the satisfaction of the judge seems to entail that the judge has the duty to find for the plaintiff without regard to the consequences of the ruling once a *prima facie* case is established. The process of making "findings" also suggests a non-consequentialist ethic in that future effects of judges' decisions are arguably irrelevant.

Up to this point, then, the role of the judge can be described as that of a "finder" regarding plaintiff's *prima facie* case. Prosser, however, like Holmes, provided a mixed system of justification for this "*prima facie*" analysis. On the one hand, he urged the judge to give priority to certain moral factors regarding negligence analysis.⁷⁰ For example, Prosser argued that defendant should not be liable where defendant shows that the circumstances were beyond his control; that for instance, "no man rides a horse without some chance of a runaway or drives a car without the risk of a broken steering wheel or a heart attack." Prosser also wrote that the defendant's conduct must be judged in light of the possibilities apparent to the defendant at the time, and not by looking backward "with the wisdom born of the event." Further, he wrote, "[t]he standard must be one of conduct, rather than of consequences." On the other hand, Prosser argued that there is some "balancing" involved in the process — that even where moral blame is weak plaintiff may recover.⁷¹ Prosser wrote:

[t]he court must put itself in the actor's place. At the same time, the standard imposed must be an external one, based upon what society demands of the individual, rather than upon his own notions of what is proper. Wherever balancing directives enter a decisionmaking system, projections of consequences and effects of a decision also enter in.⁷²

Prosser therefore seems to have left room for a certain degree of consequentialist analysis.

For a clear look at where these balancing acts occur in the *prima facie* "negligence" case, one must turn to the elements of duty and breach, the elements of the *prima facie* case, which give specific direction to the court, and are at the heart of the traditional negligence formulation.⁷³ What can be said about the ethic of decision of the duty element? The basic consensus is that this element is a legal question primarily controlled by the judge.⁷⁴ As such the adjudicatory process seems to provide some flexibility in the

⁶⁹ W. PROSSER, *supra* note 10, § 30; RESTATEMENT, *supra* note 68, § 281.

⁷⁰ W. PROSSER, *supra* note 10, § 31; *see also* RESTATEMENT, *supra* note 68, § 281.

⁷¹ W. PROSSER, *supra* note 10, § 31.

⁷² *Id.*

⁷³ Prosser explained these elements:

1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on his part to conform to the standard required. These two elements go to make up what the courts have usually called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause."

Id. § 30.

⁷⁴ W. PROSSER, *supra* note 10, § 53; Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1023 (1928) [hereinafter cited as Green, *The Duty Problem*]. "A duty, in negligence cases,

processing of this decision since it is arguably not a "fact finding" process.⁷⁵ How is the judge to decide whether there is a legal duty? Traditional negligence law has given very few answers to this question.⁷⁶ The answer, however, seems to depend on which one of two types of duty questions the particular duty issue falls into.⁷⁷ Commentators tell us that where the defendant has acted (misfeasance), tort law requires one system of decisionmaking,⁷⁸ and where the defendant has not acted (nonfeasance), there is another.⁷⁹ When the defendant has acted the question of duty is objective, that is the duty is tested by a reasonably prudent person standard.⁸⁰ The question of whether the standard was breached is then answered by the jury. Therefore, in misfeasance cases

may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." W. PROSSER, *supra* note 10, § 53. Prosser stated:

There is little analysis of the problem of duty in the courts. Frequently it is dealt with in terms of what is called "proximate cause," usually with resulting confusion. In such cases, the question of what is "proximate" and that of duty are fundamentally the same: whether the interests of the plaintiff are to be protected against the particular invasion by the defendant's conduct.

Id. § 326; see also Bohler, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209, 213-35 (1905) (for the only guidance that can be found on the topic).

⁷⁵ W. PROSSER, *supra* note 10, § 53. He wrote:

It is better to reserve "duty" for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. In other words, "duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk.

Id.

⁷⁶ Green, *The Duty Problem*, *supra* note 74, at 1024. I am certainly not the first to ask questions about the nature of the duty element. Green points out the confusing state of this element:

How does the stating of the problem in terms of duties enable a judge to pass judgment? Where shall he find the source of duties? Do judges find them ready made? Do they assume them? Do they create them, and if so, do they create them in wholesale, or must each court create a particular duty which fits the particular case then before it? So far as I have been able to discover, the common law courts have stumbled through the whole period of their existence without committing themselves on this inquiry. Perhaps it is a subject which is not to be talked about. We are clearly dealing with the very processes by which law is generated. And doubtless the questions as to the paternity of these duties brought forth in case after case is embarrassing enough at best.

Id.

⁷⁷ W. PROSSER, *supra* note 10, § 56. Green agrees:

1. *Affirmative conduct.* The most definite boundary of negligence law is the line between affirmative and negative conduct. Broadly speaking no person is under a duty to another unless he has entered upon some course of conduct towards such other. As long as a person does nothing he comes under no duty imposed by law. This is one of the most dependable limitations upon duties, but it is a limitation seldom required to be made. Probably after all we are merely saying that in the tort field at least this power we call law is merely designed to control conduct and not to compel it. We have enough to do to keep our activities within control, without attempting to regulate the directions the latent energies of individuals should take.

Green, *The Duty Problem*, *supra* note 74, at 1026-27.

⁷⁸ Green, *The Duty Problem*, *supra* note 74, at 1026-27.

⁷⁹ *Id.*

⁸⁰ W. PROSSER, *supra* note 10, § 56.

judges have no decision to make about whether a duty exists.⁸¹ However, where a person has not acted, the court, or more specifically the judge, is required to find or declare whether a duty exists that requires the defendant to have acted affirmatively.⁸²

In the nonfeasance cases the majority of courts, following Prosser and the Restatement, direct the judge's decisionmaking function as follows: the judge is to find that a duty exists only if he finds that a "special relation" exists which gives rise to the duty to aid.⁸³ The courts have found "special relations" to exist in certain generalized situations and these may be indications of the ethical system of this element of tort law.⁸⁴ For an examination of this element, the Restatement rendition on duties for the protection of others is enlightening.⁸⁵ The Restatement, section 314 first states a general principle: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."⁸⁶ Section 314A then goes on to specify that there are special relationships between a common carrier and its passengers,⁸⁷ an innkeeper and his guests,⁸⁸ a possessor of land held open to the public and those invited on the land,⁸⁹ and one who is required by law or who voluntarily takes custody of another under circumstances that deprive the other person of his normal opportunities for protection.⁹⁰ The Restatement's caveat to section 314A is most important: "The institute expresses no opinion as to whether there may not be other relations which impose a similar duty."⁹¹

The arguments over the category of ethics that the Restatement describes here go both ways. Section 314 is a "general principle" in the negative. The societal goal towards which the distinction between misfeasance and nonfeasance is directed is not explicitly stated by the Restatement.⁹² Prosser, however, suggested that

[t]he reason for the distinction may be said to be in the fact that by "misfeasance" the defendant has created a new risk of harm to the plaintiff, while by nonfeasance he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs. The highly individualistic philosophy of this common law had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from converting the courts into an agency for forcing men to help one another.⁹³

Prosser's rationale seems to be simultaneously definitional (nonconsequentialist) and roughly utilitarian (consequentialist).⁹⁴

⁸¹ The decision has already been made. The common law has set the duty in misfeasance cases as that of a reasonably prudent person in similar circumstances. Prosser wrote, "the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk." *Id.* § 53.

⁸² See *id.* § 56, at 339; Green, *The Duty Problem*, *supra* note 74, at 1026.

⁸³ W. PROSSER, *supra* note 10, § 56, at 339; RESTATEMENT, *supra* note 68, § 314A.

⁸⁴ W. PROSSER, *supra* note 10, § 56, at 341-50; RESTATEMENT, *supra* note 68, § 314A.

⁸⁵ RESTATEMENT, *supra* note 68, § 314.

⁸⁶ *Id.*

⁸⁷ *Id.* § 314A(1).

⁸⁸ *Id.* § 314A(2).

⁸⁹ *Id.* § 314A(3).

⁹⁰ *Id.* § 314A(5).

⁹¹ *Id.* § 314A.

⁹² *Id.* § 314.

⁹³ W. PROSSER, *supra* note 10, § 56.

⁹⁴ Perhaps, however, to describe tort law as a normative ethical system, either consequentialist

The language used by section 314A of the Restatement seems to presuppose a

or nonconsequentialist, is to assume something that some would be unwilling to accept — to assume that law has something to do with telling people how they ought to live. Law may be defined as nothing more than a description of the conventions and customs of a particular society. Law is then only an outward manifestation of an ongoing process and lacks normative ethical content.

Take, for instance, the following position of tort law regarding duty: Where a stranger is drowning, and a bystander can easily rescue without danger to life or limb, absent some affirmative duty to the contrary, tort law does not require rescue. Yet the critic would point out that certainly the moral thing to do would be to rescue the stranger. The contentions of society do not require actions. Therefore, law and morality must be distinct. Law must not be concerned with normative ethics if law provides such a rule. See W. FRANKENA, *supra* note 21, at 78–96.

Obviously, there are a number of philosophical answers to this “amoral” argument. Within the context of the tort doctrine, the answer might be that if this be tort law, then tort law “is an ass,” or is immoral, not amoral. In other words, tort law should be changed to what the critic argues is the obvious moral position. A Good Samaritan rule ought to be provided. In the alternative, the nonconsequentialist might argue — accepting that the rule of torts ought to be as described above — that this tort law is moral. Man’s reason, or God’s revelation, or nature, dictates that to require man to rescue is contrary to reason, revelation or nature. Man’s inherent rights to freedom to not act, to be no one’s slave unless by bargain or choice, requires that the rule of law for this situation not force a man to rescue.

Professor Epstein, for instance, himself perhaps best categorized as a nonconsequentialist, a Kantian, in that his final appeal about the rightness or wrongness of a decision is to a categorical imperative, uses a nonconsequentialist argument concerning obligations to act. His argument is instructive of a nonconsequentialist’s ethical argument. Epstein writes:

Once one decides that, as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty . . . [Epstein uses forced payment of money to save a life as an example of the Good Samaritan principle].

Once forced exchanges, regardless of the levels of payment, are accepted, it will no longer be possible to delineate the sphere of activities in which contracts (or charity) will be required in order to procure desired benefits and the sphere of activity in which those benefits can be procured as of right. Where tests of “reasonableness” — stated with such confidence, and applied with such difficulty — dominate the law of tort, it becomes impossible to tell where liberty ends and obligation begins; where contract ends, and tort begins. In each case, it will be possible for some judge or jury to decide that there was something else which the defendant should have done, and he will decide that on the strength of some cost-benefit formula that is difficult indeed to apply. These remarks are conclusive, I think, against the adoption of Ames’ rule by judicial innovation, and they bear hearing on the desirability of the abandonment of the Good Samaritan rule by legislation as well. It is not surprising that the law has, in the midst of all the clamor for reform, remained unmoved in the end, given the inability to form alternatives to the current position.

Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 198–200 (1973). Note that Epstein makes no appeal to the bad consequences upon society of adopting a Good Samaritan rule. His argument stops just short of doing so each time. His argument is that such a rule lacks definition. It lacks clarity and demarcation. It is not “discoverable” nor “identifiable.” Because the rule, “no duty to rescue” is clearer, more easily defined, and consistent with the way the world understands liberty, he “discovers” that the lack of an obligation to act is essential and is therefore the law. Likewise, the consequentialist would agree about the normative nature of such a doctrine on the basis of the results it produces arguing that the rule should be changed if the results do not measure up.

