Tel Aviv University Law School
Tel Aviv University Law Faculty Papers

Year 2012 *Paper* 163

Reasonable Care: Equality as Objectivity

Avihay Dorfman*

*Tel Aviv University, Faculty of Law, dorfman@post.tau.ac.il

Reasonable Care: Equality as Objectivity

Avihay Dorfman

Abstract

The most compelling defense of the standard of reasonable care in negligence law casts itself in terms of equality. This commitment to equality may paradoxically turn out to be flatly inegalitarian. This is because it discriminates against the less capable through ignoring their deficient capabilities (and so against their chances of meeting the standard of reasonable care successfully). A promising, though still unfamiliar, way to revive the egalitarian aspirations of reasonable care would be to show that imposing the standard of reasonable care even on the less competent expresses, rather than inhibits, a true devotion to equality. I seek to make this showing, and thus to reclaim for this standard of care its egalitarian foundations more adequately than has so far been proposed.

REASONABLE CARE: EQUALITY AS OBJECTIVITY

Avihay Dorfman*

Law & Philosophy (forthcoming 2012)

ABSTRACT. The most compelling defense of the standard of reasonable care in negligence law casts itself in terms of equality. This commitment to equality may paradoxically turn out to be flatly inegalitarian. This is because it discriminates against the less capable through ignoring their deficient capabilities (and so against their chances of meeting the standard of reasonable care successfully). A promising, though still unfamiliar, way to revive the egalitarian aspirations of reasonable care would be to show that imposing the standard of reasonable care even on the less competent expresses, rather than inhibits, a true devotion to equality. I seek to make this showing, and thus to reclaim for this standard of care its egalitarian foundations more adequately than has so far been proposed.

INTRODUCTION

Playing ball with one's twelve year old nephew gives rise to a basic question of fairness. Ought we to infantilize our playing performance so as to allow the hopeless nephew to win the game? Or should we stick to our ordinary play, in which case we know we will defeat the youngster? Perhaps surprisingly, it is not uncommon for those preferring the former alternative to experience some negative reaction on the part of the nephew: "Don't fake it, play your best." The plight of the nephew, that is, is that he wants to be treated as an equal, rather than as an inferior (in the appropriate sense of playing ball against a grown-up). Nevertheless, he *is* inferior (again, in the appropriate sense).

Precisely the same structure of dilemma occurs beyond the grownup-child interaction and outside the basketball court. In particular, I shall argue that it presents itself in connection with the objective standard of due care in the law of negligence. Moreover, I shall insist that this dilemma gives rise to the most fundamental threat to the integrity and legitimacy of this standard of care. Importantly, however, *this* dilemma has never been analyzed, let alone solved, head-on. I shall seek to do both.

To begin with, the standard of reasonable care in negligence law is objective in the negative sense that, *all else being equal*, it does not take into account idiosyncrasy on the

* Tel Aviv University Faculty of Law. Email: dorfman@post.tau.ac.il

This Article has benefited from responses received at the at the Stanford/Yale Junior Faculty Forum, the Second Annual Meeting of the Israeli Association of Private Law, Haifa University faculty workshop, and the Human Rights Workshop at The Hebrew University. I would like to thank the participants in these occasions. I would also like to thank to two anonymous *Law & Philosophy* reviewers for their excellent comments. Thanks also to Cegla Center for Interdisciplinary Research of the Law for a generous financial support.

part of a risk-creator.[1] The law conceives of the parties to a tort interaction as equals, since it fixes the contours of reasonableness by reference to what any reasonable person ought to do under the circumstances. This standard functions regardless of what, from the point of view of the actual actor, counts as discharging appropriate—including even best—care toward the other. But all else may not always be equal precisely *because* not all risk-creators possess the capacities that are pertinent to meeting successfully the standard of reasonable care. Paradoxically, therefore, disregarding idiosyncrasy finds its most appealing defense in an ideal of equality between parties to a tort interaction. At the same time this invites treating some risk-creators (in terms of the duty to exercise reasonable care) *as though* they could live up to the uniformly objective standard of care, although in fact and through no fault or choice of their own they cannot.[2] Were equality the moral center of gravity of the standard of reasonable care, it would be necessary to dissolve the paradox just mentioned by explaining to what extent this standard takes seriously the plight of those who are less capable of meeting it.[3] After all, negligence law's commitment to equality is hardly challenged by subjecting the more capable person—the person of "ordinary intelligence and prudence"[4]—to the test of reasonableness.