The distinction, however, between the “is” and the “ought” is a troublesome one. See Frankena, “Ought” and “Is” *Once More*, in 2 MAN AND WORLD 515–33 (1969); see also D.H. HODGSON, *supra* note 38 (where Hodgson argues that law has a normative context).

Kantian ethical basis,⁹⁵ because the ethic is one of finding duties by finding special relationships to exist only where one of the listed relationships is in issue. Since the Restatement provides a duty wherever a "special relationship" is found, the Restatement position is a tautology. The very word "duty" supports the nonconsequentialist nature of the processing part of this element. A deontological system, which has been categorized by philosophers as nonconsequentialist, is by definition an inquiry into duties.⁹⁶

Though section 314A's format may be a nonconsequentialist one, this is not conclusive of the ethical nature of the judge's decision. The consequentialist would argue that

⁹⁵ RESTATEMENT, *supra* note 68, § 314A.

⁹⁶ Thiroux writes of the nonconsequentialist base to Kant's Duty Ethics, as follows:

Another famous rule of nonconsequentialist theory, Duty Ethics, was formulated by Immanuel Kant. Kant first argued that it is possible to set up valid absolute moral rules by reasoning alone, not by reference to any supernatural being or by empirical evidence but by the same kind of logical reasoning which establishes such indisputable truths in mathematics and logic as " $2 + 2 = 4$," "no circles are squares," and "all triangles are three-sided." Kant's first requirement for an absolute moral truth is that it must be logically consistent; that is, it can not be self-contradictory, such as the statement, "a circle is a square," would be. Secondly, the truth must be universalizable; that is, it must be able to be stated to apply to everything without exception, not just to some or maybe even most things. This is exemplified in the statement, "all triangles are three-sided," for which there are no exceptions. Triangles may be of different sizes and shapes, but they are by definition indisputably and universally three-sided. If moral rules could indeed be established, as Kant thought, in this same manner, then they too would be indisputable and therefore logically and morally commanding to all human beings. Of course, people might disobey these rules, but we could clearly brand such people as immoral.

In some ways, Kant's ideas were brilliant. For example, he could establish the fact that living parasitically would be immoral because it would also be illogical. He could say that the commandment, "[a]lways be a parasite, living off of someone else" is illogical because if everyone lived like a parasite, then off whom could he live? It is easy to see that the principle of universalizability causes the inconsistency here. Obviously some people can be parasites, but not all. Now, if one could find such "moral" absolutes, then a completely irrefutable system of ethics could be established, and the obeying of the rules of this system would be what is moral, regardless of the consequences to oneself or to others.

Kant next spoke about obeying such rules out of a sense of duty. He said that human beings are often inclined to act in certain ways (that is, they are inclined to do a variety of things such as give to the poor, stay in bed rather than go to work, rape someone, or be gentle to children). Such inclinations, according to Kant, are irrational and emotional and since we seem to operate on whim rather than reason when we follow them, people must force themselves to do what is moral out of a sense of duty. In other words, we have many inclinations of various sorts, some of which are moral, some immoral, but if we are to act morally, we must rely on our reason and our will and act out of a sense of duty.

Kant even went so far as to say that an act simply is not moral unless duty rather than inclination is the motive behind it. A person who is merely inclined to be kind and generous to others is not to be considered moral in the sense in which Kant uses the word. Only if this person, perhaps because of some unexpected tragedy in his life, no longer is inclined to be kind and generous to others, but now forces himself to do so out of a sense of duty, is he acting in a moral manner. This seems quite a harsh demand to most people, but at least it shows Kant's emphasis on his concept of duty as it pertains to following clearly established absolute moral rules.

After Kant felt he had established moral absolutes, it seemed obvious to him that to be moral one should obey them out a sense of duty. Therefore, he went on to form the keystone of his moral system, the "Categorical Imperative."

J. THIROUX, *supra* note 16, at 43-44.

this takes too narrow a view of what truly goes on in the process of deciding that a special relation does or does not exist.⁹⁷ This is the opening provided for by the Restatement's caveat that the list contained in section 314A is not necessarily exclusive.⁹⁸ The consequentialist would point out that the law regarding duty is cognizant of the consequences of either finding a duty or not finding one. The judge projects into the future to try to determine what would be the consequences to society of imposing such duties, that is, what would be its value to society and how would it be detrimental to society. Many cases seem to support the position that a roughly defined consequentialist/utilitarian basis — a basis that produces the greatest amount of good over evil — is the ethic by which tort law decides the duty issue.⁹⁹ The Restatement, however, does not *explicitly require* that the judge go through this balancing process.¹⁰⁰ The common law seems to allow expansion of affirmative duties only by analogy.¹⁰¹ A discussion is therefore appropriate of the ethical nature of justification by analogy.¹⁰²

⁹⁷ *Id.* at 47. Thiroux writes about the tendency of many nonconsequentialist systems to smuggle in consequences:

First of all, even Kant, who fought against consequences, seems to have smuggled them in his reversibility doctrine. Even without this doctrine, when you push any ethical system back far enough, asking why one should do these things, won't your answers have to bring in consequences for yourself, others, or all concerned? For example, in the Divine Command Theory, isn't it really possible to justify the more immediately applicable and practical commandments as ethical necessities whether or not you believe God gave them to human beings? One could ask why God is so wise in having stated that human beings should not kill, steal, or commit adultery, and answer that the consequences of not having some rules in those areas would be much worse. If killing were freely allowed, then people's lives would be in danger constantly, human growth would not be able to take place, and there would be no moral systems or cultures, only constant battles to avoid being killed. These commandments help all human beings to respect the rights of their fellows and bring some stability and order into a social system which would otherwise be in a constant state of chaotic upheaval.

Id. at 47-48.

⁹⁸ See *supra* note 91 and accompanying text.

⁹⁹ See *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968); for more cites see W. PROSSER, *supra* note 10, § 56, at 332-33.

¹⁰⁰ RESTATEMENT, *supra* note 68, § 314. The caveat to § 314A reads: "The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty."

¹⁰¹ *Id.* § 314A, comment b reads:

(b) This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment a above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

Id.

¹⁰² It must be noted that this discussion is not just limited to the duty analysis but applies wherever the judge acts as a lawgiver or lawmaker.

Much has been written about the nature of argument from precedent or by analogy and what follows is not meant to be exhaustive on the subject. The following brief analysis is meant only to point out the ethical characteristics of this process. This decisionmaking justification can be viewed as ethical nonconsequentialist or consequentialist justification.¹⁰³ The nonconsequentialist would argue that one decides a particular way simply because "that is the way it was done in the past."¹⁰⁴ If a controversy is a case of "first impression," then the court is directed by the nonconsequentialist to make a reference to rules in areas closest to that of the controversy.¹⁰⁵ The nature of the analogy justification would be that decisions are made on the basis of what has been done instead of on the basis of what will be the effect of the decision. Such analysis is inherently tied to a natural law view of the law.¹⁰⁶ Faith in the unchanging nature of society's rules and man's ability to reason his way to discover them is the ultimate basis of the decision when it is made as described above.

This process of justification by analogy, however, can also be consequentialist.¹⁰⁷ The determination of which rules or policies are most similar often turns on the similarity of consequences the rules are projected to produce. The consequentialist would point out that the act of comparing the present controversy with past cases includes an examination of the underlying policies and the legitimacy of those policies for the community.¹⁰⁸ "Rules" are not garnered from these past decisions, only "principles."¹⁰⁹ This study of the effect of the past principles on society and an analysis of these principles as a means to certain societal ends is the process by which the consequentialist predicts the effects of the new decisions.¹¹⁰ Such analysis is obviously tied to a realist's philosophy of law.¹¹¹ The ultimate appeal here is to some principle for the attainment of "good" for society and is, accordingly, consequentialist.¹¹² There is room, therefore, in the process of justification by analogy for both consequentialist and nonconsequentialist arguments. It is to this same point — that in the act of making decisions of law, negligence simultaneously makes use of consequentialist and nonconsequentialist justifications — that we will return to when the element of proximate cause is discussed.

In the final analysis, then, the underlying support for the duty element and a description of settled areas of tort law regarding duty seems to have explicit nonconsequentialist justifications and inexplicit consequentialist justifications. While the processing of the law of duty has directives as to findings and is most often viewed as nonconsequentialist, the actual balancing process the court often goes through to "find" a duty seems to have room for consequentialist justifications. The duty element's primary ethical characteristics are consistent with those Holmes expressed, that duty is supported both

¹⁰³ See, e.g., J. GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE* (1976); STATSKY & WERNET, *CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING* (1977); see also CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

¹⁰⁴ D.H. HODGSON, *supra* note 38, at 111-41.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 139-141.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

by a rough sense of morality and by intuitions as to the consequence such a system will produce.¹¹³

II. THE ETHICAL SYSTEM OF BREACH

The question of breach, in both misfeasance and nonfeasance questions, is described as a "fact" question.¹¹⁴ As such this question is to be left primarily to the jury.¹¹⁵ It might be assumed, then, that this element is a nonconsequentialist element in that it involves the making of a "finding" that some rule has been broken. The directive most often given to the jury concerning how they are to decide this question, however, is the reasonably prudent person instruction,¹¹⁶ which is justified primarily by consequentialist arguments.

The primarily consequentialist nature of this decisionmaking process is evidenced in Holmes's writing concerning whether the reasonably prudent person standard is objective or subjective:¹¹⁷

Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgement he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence judged by a moral standard which would take his personal characteristics into account. But supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was.

Some middle point must be found between the horns of this dilemma.

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his

¹¹³ O.W. HOLMES, *supra* note 43, at 96.

¹¹⁴ Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1421 (1961).

¹¹⁵ For an example of a typical jury instruction, see ILLINOIS PATTERN JURY INSTRUCTIONS, Civil § 10.01 (1961).

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 prudent 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.

Id.

¹¹⁶ See RESTATEMENT, *supra* note 68, § 283.

¹¹⁷ See O.W. HOLMES, *supra* note 43, at 107-108.

congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.¹¹⁸

Holmes seems to have been primarily consequentialist in his argument for the objective standard by his reference to what is necessary to the general welfare. Many commentators have agreed with the tenor of these justifications and argued that the consequentialist argument is not only primary but is the ultimate argument supporting the reasonably prudent person standard.¹¹⁹

[T]he great vice of the subjective theory . . . — [the view] that negligence [requires] indifference or inadvertance — [is that it] leaves the general security unprotected against that vast amount of dangerous and harmful conduct which results not from inadvertance or indifference but from deficiencies in knowledge, memory, observation, imagination, foresight, intelligence, judgement, quickness of reaction, deliberation, coolness, self control, determination, courage or the like.¹²⁰

This consequentialist argument is probably the most widely accepted basis for the objective standard in negligence¹²¹ and provides the support for the conclusion that breach of duty is ultimately consequentialist in ethic.¹²² It is from such arguments that many commentators find support for labeling negligence as a utilitarian system.¹²³

Holmes, however, did not end his discussion of the reasonably prudent person standard with an analysis of the objective nature of this standard.¹²⁴ He went on to suggest that while the law does not take into account minute differences, a "blind man is not required to see at his peril . . . an infant of very tender years is only bound to take the precautions of which an infant is capable," and insanity should also be taken into consideration.¹²⁵ In so arguing, Holmes seems to have been sitting simultaneously on both the subjective/objective fence, and the consequentialist/nonconsequentialist fence. Commentators, in reviewing the developing list of exceptions to the objective standard, have noted that a subjective construction of the reasonably prudent person standard is allowed wherever society feels more comfortable with its ability to discern defendants' actual state of mind.¹²⁶ They point out that the law has made exceptions to the objective

¹¹⁸ *Id.*

¹¹⁹ See Edgerton, *Negligence, Inadvertence and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926).

¹²⁰ Edgerton, *supra* note 119, at 867.

¹²¹ See W. PROSSER, *supra* note 10, § 32; RESTATEMENT, *supra* note 68, § 283, comment c.

¹²² Though the reason as to why an objective standard is used is often left unstated by the courts and may be viewed by courts as a matter of doctrine and definition, its ultimate basis seems to be that of the Holmes consequentialist policy argument.

¹²³ D.H. HODGSON, *supra* note 31, at 7, 8; AMES, *Law and Morals*, 22 HARV. L. REV. 97, 110 (1908); POSNER, *Utilitarianism*, *supra* note 1, at 106.

¹²⁴ O.W. HOLMES, *supra* note 43, at 109; see *Vaughan v. Menlove*, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (P.C. 1837) (particularly the opinion of Judge Tindal).

¹²⁵ O.W. HOLMES, *supra* note 43, at 109.

¹²⁶ See, e.g., JAMES, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951):

standard where defendants' particular deficiencies are more easily proven.¹²⁷

The fluctuation between measuring conduct under an objective or a subjective standard demonstrates that a system is consequentialist only to the point where there is no satisfactory proof or adequate definition about the actual thought process that the defendant went through.¹²⁸ The system takes on the appearance of a nonconsequentialist ethic as experience provides understanding and empirical data about the actual thought processes of fault.¹²⁹ Once this information is provided the system takes this information into account without a continuing concern for the potential consequences of such decisions on society.¹³⁰

Apart from the objective/subjective debate, there seems to be a good deal of support for the argument that negligence is ultimately clothed in nonconsequentialist garb. This is especially true where the law of evidence appears to place constraints on the process.¹³¹ Evidence law relayed by the judge informs the jury or trier of fact on the limited nature of their decision.¹³² The jury is instructed that as fact finder they are not to consider

By and large the law has chosen external, objective standards of conduct. The reasonably prudent man is, to be sure, endowed with some of the qualities of the person whose conduct is being judged, especially where the latter has greater knowledge, skill, or the like, than people generally. But many of the actor's shortcomings such as awkwardness, faulty perception, or poor judgment, are not taken into account if they fall below the general level of the community. This means that individuals are often held guilty of legal fault for failing to live up to a standard which as a matter of fact they cannot meet. Such a result shocks people who believe in refining the fault principle so as to make legal liability correspond more closely to personal moral shortcoming. There has, therefore, been some pressure towards the adoption of a more subjective test. But if the standard of conduct is relaxed for *defendants* who cannot meet a normal standard, then the burden of accident loss resulting from the extra hazards created by society's most dangerous groups (e.g., the young, the novice, the accident prone) will be thrown on the innocent victims of substandard behavior. Such a conclusion shocks people who believe that the compensation of accident victims is a more important objective of modern tort law than a further refinement of the tort principle, and that compensation should prevail when the two objectives conflict. The application of a relaxed subjective standard to the issue of *plaintiff's* contributory negligence, however, involves no such conflict. On this issue the forces of the two objectives combine to demand a subjective test: the refinement of the fault principle furthers the compensation of accident victims by cutting down a defense that would stand in its way. For this reason the writer has elsewhere developed the thesis that there should be an explicit double standard of conduct, namely an external standard for a defendant's negligence, and a (relaxed) subjective standard for contributory negligence. Even if this thesis is rejected, the same result probably prevails anyhow, because the application of the legal standard is largely left to the jury, and juries, by and large, tend to resolve doubts on both issues in favor of plaintiffs.

Id. at 1-2.

¹²⁷ *Id.* at 17-22. James notes: "A blind man will not be required to see, though he may perhaps have to use his other senses more sharply than one who can." *Id.* at 18.

¹²⁸ O.W. HOLMES, *supra* note 43, at 107-109. *But see* Vaughan v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (P.C. 1837); Edgerton, *supra* note 119, at 867 (for the arguments that the great vice of subjective negligence theories is it leaves the general security unprotected).

¹²⁹ O.W. HOLMES, *supra* note 43, at 109.

¹³⁰ *Id.*

¹³¹ FED. R. EVID. 401, 402, 403. *See* 1A J. WIGMORE, WIGMORE ON EVIDENCE § 28 (Tiller rev. ed. 1983) [hereinafter cited as WIGMORE].

¹³² C. McCORMICK, McCORMICK ON EVIDENCE § 336, at 783 (E. Cleary 2d ed. 1972). "Thus 'proof' is the end result of conviction or persuasion produced by evidence." *Id.* The trier of fact is bound to consider only evidence presented by the parties.

anything "extraneous" to that "presented by the parties."¹³³ For example, in considering whether a party has breached her duty the jury is instructed to consider all "relevant evidence" presented by the parties.¹³⁴ This general instruction is not very helpful and the definition offered by the Federal Rules of Evidence presents only a small clue as to the ethics of the decision. Federal Rule of Evidence 401 defines "relevance" as anything of consequence.¹³⁵ The problem that rule 401 presents the jury is determining what is of consequence. Rules 407 and 411 make some specific statements as to what is not of consequence. The trier of fact is not to consider whether the defendant or plaintiff is insured;¹³⁶ nor are they to consider the wealth of the parties when deciding the issue of fault.¹³⁷ Evidence law, in these instances, denies to the decisionmaker consideration of the very real, measurable, and immediate consequences of their decision.¹³⁸ By so requiring, evidence law seems to support a nonconsequentialist processing, but as to the rest of what defines "of consequence" the federal rules give no information.¹³⁹

The actual psychology of this jury process is hard to determine. The jurors are told that they are free to examine their individual experiences and draw on their common sense to determine what they believe a reasonably prudent person would have done in similar circumstances.¹⁴⁰ It is argued, however, that each jury member, despite instructions to the contrary, would instead invariably ask himself what he would have done in similar circumstances.¹⁴¹ Jurors may try to imagine what they would have foreseen and measure the defendant against this imagination.¹⁴² The decision may then be reached

¹³³ WIGMORE, *supra* note 131, § 28.

¹³⁴ *Id.*

¹³⁵ FED. R. EVID. 401; *see* WIGMORE, *supra* note 131, § 28.

¹³⁶ FED. R. EVID. 411.

¹³⁷ FED. R. EVID. 417.

¹³⁸ Wigmore argued that the law of evidence is distinct from the substantive law issues; the distinction is made between immateriality and relevance. FED. R. EVID. 407 and 411 are indicators that the rules of evidence do impinge upon what is of "consequences" in a torts case. Likewise the acceptance of the distinction in evidence theory between the factfinding process and lawmaking process supports a very nonconsequentialist ethic. *See* 1 WIGMORE, *supra* note 131, § 2.

¹³⁹ *See* FED. R. EVID. 401 advisory committee note (discussion of philosophical complications of determining "relevance").

¹⁴⁰ James, *supra* note 126.

¹⁴¹ *See* Kahneman & Tversky, *supra* note 22. They describe studies where subjects were asked to make a series of choices. These choices would be made with reference to the objective criteria provided by probability theory. The choices the subjects made often times varied significantly from what the probabilities dictated were "reasoned" choices. They note:

If a decision is influenced by the reference point with which possible outcomes are compared, what determines the reference point? The dependence of impressions, judgments and responses on a point of reference is a ubiquitous psychological phenomenon. The same tub of tepid water may be felt as hot to one hand and cold to the other if the hands have been exposed to water of different temperatures. A given income may be considered lavish or inadequate depending on whether one's earnings have recently increased or decreased. In these cases the reference point is the state to which one has become adapted.

Id. at 171. Likewise, each juror would create a reasonable person with reference to their experience.

¹⁴² *Id.* at 171, 172. The impact of imagination on "objective reasoning" is described as follows: In many cases, however, the reference point is determined by events that are only imagined. Consider the following incident:

Mr. Crane and Mr. Thomas were scheduled to leave the airport on different flights at the same time. They traveled from town in the same limousine, were caught

by polling the jury about whether the defendant's activity constitutes a "breach" in their imagination.¹⁴³ If this is indeed the process that takes place in the jury room then it follows that a decision is reached when a sufficient number of jurors are persuaded to agree with each other. This may occur when one juror makes vivid to the others' imaginations what the juror argues the defendant would or would not have foreseen.¹⁴⁴ The position produced by this process is arguably what tells society and the parties whether the community's standard of care has been breached.¹⁴⁵ Any division or uncertainty may ultimately be worked out as a matter of "burden of proof."¹⁴⁶

The ultimate justification for a jury's decision is based upon the validity of, and faith in, the unspecified and unknown psychology of jury deliberations.¹⁴⁷ The jury's ability to "discover" or set out the community standard depends on their own sense of morality, and their imagination and intuition as to the effect of such a standard on the parties and on society. If the ultimate justification for the negligence system in the element of breach is that the jurors collectively, by applying their common sense and community intuitions, are the best source of the law of liability, then the system's ethic is arguably mixed and inconsistent. At best such a system is a structured consequentialist system whose adherents are successful in their defense of their system only where their audience also "believes" in the jury's ability to do its factfinding appropriately.¹⁴⁸

in a traffic jam and arrived at the airport 30 minutes after the scheduled departure of their flights. Mr. Crane is told that his flight left on time. Mr. Thomas is told that his flight was delayed and just left five minutes ago. Who is the more upset?

Almost everyone presented with this incident agrees that Mr. Thomas is more upset than Mr. Crane, although their objective conditions were identical: both have missed their flight. Furthermore, both had expected to miss their flight, so that Mr. Thomas has no reason to be more surprised or disappointed than Mr. Crane. If Mr. Thomas is the more upset, it is presumably because in the act of imagination Mr. Thomas comes closer than Mr. Crane to catching his flight. The frustration experienced in an unsatisfactory situation increases when it is easy to imagine a more desirable alternative. For another example of the same notion, consider the following:

The winning number in a lottery was 865304. Three individuals compare the ticket they hold to the winning number. John holds 361204; Mary holds 965304; Peter holds 865305. How upset are they respectively?

There is general agreement that the experience is devastating for Peter, quite severe for Mary, and very mild for John. Here again the ranking corresponds to the degree to which the individuals can be described as having "come close" to winning the prize.

An individual's experience of pleasure or frustration may therefore depend on an act of imagination that determines the reference level to which reality is compared. It is notable that the act of imagination by which one creates alternative realities reflects many realistic constraints. If there were no constraints, John would find it as easy as Peter to imagine himself with the winning ticket. Imagination appears to be governed by rules, and the rules of imagination affect our experience of reality by controlling the alternatives to which it is compared.

Id. at 171-72.

¹⁴³ The jury often picks a foreperson and then takes an informal poll of each member's feelings concerning liability. Then discussion takes place to persuade and make sure the evidence is considered.