Hence, there might exist a gapping distortion between the egalitarian underpinning of the objective standard of reasonable care and tort law's self-conscious disregard of disability for the purpose of fixing the contours of appropriate care. *Why should an objective requirement of care, which thereby sets a mandatory standard of conduct beyond the reach of some, make sense to the egalitarian at all*? Perhaps, pragmatic reasons (such as reducing the cost of judicial case-by-case assessment of subjective traits and competencies) can support a uniformly objective standard. However, these alone can hardly address, let alone explain, the egalitarian anxiety just expressed.

In the pages that follow, I shall seek to defeat this anxiety by reclaiming for negligence law the deeply egalitarian character of an objectively-fixed reasonable care. I shall argue that the standard of reasonable care can, and indeed should, reflect society's commitment to treat its constituents as equals. The proposed account, it is important to

[1] The *locus classicus* is Vaughan v. Menlove, 132 Eng. Rep. 490 (C.P. 1837). See also The Germanic, 196 U.S. 589, 595-96 (1905), in which Justice Holmes observed: "The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the person concerned."

[2] Throughout, I shall investigate the standard of care in connection with persons whose caring skills are *deficient*, which is to say the case for (or against) a *sub*standard of reasonable care. I shall not take issue with cases involving super-skilled persons (such as a top-notch brain surgeon), which is the case for (or against) a *higher* standard of reasonable care. I do that because the principal difficulty for egalitarianism is that of demanding reasonable amount of care from persons whose caring skills are (through no fault or choice of their own) importantly deficient. Moreover, it is not clear to me whether the two cases (of deficiency and proficiency, respectively) are symmetrical in the sense that the same considerations and concerns apply to both; certainly, the argument I shall develop below does not turn on such normative symmetry.

[3] Surprisingly, tort theorists who emphasize the egalitarian foundations of the objective standard of care pay relatively little attention to this concern. See, e.g., the discussion, in a footnote, of the consistency of corrective justice with certain classes of incompetent care-discharger in Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995), p. 183 n. 22.

[4] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), p. 108.

note, is no speculative exercise of ideal-world design of legal institutions. Rather, it is a sympathetic *reconstruction* of the common law tort of negligence. A central theme in the argument I shall develop draws on a less familiar element in the demands of equality that, nonetheless, animates tort law. Indeed, these demands have mostly been articulated in connection with the principle of corrective justice. There, disturbances to an *ex-ante* equilibrium between the *equal rights* of interacting persons (say, the freedom of a tort-feasor and the security of a tort-victim) are instances of injustice calling for correction. By contrast, I shall emphasize another distinct aspect of equality that figures prominently in our moral and legal experience of each other; namely, a recognitional aspect of equality. In the context of the duty of reasonable care, an important feature of what it means to be treated as equals by the law is the recognition of tort-feasors as duty-bound, as persons who are *equally* accountable and, indeed, responsible for their failure to meet the requirement of appropriate conduct expected from all (here, exercising reasonable care).[5] On the other hand, excusing them from the requirement of reasonable care expresses a retreat from the equal standing they deserve by virtue of their equal worth *qua* persons. That a duty of reasonable care is not merely a burden but more fundamentally a token of being recognized as an equal has an important implication beyond the limited counters of the institution of tort law. It requires, in ways I specify more fully below, the commitment of the entire society as a whole (i.e., public law) to provide the background conditions needed to make possible this aspect of equality.

More generally, my analysis pins down the complexity of turning equality into society's regulative ideal as it *requires*, rather than merely sanctions, the complementary work of private and public legal orderings. Simply put, I shall argue that, rather than competing against each other, the demands of equality that traditionally inform private law, on the one hand, or public law, on the other, could be made mutually constitutive and, therefore, supportive of one another, at least in respect to the duty of reasonable care and the normative landscape onto which it maps. Thus, no one form of legal ordering—private or public—can alone bear the burden of equality. It is only through the interlocking efforts of both that either one can flourish in the first place. I shall flesh out this notion of interconnectedness by introducing what I shall call the three facets of equality that underlie the egalitarian structure of the duty of reasonable care. According to the first facet, equality requires that tort-victims be protected by an obligation to comply with an objective standard of care; on the second, equality requires that tort-feasors be treated as persons who can and should be held responsible for their success and failure in meeting this very standard; and on the third, equality, therefore, places a demand on the state to organize the social and political orders accordingly.