¹⁴⁴ Kahneman & Tversky, *supra* note 22, at 173.

¹⁴⁵ Green, *The Submission of Issues in Negligence Cases*, 18 U. MIAMI L. REV. 30, 37-44 (1963).

¹⁴⁶ *Id.* at 41-43.

¹⁴⁷ WIGMORE, *supra* note 131, § 37.7.

¹⁴⁸ *Id.*

Note, however, that the two systems of rationale are worked into each other and do not appear to be incompatible. Given that the underlying ultimate rationale is consequentialist, and the process is nonconsequentialist, the whole ethic can be more aptly labeled "structured consequentialism." The "structure" imposed on the system gives it its nonconsequentialist appearance. The structure tells the individual decisionmaker which consequences count and in which situations they should be applied. The duty/breach system tries to take away, as much as possible, the immediate decisionmaker's discretion to apply his own view of what will produce the greatest good for society, and instead imposes the views of those who create the structure of the decisionmaking process. Therefore, while the underlying rationale of the system is consequentialist, the decisionmaker is treated in the process very much like an automaton and must smuggle in the consequential aspects of his decision. Such a system has the characteristics of both a moral and an absolutist factfinding system, which is measured finally by unstated intuitions concerned with the consequences on society.

Sometimes, however, this "structured consequentialist" label does not accurately describe what the jury is directed to do. For example, consider the jury's dilemma when presented with evidence of society's custom concerning the defendant's conduct. If the process truly is a nonconsequentialist process, the jury would only need to be shown what the custom was and it would have "found" the community's standard of care. "Duty/breach" law, however, instructs the jury that custom is not final evidence of negligence, but that it is free to set a standard of care higher than the present custom if it feels that industry custom is lagging behind what it ought to be.¹⁴⁹ What then should the jury do? Does it simply project the effect on society of raising the standard and decide whether the consequences are better to society? This seems to be what is required of the jury in these cases. Faith in the jury's ability to do this consequentialist analysis without producing harmful effects on society is the basis of the acceptance of this method of the setting of the standard of conduct. The process in this area, however, breaks from the structure and is more openly consequentialist.

III. THE ELEMENT OF PROXIMATE CAUSE

The nature of proximate cause, perhaps most clearly evidences the nature or the mixed ethic in the traditional tort case. Prosser tells us that the nature of proximate cause is a mixed question of law and fact.¹⁵⁰ The factual part of the inquiry is the cause and effect inquiry.¹⁵¹ The "legal" part of the inquiry is the "policy" part, left to the judge.¹⁵² The "legal" part is the most obvious place for a consequentialist judge to consider the effects of his rule in the light of "proximate cause." While the "factual" attributes of proximate cause point to a "finding process" which entails a consequentialist ethic, it is the "legal" part of the element that initially deserves attention.

The historical debate over proximate cause and whether it should contain an examination of foreseeability suggests that there is not total agreement over whether the decisions of liability are unaffected by nonsequentialist ethics.¹⁵³ In the famous case, *In*

¹⁴⁹ The *T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

¹⁵⁰ W. PROSSER, *supra* note 10, § 45.

¹⁵¹ *Id.*

¹⁵² *Id.*; RESTATEMENT, *supra* note 68, § 434. See also *In re Polemis*, [1921] 3 K.B. 560.

¹⁵³ See W. PROSSER, *supra* note 10, § 43. Green argues that foreseeability should not be a part of the proximate cause discussion at all, but should be left to the jury when the jury considers the

re *Polemis*,¹⁵⁴ the English court argued that once a sufficient direct causal relationship is established, the law should not be concerned with whether certain types of damages or certain unexpected plaintiffs were foreseeable.¹⁵⁵ *Polemis* concluded that once the fault issue was determined liability would follow without regard to the far-reaching effects of such a rule on society.¹⁵⁶ The rule was set because of definitional arguments about cause and effect and because courts were said to be incapable of defining foreseeable plaintiffs.¹⁵⁷

It follows, then, that according to *Polemis*, the ethic of this element is nonconsequentialist. Disagreeing with the ethic of *Polemis*, Justice Cardozo, in *Palsgraf v. Long Island R.R.*, asserted a "bad effect" on society if the fact of unforeseeability of certain plaintiffs, which he described as plaintiffs "beyond the zone of danger,"¹⁵⁸ did not preclude proof of the plaintiff's prima facie case. *Polemis* held that once a duty is breached, it is breached to the whole world. Any plaintiff, whether foreseeable or unforeseeable, would be able to recover as long as there was an uninterrupted direct causal relation between his injury and the defendant's acts.¹⁵⁹ The side effects of the nonconsequentialist, *Polemis*-type ethic, Cardozo argued, would make the courts ineffective controllers of runaway juries.¹⁶⁰ The result would be "bad" for society.¹⁶¹ Cardozo, here, is more openly utilitarian in his analysis. His zone of danger language allows the law suit between defendants and certain plaintiffs to be cut off where such law suits become too burdensome to court and defendant alike.¹⁶² The consequentialist, following Cardozo's analysis, or some like analysis,¹⁶³ would argue that tort law today is controlled by the proximate cause (or duty/zone of danger analysis) element and that it is in this element that the judge considers the consequences of his decisions on society.¹⁶⁴

element of negligence. Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962) [hereinafter cited as Green, *Causal Relation Issue*].

¹⁵⁴ [1921] 3 K.B. 560.

¹⁵⁵ *Id.* at 570. For criticism of *Polemis*, see also Goodhart, *The Brief Life Story of the Direct Consequence Rule in English Tort Law*, 53 VA. L. REV. 857 (1967) [hereinafter cited as Goodhart, *Direct Consequence Rule*].

¹⁵⁶ Goodhart, *Direct Consequence Rule*, *supra* note 155, at 860-61.

¹⁵⁷ *Polemis*, 3 K.B. at 570.

¹⁵⁸ *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 343, 162 N.E. 99, 100 (1928).

¹⁵⁹ *Polemis*, 3 K.B. at 562-63.

¹⁶⁰ *Palsgraf*, 248 N.Y. at 342-43, 162 N.E. at 100.

¹⁶¹ *Id.*

¹⁶² *Id.* at 344-46, 162 N.E. at 104-06.

¹⁶³ See, e.g., W. PROSSER, *supra* note 10, § 43; RESTATEMENT, *supra* note 68, § 435(2). The limiting words used here are to cause a decisionmaker to consider whether, when looking backwards, the event would be considered highly extraordinary.

¹⁶⁴ Prosser stated:

It seems evident that in all of these proposed rules and formulae the courts and the writers have been groping for something that is difficult, if not impossible, to put into words: some method of limiting liability to those consequences which have some reasonably close connection with the defendant's conduct and the harm which it originally threatened, and are in themselves not so remarkable and unusual as to lead one to stop short of them. It may be questioned whether anyone has yet succeeded in accomplishing more than the courts themselves have been able to achieve with the idea of such a reasonably close connection contained in the despised word "proximate," which may have more in the way of merit than is usually credited to it.

W. PROSSER, *supra* note 10, § 43.

The law of "relevance" from the field of evidence law, however, seems to once again give the element of proximate cause a nonconsequentialist structure. Causation issues, as factual inquiries, are supposed to be jury decisions.¹⁶⁵ The judge's role is initially only to instruct the jury on what proximate cause is; thereafter the judge is only to act when he somehow decides as a matter of law that there is no evidence of proximate cause.¹⁶⁶

The information given to both the judge and jury by which to make this proximate cause decision is very limited. The only information given to the judge to make his "legal decision" is like cases from the past.¹⁶⁷ Evidentiary limitations prohibit irrelevant considerations concerning the effects of the judge's decision on parties not before the court.¹⁶⁸ Hence, a judge is rarely aware of the broader impact that his ruling on proximate cause will have.¹⁶⁹ The jury does not even have past case information, and evidence not presented in court is immaterial according to the dictates of evidence law.¹⁷⁰

This information concerning consequences, the consequentialist would argue, can slide in to the trial by the side door.¹⁷¹ Evidence given to the jury concerning customs in the industry,¹⁷² and the cost of changing some pattern of behavior can be used as a basis to predict the societal consequences of the judge's rulings and jury's decision.¹⁷³ The judge, however, is directed by the law of evidence to instruct the jury on the limited

¹⁶⁵ *Id.*

¹⁶⁶ Prosser described the historical inquiry as a search for the direct "cause." *Id.* § 43. Prosser noted this illusory factfinding feature of the proximate cause "inquiry":

The usual answer has been that "foreseeability" means "in proximate cause" the same thing as in negligence; and that the same considerations which determine the original culpability are to be used again to determine liability for consequences. This has a comforting sound of predictable certainty and facility of administration. But, with deference, it is submitted that both are quite illusory.

Id. Professor Calabresi agrees:

I am using "cause" here and throughout this book as a "weasel" word. I do not propose to consider the question of what, if anything, we mean when we say that specific activities "cause" in some metaphysical sense, a given accident; in fact, when we identify an act or activity as a "cause," we may be expressing a number of ideas.

Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69, 78-80 (1975) [hereinafter cited as Calabresi, *Concerning Cause*].

¹⁶⁷ D.H. HODGSON, *supra* note 38, at 120.

¹⁶⁸ *Id.* at 137.

¹⁶⁹ *Id.* at 138. Hodgson writes:

Utility is given less weight than justice. And when it is considered, it is not done in a thorough and systematic way, on the basis of sociological evidence. The judge simply estimates and evaluates, as best he can, some of the more noteworthy consequences of the rule and its alternatives. His knowledge of sociology is usually no more, and no less, than that of a normal well-educated man, except insofar as he, as a lawyer, has had the opportunity to observe the law in action; and his values, too, are usually those shared fairly widely in his society. In earlier times, informed common sense was the best means available for accessing consequences. Now that sociological inquiry and evidence is possible, it might seem better to make use of it; but this is a question which cannot be dealt with here.

Id.

¹⁷⁰ Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978); Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 906 (1982).

¹⁷¹ See e.g., *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

¹⁷² *Id.* at 740.

¹⁷³ *Id.* Calabresi also notes the dual nature of accidents and accident prevention inquiries. See Calabresi, *Concerning Cause*, *supra* note 166, at 82.

nature of this evidence, its relevance to the fault of the defendant, and its irrelevance to a consideration of the effect of their decision on an industry as a whole.¹⁷⁴ It is unclear how the judge can be consistent if he chooses not to follow his own instructions concerning those propositions that are relevant to the adjudicatory process. If the judge uses this information, given to the jury with limiting instructions, to study the consequences of his ruling, the actual features of his decision are hidden from examination.¹⁷⁵ Despite the inconsistency with judges' directives to juries, it is apparent that judges are doing this in many cases.¹⁷⁶ In these cases, the judges appeal to their beliefs as to the societal consequences in "finding" or "not finding" a proximate cause relationship to exist.¹⁷⁷ Once again, therefore, while the substance of the proximate cause element is most often thought of as consequentialist, it certainly is nonconsequentialist in the evidentiary limitations which constrain and obscure the decision.

It is at this point in the proximate cause analysis that many critics become most frustrated with traditional tort analysis. What is the true basis, they ask, of the court's proximate cause decision?¹⁷⁸ Proximate cause, where it is legal, as opposed to factual, is not "saved" by appealing to a magical jury process. How indeed does the judge make this decision?¹⁷⁹ Because the process does not provide the "information" for the judge to know the policy effects of tort decisions, some critics have argued that the judge is arbitrary and unreasoned in his decisionmaking process.¹⁸⁰ The judge pretends to be nonconsequentialist although he will make selective use of veiled consequentialist policy arguments.¹⁸¹ It is perhaps this ethical inconsistency in the more policy-oriented proximate cause position that leads the majority of American courts to adopt the *Polemis* type

¹⁷⁴ 3A REID'S BRANSON INSTRUCTIONS TO JURIES § 1370 (1961) (negligence to be shown before damages allowable). These instructions imply that fault must be determined without reference to the effect of the extent of such damage awards on the defendant or other like defendants. *But see* *Boomer v. Atlantic Const. Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (example of a court's handling of injunctions in nuisance cases and their consideration of the effects of their rulings on parties not before the courts).

¹⁷⁵ Calabresi, *Concerning Cause*, *supra* note 166, at 78-80. *See also* WIGMORE, *supra* note 131, § 37.7.

¹⁷⁶ *See* *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932); *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In *Tobin*, Justice Brietel wrote:

Beyond practical difficulties there is a limit to attaining essential justice in this area.

While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of the world. Every injury has ramifying consequences, like the rippling of the waters, without end. The problem for the law is to limit the legal consequences to a controllable degree.

Tobin, 24 N.Y.2d at 619, 249 N.E. at 424, 301 N.Y.S.2d at 561. Judges have also used consequentialist reasoning in their analysis of duty. *See* Green, *The Duty Problem*, *supra* note 74, at 1040.

¹⁷⁷ *The T.J. Hooper*, 60 F.2d 137, 140 (2d Cir. 1932); *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 924-25, 69 Cal. Rptr. 72, 83-84 (1968).

¹⁷⁸ Green, *Causal Relation Issue*, *supra* note 153, at 544-45.

¹⁷⁹ Green writes that the judge cannot use "proximate cause" effectively because proximate cause is overburdened with the analysis of many separate issues. *Id.* Other commentators are disturbed by the ambiguities of a causal system of analysis. *See* Epstein, *Strict Liability*, *supra* note 94, at 160-69, 172-85, 189-91, 197-202, 203-04 (discussion of Professors Coase and Fletcher's troubles with causation doctrines with which Epstein himself has less trouble).

¹⁸⁰ G. CALABRESI, *COSTS OF ACCIDENTS*, *supra* note 1, at 7-16. G. Calabresi, *Concerning Cause*, *supra* note 166, at 105-08.

¹⁸¹ Calabresi, *Concerning Cause*, *supra* note 166, at 108.

analysis of proximate cause, that the proximate cause decision is made only with regard to some notion of causal directness.¹⁸² At least under such analysis the court can continue to pretend to be more consistent, and pretend that such a decision is made simply by analyzing the facts presented by the parties before the court.

Nevertheless, even those courts that go beyond *Polemis* and analyze the broader policies in discussing proximate cause (those who prefer to discuss whether there exists a "superseding intervening cause" or whether the examination of the duty element will include the risks covered by the duty) couch the analysis as a "finding" process,¹⁸³ a nonconsequentialist process, done only with reference to the parties before the court. These cases all fail miserably at making complete and consistent justifications for the court decisions.¹⁸⁴ The word games used in these cases provide the appearance of rationality without acknowledging inconsistent, indefinite, and arbitrary consequentialist/nonconsequentialist appeals.

IV. CONCLUSIONS AS TO DUTY/BREACH/PROXIMATE CAUSE

To speak as if the duty/breach system is solely a nonconsequentialist, backward looking system is to speak imprecisely.¹⁸⁵ To label this traditional negligence law utilitarian and consequentialist is also too simplistic.¹⁸⁶ The duty/breach/proximate cause system has a mixed consequentialist and nonconsequentialist ethic. It is, more accurately, consequentialist in substance and nonconsequentialist in process. As has been previously noted, in routine cases this "structured consequentialism" seems to work fairly well. However, where society has little experience with the case, the negligence system's ultimately consequentialist ethic breaks into the open.

It is easy to see from the foregoing discussion of the elements of negligence why the economist is frustrated and dissatisfied with negligence as an ethical system. To the economist, the system is an unwieldy combination of consequentialist and nonconsequentialist decision justifications.¹⁸⁷ Where the system is dogmatic, and nonconsequentialist, in its formulation in a prima facie case constrained by a fact finding process, the economist argues that the system is incomplete and logically inadequate.¹⁸⁸ The economist questions how this formulation produces "good" for society. Is there not some better scientific or empirical basis for tort law?¹⁸⁹ The economist asks whether the tort system really deters bad conduct,¹⁹⁰ whether it compensates adequately,¹⁹¹ and how negligence proponents know their system is the best.¹⁹² Where the system is consequentialist — primarily in the creation of "duties," in the objective reasonably prudent person standard, and in the analysis of proximate cause — the economist wonders how the system can be

¹⁸² See C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS*, 279-80 (1977).

¹⁸³ See Green, *Causal Relation Issue*, *supra* note 153, at 568-69.

¹⁸⁴ *Id.*

¹⁸⁵ See Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEG. STUD. 49, 74-75 (1979).

¹⁸⁶ *Id.*

¹⁸⁷ Posner, *Utilitarianism*, *supra* note 1, at 111-19.

¹⁸⁸ *Id.* at 114-19.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

made to speak with consistency in its decisions and give consistent reasons for its rules.¹⁹³ He is thereby frustrated by the indefiniteness of negligence and its resultant arbitrariness and lack of predictability.¹⁹⁴

Is there any good word left to say about the negligence system? Can it be defended on any grounds? MacCormick probably provided the negligence proponent's best defense. Where MacCormick pointed out that a system can not be overly consequentialist or nonconsequentialist, he implied that a system can never be wholly consistent nor complete. This is because of the simultaneously backward-looking and future-predicting features of an adjudicatory decision.¹⁹⁵ Inconsistency, incompleteness, and indefiniteness may be inherent to both systems.

V. THE ETHICS OF ECONOMICS

In order to give context to what has developed as Posner's economic ethic, a brief discussion of Posner and Calabresi's ethical debate is appropriate.¹⁹⁶ Much of what Posner writes concerning the ethic of economics is in response to Calabresi's attempt at an economic decisionmaking system.¹⁹⁷ This exchange is an excellent example of the neo-conceptualization process at work in tort law.¹⁹⁸ Such a discussion indicates the movement of an ethical legal system from a consequentialist position into a nonconsequentialist structure.¹⁹⁹

Calabresi articulates criteria for the decisionmaking process for economic analysis which balance two basic goals.²⁰⁰ The first is the compensation goal; the second is deterrence.²⁰¹ Each is derived from Calabresi's belief about what would produce good for society. Each of the two goals has two components: the compensation goal is broken down into the subgoals of spreading losses and distributional equity²⁰² while the deterrent goal is bifurcated into specific deterrence and general deterrence.²⁰³ Calabresi argues that the best way to provide for these goals is to set up a system that refers every decision made to the key question of who is the cheapest cost avoider.²⁰⁴ This decision must take

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ MacCormick, *supra* note 26, at 239-40. See also WIGMORE, *supra* note 131, § 37 (discussion of inherent evidentiary relevance limitations); Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 904 (1982) (discussion of the adjudicatory constraints necessary to any tort system).

¹⁹⁶ At the time of this writing, a new piece has appeared that further refines the ethic of economics. I believe much of my criticism of Posner's economics ethics is applicable to Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799 (1983).

Grady, like Posner, is hard to critique since he insists that he is being "descriptive" as opposed to being normative. *Id.* at 799. Clearly, however, judges do not consciously do the technical analysis he suggests, nor do they justify their decisions by the use of this system. In order, then, for his writing to be useful, it must be a normative suggestion. As such his technical analysis fails as a formal "objective" system for the same consequentialist uncertainties that plague Posner's system. See also *supra* note 2.

¹⁹⁷ Englard, *supra* note 2, at 51.

¹⁹⁸ See G.E. WHITE, *supra* note 2.

¹⁹⁹ See G.E. WHITE, *supra* note 2; Englard, *supra* note 2, at 47.

²⁰⁰ Englard, *supra* note 2, at 47.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 36.

into account the person who is in the best position to make a cost/benefit analysis between accident cost and accident avoidance cost.²⁰⁵ Since Calabresi's system is principally concerned with cost avoidance, it is a consequentialist system. Calabresi argues that such a goal will be achieved if one follows the process of answering "the best cost avoider" question.²⁰⁶

Commentators have argued that Calabresi's system is faulty.²⁰⁷ Professor Englard, for instance, argues that Calabresi places too much faith in accident cost reduction at the expense of the autonomous nature of traditional legal policies.²⁰⁸ Additionally, Englard argues that Calabresi is too much of an instrumentalist with his economic analysis in that he overlooks the need for value judgements in determining specific legal policies. Englard finds Calabresi in the end to be a utilitarian in the extreme.²⁰⁹

The commentators criticize Calabresi where Calabresi is unabashedly and overly consequentialist. They find his system lacks definition of values, causally treats moral and religious values, lacks respect for individual legal responsibility, lacks sensitivity to individual person cost, and lacks predictability and uncertainty of the knowledge of consequences.²¹⁰ Posner, in describing his version of economic analysis, joins Calabresi's critics in many of their attacks.²¹¹ To these criticisms he adds another, directed once again at where Calabresi is overly consequentialist. He takes Calabresi to task for his lack of empirical verification of his theory: "Calabresi's work is an uncertain portent too, not so much because he himself has declined to move beyond prefacing statements of general principle as because he apparently considers such statements an adequate substitute for examining how the legal system works."²¹²

How then does Posner try to remedy the problems with Calabresi's economic system? How can he make the claim that his system provides the certainty that utilitarian/consequentialist systems generally lack? Where Posner breaks from Calabresi and simultaneously where he is different from traditional common law analysis is that he organizes the total decisionmaking process of all common law decisions around the analysis of the general proposition that a judge ought to do that which maximizes wealth to society as a whole.²¹³ There is, therefore, no need for traditional contract analysis, or negligence analysis. Thus, Posner's process does not involve duty analysis, nor breach analysis, nor proximate cause analysis, nor offer analysis, nor acceptance analysis.²¹⁴ Contract law and tort law are presumably submerged, if they exist at all, in the economic analysis of this one major principle.²¹⁵ The liability decision rests solely on which decision alternative maximizes wealth to society.²¹⁶

This principle is obviously consequentialist and at first blush appears little different from Calabresi's. The difference is only that Posner says explicitly "wealth maximization"

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 43-47.

²⁰⁷ *Id.* at 47-51.

²⁰⁸ *Id.* at 36.

²⁰⁹ *Id.* at 34.

²¹⁰ *Id.* at 50-51.

²¹¹ *Id.* at 53.

²¹² *Id.*

²¹³ Posner, *Utilitarianism*, *supra* note 1, at 119-35.

²¹⁴ G.E. WHITE, *supra* note 2, at 220.

²¹⁵ Englard, *supra* note 2, at 51-52 & n.109.

²¹⁶ Posner, *Utilitarianism*, *supra* note 1, at 123-24.

for what is left unstated as the utilitarian principle behind the four goals to which Calabresi adheres. Where Posner claims to improve on Calabresi is that his system provides a workable process for determining his utilitarian principle.²¹⁷ Posner argues that Calabresi has not provided a workable process for directing the decisionmakers in an adjudicatory system concerned with identifying "the best cost avoider."²¹⁸ Posner argues that his theory of liability is workable and definite.²¹⁹

While Posner is speaking in the context of comparing his theory with Calabresi's, his description of this economic theory should also serve well as a basis of comparison with the duty/breach language. The above description of Posner's ethic seems to show that he offers something different not only from Calabresi's system, but also different from the duty/breach system. Assuming, however, that one agrees with Holmes's earlier discussion concerning the underlying philosophy of the basic element of fault, that it is a rough utilitarian one that examines a case in order to protect a society from careless people and therefore to promote that society's general welfare,²²⁰ one can readily recognize the common utilitarianism of the two systems. Each system has basic consequentialist principles that ultimately control the decision that is to be made; the difference lies in the economist's definition of what is "good" for society.

Posner is explicit in stating for economics what is left unstated by Holmes, Prosser, and the Restatement regarding negligence. By explicitly defining his utilitarian principle, Posner opens himself up to the usual attacks on the consequentialist nature of utilitarianism. Critics must ask whether Posner's substitution of the word "wealth," which he redefines as the value in dollars of everything in society,²²¹ for what the utilitarian usually refers to as "promoting the greatest balance of good over evil," improves the utilitarian principle.²²² It seems he has merely asserted that he can measure good; that economists have a process for measuring what is of value or what is "good." Viewed in this way the stated principle is simply a tautology. The negligence system similarly defines what will produce good for society by referring decisionmakers to its *process* or *prima facie* case. Both systems involve a "leap of faith" that their process will in fact be able to consistently predict what will be "good" or produce wealth for society in the future as well as the present.²²³ Both systems have the problem of how to adequately value the various physical and nonphysical individual rights and societal needs. In the final analysis, then, Posner will have a superior system only if there is agreement that his processing system produces the greater good or "maximizes wealth."

Posner uses the Learned Hand formula to determine what will maximize wealth for society. Where B is the burden to the defendant, P is probability of harm, and L is extent of injury, Hand's formula is simply $B < P \times L$. Dollar units representing the value of the activity of the defendant will be inserted into the formula to determine the burden (B) on the defendant and the extent of the liability (L).²²⁴ If defendant's burden is less than the probability of harm times the extent of liability, then the defendant will be liable.²²⁵

²¹⁷ *Id.* at 127-35.

²¹⁸ *Id.* at 123-24; Englard, *supra* note 2, at 53.

²¹⁹ Posner, *Utilitarianism*, *supra* note 1, at 123-24.

²²⁰ O.W. HOLMES, *supra* note 43.

²²¹ Posner, *Utilitarianism*, *supra* note 1, at 123.

²²² Englard, *supra* note 2, at 51-52.

²²³ Posner, *Utilitarianism*, *supra* note 1, at 123-24.

²²⁴ *Id.* at 120.

²²⁵ *Id.*

Posner claims that if the judge follows this process wealth maximization will be guaranteed.²²⁶

The comparative features of the economic system and the negligence system are obvious. Where traditional negligence uses the *prima facie* case, the economist uses a mathematical formula. The mathematical formula provides a nonconsequentialist appearance similar to that of negligence's *prima facie* case. Posner argues that dollar values are "found" by reference to economic models.²²⁷ These values are plugged into the Hand system which will give the answer concerning whether the defendant is liable, which in turn will maximize wealth. Such a process downplays the overtly consequentialist aspects of the decision.

What are the economic models or reference points Posner's decisionmaker uses to "find" the values to substitute in for the variables of Hand's formula? To Posner, adjudicatory decisions are made with reference to "market theory."²²⁸ "Market theory" is Posner's processing device by which determinations can be made concerning the worth or values of certain activities that are before the court.²²⁹ He thereby further cloaks the consequentialist nature of his decisionmaking system within a market theory process which he describes as a nonconsequentialist act of "finding." The dollar value for determining wealth maximization is "found" by using either "actual" or "hypothetical" markets.²³⁰ The actual market, Posner tells us, is "right" for the majority of cases that involve voluntary transactions.²³¹ In the realm of "accidents," however, Posner writes that the transaction is not voluntary, and since no value has been placed by the parties themselves on the activity, the value of the activity must be made with reference to a hypothetical market.²³² Since most tort cases deal in the realm of accidents, and are nonvoluntary, Posner implies that most "tort" decisions to be made by the economist will be referred to the hypothetical market.²³³

Use of the hypothetical market has great similarities with negligence's use of the reasonable person theory. For example, Posner suggests that if A owns a bag of oranges, and Posner accidentally smashes A's bag of oranges because he is walking very fast with them, when the court is asked to decide liability, the court should apply the Hand formula to place a dollar value on A's oranges and a dollar value on Posner's walking very fast.²³⁴ The hypothetical market is supposed to "supply" the dollar value for the oranges and the dollar value for walking very fast. Posner, however, does not reveal his

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 119-20.

²²⁹ *Id.*

²³⁰ *Id.* As Posner explains:

The market, however, need not be an explicit one. Even today, much of economic life is organized on barter principles; the "marriage market," child rearing, and a friendly game of bridge are some examples. These services have value which could be monetized by reference to substitute services sold in explicit markets or in other ways. They illustrate the important point that wealth cannot be equated to GNP or any other *actual* pecuniary measure of welfare. A society is not wealthier because of a shift of women from household production into prostitution.

Id. (emphasis in original).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 120-21.

²³⁴ *Id.* at 121.

thinking about precisely how, by referring to some hypothetical market, a dollar value is found. In this way he puts the decisionmaker in the same situation a jury is put in when it is told to make a decision with reference to a reasonably prudent person. Presumably the economist would talk in terms of "cost" and "benefit," "supply and demand," "opportunity cost," and "risk and return" instead of "custom," "foreseeability," and "personal experience." Use of economic jargon, however, does not negate the similar, hypothetical nature of the process.

For specific concrete evidence of how an economist would value certain activities and commodities in a torts setting, where there is no voluntary buying and selling, one must turn to an analogous situation, also a forced transaction, where an economist values activities and commodities. Courts are, at times, called upon to determine the value of a dissenting shareholder's stock when the stockholder exercises his appraisal rights. This judicial determination concerns a forced transaction and economists are often called upon to aid the process.²³⁵ Note here that the process of valuing shareholder stock is a part of the decision involving a business. Valuing a business can be recharacterized as the process of valuing activities and assets and liabilities and, therefore, should be the same basic process that an economist would use in many torts valuation decisions.

The economist talks of three basic methods that can be used to value a business.²³⁶ The economist uses either an actual market approach, a discounted cash flow approach, or a "net asset" approach. If the business is in a widely traded group of like businesses, then the value is determined with reference to the "actual market" for the business. The actual market gives the best price received in a recent exchange of a very similar business. At first appearance this process of determining value has intuitive appeal. This process, however, has inherent circularity to it. Valuation by reference to actual market transactions is a method that relies on the intuition that similar assets have similar value without making plain how an asset's value is determined in the first place. This method depends on the basic economic tenet that the value of any item is a function of the amount and character of the returns that one can expect to derive from the item. The volatility of those returns also conditions value since the economist tells us that two assets with like estimated expected returns will not be equal unless the risk associated with each return is roughly equal.²³⁷ Even after the economist's underlying tenets are disclosed, however, the problem of circularity remains. Volatility or risk of return is only discovered with reference to comparable investments and these comparables are, once again, market determined.²³⁸

The subjective nature of the determinants of market interest rates which allegedly drive market values is also readily apparent. The determinants include the inclination of some people to borrow in order to be able to buy now rather than later; the inclination of others to save now in order to be able to buy what they need later in life; and the inclination of others to borrow in order to finance a machine or some other productive

²³⁵ See *Francis I. duPont & Co. v. Universal City Studios, Inc.*, 312 A.2d 344 (Del. Ch. 1973); *Swanton v. State Guaranty Corp.*, 42 Del. Ch. 477, 215 A.2d 242 (1965); *Application of Delaware Racing Association*, 42 Del. Ch. 406, 213 A.2d 203 (1965).

²³⁶ W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS*, 129-30 (1980) [hereinafter cited as W. CARY].

²³⁷ W. KLEIN, *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 202 (1980).

²³⁸ *Id.* at 202-03.

process, which depends, of course, on the availability of money. The ability of economists to predict interest rates with any certainty is highly problematic and the literature on the determinants of the interest rates is at best difficult.²³⁹

To trust the actual market's ability to come up with a true value one must believe the market has perfect information and is an absolutely efficient and effective processor of society wants and needs. Because the market is governed by many unpredictable, perhaps nonrational forces, much of the value given to a business is dependent upon the collective fleeting preferences of the market's various individual participants. Accordingly, the value of a business is affected by the Federal Reserve Board's policy concerning the money supply, by market psychology, and by general business optimism or pessimism. Perhaps Posner would argue that these "hypothetical market" variables are supplied by references to or borrowings from the actual market's experience with valuation. If Posner, however, makes this allowance, the decisionmaker's freedom to second guess the actual market would reduce the certainty and consistency of the system.

Granting that such a method might be useful in some situations, valuation by reference to market prices is often impossible where there are not comparable businesses that are widely traded. In these situations the economist would use either the method of discounting cash flows from the business to determine its present worth or would value according to the net asset value approach. Taking the discounted cash flow approach first, this method is described as follows:

The appraiser generally starts by computing the average earning for the corporation in the past number of years Extraordinary gains and losses are excluded from the average earnings calculation The appraiser then selects a multiplier [to be applied to average earnings] which reflects the prospective financial condition of the corporation and the risk factor inherent in the corporation and the industry In selecting the multiplier, the appraiser generally looks to other comparable corporations. [Then the value obtained by multiplying the average earnings times the multiplier is discounted to its present value].²⁴⁰

The consequentialist nature of this process is readily apparent. The process involves predicting the life of average earnings, it involves a guess about the length of time such business will be carried on into the future, and it involves a guess as to a discount rate that will adequately take into account the real return rates of future investments. The process of valuation, therefore, involves the setting of probabilities on many different and interrelated occurrences. As such it is a very difficult and inexact process that presumes the existence of perfect information and the ability to determine exact probabilities. For instance, a slight variance in the discount rate over a number of years would greatly change the value given the business.

Finally, the economist may use the net asset valuation method. This is the method most often used when there is little actual trading and few comparable businesses, that is, when there is little or no experience with the activity.²⁴¹ The process simply tries to value the parts of the activity at a given time, according to certain accounting principles, and weigh these assets against the company's liabilities which are also determined by

²³⁹ W. CARY, *supra* note 236, at 129-30.

²⁴⁰ W. KLEIN, *supra* note 237, at 202.

²⁴¹ W. CARY, *supra* note 236, at 129.

accounting principles. Accounting principles direct an accountant to value certain items by their actual cost less depreciation or by their liquidation value. The accountant's computations are reported on the company's business balance sheet from which one can determine the company's "book value." Professor Cary presents a very short critique of the process of looking at the valuation of book values, which demonstrates that it is subjective and very consequentialist:

In general, there is nearly complete agreement that book value does not accurately represent the fair valuation of corporate assets. It is essentially a historical figure. Balance sheets usually list assets at original cost, less depreciation, which may differ greatly from present usable value or the present cost of equivalent assets. In most cases liquidation value of the assets is not an appropriate consideration, since "liquidation" comprehends the termination of the business and disposal of the assets [this liquidation method or salvage value is inappropriate since the business is continuing and the asset has more value as it continues to produce and be used]. Reproduction cost less depreciation (and obsolescence) may be used, although it is an uncertain measure of value because of the implicit assumption that the plant or other tangible assets would be reproduced in substantially their present form. [The process also involves predicting the life expectancy of an asset to determine a depreciation figure. If an incorrect useful life expectancy is used in the calculation the true value is thrown off].²⁴²

Cary's comment points out that "cost" of an item depends on the scarcity of the item and demand for it at any given time. The determination of value, however, seems to involve an analysis of an item's past, present, and future supply and demand. Once again, if the decisionmaker recognizes that these are future looking features he will and perhaps should exercise his discretion to value the item's "true" cost. If the decisionmaker is free to do this, whatever is gained in "accuracy" is set off by a loss in consistency.

If we take these three alternative decisionmaking systems of analysis and apply them to Posner's hypothetical problem of valuing walking very fast we are faced with a process that is no better in producing a consistent definite decision than the duty/breach analysis. After first taking stock of Posner's reminder to view the value of walking very fast not as the defendant actually viewed it but instead as the hypothetical market would value it, we are faced with applying either actual market, discounted cash flow, or net asset value analysis or some combination. If I place myself for a moment into the economist's shoes, since I have no information on a recent exchange of dollar value for the activity of walking very fast, and I presume none can be presented, I must rule out the use of the market value method. I am left with a method choice between discounted cash flow or a net benefit over costs.²⁴³ Under a discounted cash flow analysis I would look at the past value or "cash flow" produced to society of walking very fast over a period of years and try to average it and project its continued value to society.²⁴⁴ From whose perspective do I value it? From society's, from the defendant's, from mine? Oh, yes, I remember I use a hypothetical market. Is this to ask what society would pay the defendant in his situation to keep him from walking very fast? Perhaps I should find relevant to my consideration alternative modes of transportation available to the defendant and the

²⁴² *Id.*

²⁴³ See W. KLEIN, *supra* note 237, at 214.

²⁴⁴ *Id.*

value to society over time of the defendant's and other person's use of these. Perhaps the economist would consider these alternatives as the opportunity cost to the defendant. The economist might suggest that I extrapolate from the defendant's expected rate of return of walking very fast versus other alternatives. This should then turn my thinking to the assignment of a discount rate which would, *voilà*, determine from the value of the activity to the defendant over time, the present value of the activity — but I am at a loss and my head is spinning.

Instead, I might jump at a simpler process, and try using the net asset analysis. I might simply try to determine, at the time of defendant's decision, the net cost to society of walking very fast when compared to its benefits. Again, at what point do I value the activity and how do I accurately take into account its past value and future value? I would be sorely tempted to value walking very fast on my personal belief of what ought to be its value instead of how society might actually value it.

Note the similarities of any of the three valuation techniques — market approach, net asset approach, and discounted cash flow approach — to the duty/breach process. The decisionmaker must struggle with the problem of determining whether his experience gives him enough information about the hypothetical market to be able to value the item properly. He must trust his intuitions that his experience is society's experience with the item. He must struggle with knowing when to stop considering the ripple effects of his decision concerning value of the item. In this way he is struggling with the same evidentiary limitations and definitions of relevance that the jury struggles with in "negligence." He must also struggle with the dilemma of when to value an activity by what he feels "ought" to be the value instead of what "is" the value. In this instance he is struggling with the same issue the jury faces when deciding whether to hold a defendant to a higher standard than that set by the existing custom regarding defendant's behavior. Use of the hypothetical market does not deal with the ethical inconsistency or indefiniteness of consequentialist theories any better than does the appeal to a reasonable person standard. Economics tell the decisionmaker to "find" what he cannot with certainty find and predict what he cannot definitely predict. Such a system is most inconsistent and indefinite where it requires a prediction of future consequences by referring one to a highly structured dogmatic system of rules which provide the decisionmaker little information about the decision.

As has been noted, the problem of valuation is filled with uncertainties. Each valuation method is filled with circularities and fails to guard against the problems of imperfect information. In addition, each method lacks specific guidelines for making future predictions about value and buries the subjectivity of the process in economic jargon. Even if, however, the economist could provide a dollar value for the cost to the defendant to protect against harm, and a dollar value for the damages that the defendant's activity may cause, so that under the Hand formula both the "*B*" (for burden) and the "*L*" (for extent of the liability) could be filled in, the variable "*P*" (for probability) is still undetermined.²⁴⁵

The assignment of a probability also has both consequentialist and nonconsequentialist features. Though assigning probabilities seems to only involve a determination from evidence of the past events the likelihood of some future event,²⁴⁶ whether in fact

²⁴⁵ See R. POSNER, *ECONOMICS*, *supra* note 1, at 122-23.

²⁴⁶ W. SALMON, *THE FOUNDATIONS OF SCIENTIFIC INFERENCE* 68 (1967). Salmon refers to this

this process can ever be done without skewing the probabilities in favor of a preferred outcome is highly questionable.²⁴⁷ In fact, some argue that decisionmakers will inevitably assign the probability with reference to their own beliefs about the best outcomes for

description of probability as the "Logical Interpretation" of probability. He writes that such a description involves inductive reasoning. *Id.* at 68-69.

²⁴⁷ Salmon calls this description of probability the subjective theory. Salmon writes of Rudolf Carnap's theory of inductive logic which relates to Posner's attempts at defining an economic ethic:

Carnap's earlier systems of inductive logic have been criticized — especially by those who are more interested in questions of practical statistical inference than in foundational questions — on the ground that the [Carnap's] confirmation functions were defined for extremely simple languages. The languages embody only qualitative concepts, that are patently inadequate as languages for science. In his more recent work, Carnap has been developing systems that are able to treat physical magnitudes quantitatively.

Id. at 74.

Posner's ethical analysis parallels Carnap's analysis in that he suggests that tort should as nearly as possible make value judgments in quantitative terms. Salmon, however, in criticizing Carnap, provides the foundational criticism of Carnap's theory which likewise applies to Posner's efforts:

As the preceding remarks should indicate, Carnap has been acutely aware of various technical difficulties in his earlier treatments of the logical interpretation of probability, and he has made enormous strides in overcoming them. There is, however, in my opinion, a fundamental problem at the heart of the logical interpretation. It is, I think, a difficulty of principle which cannot be avoided by technical developments. It seems to be intrinsic to the entire conception of probability as a logical relation between evidence and hypothesis.

The logical interpretation involves, in an essential way, the conception of probability as a measure of possible states of affairs. Whether the measure is attached to statements describing these possibilities (i.e., state descriptions or structure descriptions) or to the possibilities themselves (i.e., facts, propositions, models), the measure is indispensable. There are many alternative ways of assigning such a measure; for instance, there are infinitely many different ways of assigning nonnegative weights to the state descriptions of our simple illustrative language in such a way that together they total one. As a matter of fact, Carnap has described a continuum of weightings, and there are others beyond the scope of that collection. Alternative methods of weighting have, of course, differing degrees of intuitive plausibility. The inescapable question is: How are we to select the appropriate weighting or measure from the superdenumerable infinity of candidates?

One feature of the choice has single importance: *The choice must be a priori.* We may not wait to see how frequently a property occurs in order to assign it a weight; an a posteriori method of this sort would have to find its place within one of the interpretations still to be discussed. The problem is to show how we can make a choice that is not completely arbitrary. Assuming we have made a definite choice, this choice defines the notions of degree of confirmation and logical probability. It determines our inductive logic. As a consequence, degree of confirmation statements, or statements of logical probability, are *analytic* if they are true (self-contradictory if they are false). They are statements whose truth or falsity are results of definitions and pure logic alone; they have no synthetic or factual content. Given any hypothesis "h" and any consistent evidence statement "e," the degree of confirmation "c(h,e)" can be established by computation alone, as we saw in dealing with our examples above. The question is: *How can statements that say nothing about any matters of fact serve as "a guide of life?"*

Id. at 75-76 (emphasis added).

Salmon argues that Carnap ultimately answers this above question from the position of an *inductive intuitionist*. *Id.* at 78. Posner, like Carnap, has the inductive intuitionist basis for his ethical system.

the analysis.²⁴⁸ In this way the process of assigning probabilities is very much like argument by analogy. As with argument by analogy, the assigning of a probability has a mixed consequentialist/nonconsequentialist ethic to it. It is arguably tied to past events but also faced with predicting the future in the light of new, changing circumstances. Even if the psychology of the process would allow for an assignment of an objective probability figure, such a process is very uncertain where there is little or no experience with or empirical data for assigning the probability. As such it is primarily a consequentialist process, very much like the "custom" arguments in the analysis of breach. Where society changes so rapidly that the decisionmaker has little or no experience with the injury-producing situation, the decisionmaker would be faced with trusting only his intuition. He would most likely then assign a high probability if his intuition tells him that it is likely to affect society badly or a low probability if his intuition tells him its effect would not have a meaningful impact. This analysis suggests that assignment of probabilities is very consequentialist and becomes more nonconsequentialist only where society has had experience with the accident.²⁴⁹ It is incorrect that the process of assigning probabilities is necessarily a nonconsequentialist process or that it provides the same degree of ethical certainty in all situations.²⁵⁰ Assuming that the economist could overcome these problems, the economists ethical system would have one remaining obstacle to overcome, and that obstacle is a processing problem. As to "who" is to make the decision about wealth maximization, Posner discloses little, only asserting that this valuation process and application of the Hand formula will be and can be done by a court. Posner simply states that "a court can make a reasonably accurate guess as to the allocation of resources that would maximize wealth."²⁵¹ It is interesting to speculate as to "who" Posner is referring to when he says that the decision will be made by "the court." Since he does not specify whether judge, jury, a combination of judge and jury, or an economic expert under cover of the court,²⁵² will make the decision, it is unclear whether the decision will be made by a "fact finding" or by a "law making" person.²⁵³ Since we are not told the nature of the decisionmaker, the usual ethical indications given by this information are lacking.

It is important to speculate concerning the varying alternatives available to Posner's economic model under existing adjudicative constraints and what each means for the ethics of economics. The decision process could be controlled by economic experts who could give opinions as to the "value" of certain activities with reference only to the hypothetical market. These opinions could be given and justified by reference to what experts "usually" rely on in giving these expert opinions.²⁵⁴ The "fact finding process" would be done "under cover" if the courts use this economic decisionmaking process.

²⁴⁸ *Id.* at 79. This view Salmon calls the Personalists view. See Kahneman & Tversky, *supra* note 22.

²⁴⁹ W. SALMON, *supra* note 246, at 76.

²⁵⁰ *Id.* Salmon notes that determining probabilities with any certainty depends on the requirement of *total evidence*. *Id.* Note that in this way economic analysis parallels negligence analysis; that where society has had wide experience with a certain type of accident, that the "rules" are more easily and consistently applied.

²⁵¹ Posner, *Utilitarianism*, *supra* note 1, at 120.

²⁵² *Id.*

²⁵³ Elsewhere, Posner implies that the economic analysis is to be done by the judge. R. POSNER, *ECONOMICS*, *supra* note 1, at 18.

²⁵⁴ See FED. R. EVID. 703.

The economic expert would provide his opinion as to "value," and the court would end up deciding little more than if the economic expert is credible, or, if there is more than one expert, which one is more credible. Thus, under this alternative, the court would be left with plugging the value and probability given by the expert into the Hand formula and waiting for the answer to come out. One wonders how it is that the economic expert is any better than a jury at assigning probabilities. Perhaps the jury could be given the task of assigning a probability. It is easy to see, however, that even with the jury included, such a decisionmaking process gives major decisionmaking responsibilities to the economic expert that were previously given to the jury and/or judge. Hence, the overall process appears to be nonconsequentialist because the expert's "findings" would be inserted into a formula which Posner believes will guarantee wealth maximization. Under this alternative the process would be very rule oriented and absolutist and, therefore, very nonconsequentialist in appearance. The consequentialist nature of the process would be carried on by the economist.

If the decision is to be more than a credibility vote, the information — the "stuff" of the judge's or jury's decision — will necessarily have to be expanded to take into account a much broader statement of relevance.²⁵⁵ Under this alternative the court, either judge or jury, would therefore be required to "do" the economic analysis by looking to the hypothetical market. Under the jury alternative, juries would most likely assign various values and probabilities to situations depending on their experience with the various activities. The various consequentialist features of the process would then be the subject of the jury's deliberations. Faith in the ability of the jury to deliberate under these instructions would be, as it is with the reasonably prudent person instruction, the key to one's acceptance of this alternative.²⁵⁶

The third alternative decisionmaker is the judge. Under this alternative the judge would necessarily be made the economic expert. Making the judge the decisionmaker would allow for a mixed consequentialist/nonconsequentialist system like that evaluation in the duty analysis. This alternative would force the judge into the same dilemma he has when determining duty by analogy. He would have to deal with the consequentialist aspects of the decision directives in one of two ways: either subvert the policy rationale by an obscured conclusion regarding the hypothetical market valuation of an activity, or try to justify systematically, based on a hypothetical market analysis of values, the true soothsaying basis of his decision. If the latter is the economist's choice then there are yet unanswered questions as to what information the court will consider in making the determination and who will present it. The result of the economic system's choice as to who should make these decisions will either make the system more openly consequentialist or subvert and disguise the consequentialist aspects in the opinion and jargon of the economist.

With this description of Posner's system before us it is easy to see that from the philosophical ethicist's perspective, there are predictable criticisms of the different aspects of economic analysis.²⁵⁷ These criticisms should remind us of the criticism of duty and breach. This system is subject to attack for uncertainty and lack of definiteness. For instance, it is subject to much debate why anyone would assume that a wealth maxi-

²⁵⁵ W. SALMON, *supra* note 246, at 76.

²⁵⁶ *Id.*

²⁵⁷ Englund's criticisms ring consistent with those criticisms Thiroux predicted he would have. Englund, *supra* note 2, at 51-56. J. THIROUX, *supra* note 16, at 34-38, 50-51.

zation principle will produce good.²⁵⁸ If the principle of wealth maximization means nothing more than a process by which good is maximized then the statement is no improvement over the existing utilitarian formulation.²⁵⁹ This seems to be part of what Posner attempts when he defines wealth as the value in dollars or dollar equivalents of everything in society.²⁶⁰ Second, the consequentialist would ask how it is that the Hand formula really serves society by producing wealth maximization. Why, for instance, is the Hand test used rather than a reverse Learned Hand test, where the mathematical formula is also $B < P \times L$, but burden is instead associated with the plaintiff's cost or burden of preventing the accident?²⁶¹ At this point, the Holmes rationale of "little government interference," his definition of act, and his "sense of justice" certainly seem applicable as arguments for Hand's formula. As such, economics is ultimately supported by a part of the same belief system as is negligence. In addition, where Posner is overly consequentialist in his directives concerning the ability of the market to project future values, one must question the capability of ever having adequate information about the consequences of certain decisions or the future values of certain commodities.²⁶² Without such information predicting the consequences or values is a very uncertain process. The economist can guarantee no more certainty about the consequences he projects than can the judge in the proximate cause analysis in the fault based system.²⁶³

Posner's system also has the same inconsistencies as negligence where it tries to be most nonconsequentialist. How is it that the use of hypothetical markets and the Hand formula magically produce accurate evaluations? Is this not a leap of faith akin to the leap of faith which the negligence system makes when it appeals to the reasonably prudent person?²⁶⁴ The acceptance of the nonconsequentialist aspects of the market theory depends upon one's acceptance of the assumptions that the economist makes.²⁶⁵ These assumptions are the economist's articles of faith.²⁶⁶ Moreover, these assumptions are certainly not without criticism.²⁶⁷ For instance, one may question why it is that a hypothetical market is useful, reliable, or even useable.²⁶⁸ Use of hypothetical markets has proved, in certain cases, to be a very subjective and arbitrary system of decision-making.²⁶⁹ Additionally, one might criticize the lack of empirical verification for the validity of the decisions produced by the use of hypothetical markets.²⁷⁰ Such subjectivity at such a crucial level produces many of the inconsistencies of which Posner claims his

²⁵⁸ J. THIROUX, *supra* note 16, at 34-38.

²⁵⁹ *Id.*

²⁶⁰ Posner, *Utilitarianism*, *supra* note 1, at 119.

²⁶¹ Calabresi & Hirschhoff, *supra* note 1, at 1059.

²⁶² J. THIROUX, *supra* note 16, at 34-38; W. SALMON, *supra* note 246, at 76.

²⁶³ W. SALMON, *supra* note 246, at 76.

²⁶⁴ Posner is not blind to these criticisms. See R. POSNER, *ECONOMICS*, *supra* note 1, at 19-23. It seems he has forgotten the limitations of his own theorizing in making the ethical claims.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Englard, *supra* note 2, at 51-56.

²⁶⁸ *Id.* at 39.

²⁶⁹ W. KLEIN, *supra* note 237, at 202. Klein writes: "Moreover, valuation by reference to market prices of comparable assets involves an obvious problem of circularity; it is a method that tells us that similar assets have similar values without telling us anything about how that value is determined." *Id.*

²⁷⁰ W. SALMON, *supra* note 246, at 75.

system is free.²⁷¹ In this way his system is subject to the same "leap of faith," subjectivity, and lack of empirical verification criticisms to which all nonconsequentialist systems are subject.²⁷²

Both systems provide consequentialist directives to be processed by nonconsequentialist decisionmaking constraints. As such, both systems are subject to inconsistent methods and uses of justification. Where they are consequentialist in their directives they are open to criticisms for lack of definiteness as each system tries to define the "good" that their principles will produce. They are also burdened with an inability to prove or guarantee the future "good" from the use of their principles. Where each has processing constraints which are very dogmatic and nonconsequentialist the systems are open to criticisms for producing inconsistent and unpredictable results that do not serve society's widely held beliefs concerning what is in its best interest. The criticisms point out the lack of rational justifications for the assumptions that undergird their processing directives.

As the philosophers have long pointed out, these criticisms are not unique to the systems of tort law, but exist in any normative ethical decisionmaking system. Perhaps, however, the tort system, which must try to operate in the adjudicatory constraints imposed by the "real world," is driven, for the sake of appearances, to pretend the criticisms are not valid.²⁷³ It is interesting to note that what the economic system tries to do is what current philosophers argue is the best bet at bridging the inconsistencies of consequentialist and nonconsequentialist systems.²⁷⁴ These philosophers argue that the key to a unified and consistent system is a wide acceptance of the underlying faith in the tenets and assumptions of an ethical system.²⁷⁵ Once agreement is reached among all the participants in such systems, and a process for consistent decisionmaking is found, then those who agree both with the principles of the system and with its process will be satisfied with the consistency, definiteness and completeness of their system.²⁷⁶

One of the major critiques, however, of such a system is the cost to society of getting the members to agree to the underlying tenets of the proposed system and also the cost to society of the extensive processes necessary in order to provide all the information necessary to insure the results of the system.²⁷⁷ This cost critique of the "collectivized utilitarian" model, of insuring the absolute certainty and completeness of the system's decisionmaking process,²⁷⁸ has been fully discussed elsewhere.²⁷⁹

Despite the problems with the cost of collective utilitarianism, a greater problem would result even if agreement could be reached that economic analysis should be adopted wholesale. The problem that remains is the exclusivity in the economist's underlying assumption concerning the rationality of man. This underlying faith in the "rationality" of man may tend to create a monopoly in the way in which the future is predicted. The language of economics is the language of materialism. It seeks to quantify everything in terms of dollars and cents and is preoccupied with probabilities. It thereby

²⁷¹ Posner, *Utilitarianism*, *supra* note 1, at 111.

²⁷² J. THIROUX, *supra* note 16, at 50.

²⁷³ *Id.*

²⁷⁴ D. REGAN, *UTILITARIANISM AND COOPERATION* (1980).

²⁷⁵ *Id.* at chapter 8.

²⁷⁶ *Id.*

²⁷⁷ Sumner, Book Review, 80 MICH. L. REV. 701 (1982).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

puts a premium on the empirical, the measurable and the scientific, at the exclusion of the ideal, the emotional, and the religious.

As has been noted, the traditional negligence language, on the other hand, has left undisclosed the underlying assumptions of its utilitarianism.²⁸⁰ This allows more tolerance of the ideal, the intuitive, and the religious methodologies of making future predictions. It also allows for more competition in methods of predicting the future. Preference for the traditional negligence formulations is ironically somewhat "market" driven. The beauty of traditional negligence language is that it allows judges' and jurors' different belief systems the room to compete under the guise of duty, reasonableness, and causation. As has been seen in the earlier discussions of negligence, reasonableness leaves room for both the rational and the "religious," the material and the ideal. For very good reasons, individual decisionmakers may disagree with the underlying faith in the "rationality" of a process that tries to scientifically measure something without adequate definitions or measuring devices.

In any event, once the common consequentialist/nonconsequentialist characteristics of ethical systems that compete in the area of tort law have been revealed, the true nature of the systems are also revealed: that they are fundamentally based on beliefs and assumptions. This changes the nature of the competition. The debate must now be concerned with freedom of thought issues instead of being concerned solely with logical definiteness, completeness, and consistency since there can be no winner under this criteria.

CONCLUSION

The language of traditional negligence law, which refers courts to questions of duty, breach, and proximate cause, is a confused and frustrating mix of consequentialist and nonconsequentialist ethics. Its processing techniques so structure the tort decision as to bury its consequentialist features in the nonconsequentialist language of making "findings" and applying "objective" criteria. It also leaves unstated the consequentialist nature of its processing elements. Economic analysis does not improve the traditional analysis. While economic analysis makes more explicit the consequentialist nature of its principles it does no better a job of demonstrating predictability or certainty in the use of its principles. The nonconsequential mathematical nature of its processing devices are no better at disguising the consequentialist features of its system than is the *prima facie* case in hiding the inherent consequentialism of traditional negligence law.

Economics should not, therefore, claim ethical superiority for its system. Economic analysis should recognize that its "structured consequentialism" is none the less consequentialist. It should be more frank about the subjectivity inherent in any ethical system that is involved in predicting what will be the future value to society of present decisions and activities.

²⁸⁰ See, e.g., Leff, *Economic Analysis of Law: Some Realism about Normalism*, 60 VA. L. REV. 451, 453-59 (1974) (discussion of related criticism of economic analysis). See also England, *supra* note 2, for his critique of Calabresi's economics.

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