In this sense, I shall show that egalitarians have reason to endorse the freestanding force of equality within private law not only for its own sake, but also because it requires an expansive commitment on the part of society as a whole to neutralize preexisting

[5] For a thorough elucidation of equal accountability and its intimate connection to dignity in the realm of ethics, see Stephen Darwall, *The Second Person Standpoint: Morality, Respect, and Accountability* (Cambridge, Mass.: Harvard University Press, 2006). The duty-oriented account of equality I shall marshal in the main text below, while surely inspired by a broadly speaking Kantian morality, does not turn on the Darwallian ethical elaboration of equality.

inequalities.[6] Likewise, I shall show that libertarians have reason to embrace an extensive range of public law policies aiming at neutralizing inequalities in advantage, because these are the direct implications of being committed to treating parties in a private law interaction as equals.[7]

My analysis also produces important insights at the level of institutional design. Current debate between private law theorists concerning the promotion of equality often takes the form of a competition between two schemes of redistribution: first, tax and transfer; and second, legal rules such as tort law (also generically referred to as regulation).[8] The question that figures most prominently in these debates is which of the two schemes represents the most effective means of redistribution in achieving the desired end, namely, equality (of resources or welfare).[9] My account shows that, at least in the case of negligence law, this question is too simplistic to capture adequately the challenge posed by the demands of equality. Of course, the legal rules of negligence law may surely be deployed to promote external goals such as redistributive justice.[10] However, as I shall show in the pages that follow, these rules also generate a *freestanding vision* of equality, forcefully resisting their reduction into a mere means to promoting a broader end (whatever it is). Thus, these rules do not merely affect the outcome—a more or less equal distribution of resources or welfare. Rather, they partly fix the very question of what equality means, which is a question that comes logically and normatively *prior* to the question concerning more or less equality. Thus, my account suggests that the promotion of equality cannot be adequately approached from a purely *consequential* perspective, which is the perspective governing the current debates between friends of tax-and-transfer and friends of legal rules.[11] As in many different aspects of moral and political life, the process by which one advances toward a desired end is no less important than the end itself. The vision of equality I find to be immanent in the standard of reasonable care reflects this truism.[12]

---

[6] *Contra* Guido Calabresi, *Ideas, Beliefs, Attitudes, and the Law* (Syracuse, NY: Syracuse University Press, 1985), pp. 39-40, 66-67; Gregory C. Keating, "Rawlsian Fairness and Regime Choice in the Law of Accidents", *Fordham Law Review* 72 (2004): 1857 (advocating, on distributional egalitarianism grounds, for a more robust implementation of enterprise (strict) liability in place of negligence liability).

[7] *Contra* Richard A. Epstein, "Decentralized Responses to Good Fortune and Bad Luck", 9 *Theoretical Inquiries in Law* 9 (2008): 309 (criticizing government-sponsored attempts to ameliorate inequalities originating from fortune or misfortune). But cf. Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), pp. 78-79, 82-83, 87, 115 (sanctioning government provision of monetary compensation for those who, due to their disadvantaged abilities, are required to forgo certain important activities for the sake of securing the safety of others).

[8] See, e.g., Daphna Lewinsohn-Zamir, "Redistribution through Private Law", *Minnesota Law Review* 91 (2006): 326.

[9] See, e.g., Anthony T. Kronman, "Contract Law and Distributive Justice", *Yale Law Journal* 89 (1982): 472.

[10] E.g., Tsachi Keren-Paz, *Torts, Egalitarianism, and Distributive Justice* (Burlington, VT: Ashgate, 2007).

[11] Kronman, *Contract Law and Distributive Justice*, p. 508: noting that the choice between taxation and contract rules of redistribution "is an empirical [question] which must be resolved on a case-by-case basis, in the light of detailed information about the circumstances likely to influence the effectiveness of each method of redistribution."

[12] It is important to note from the outset that I shall not seek to develop a novel conception of equality. In fact my account of equality in and around the standard of reasonable care is consistent with a variety of conceptions of equality that are often associated with liberal egalitarianism, which is to say the idea (often

The overall argument will run through the following stages. In Part I, I shall take up the first facet of equality by elaborating on the equality concerns involved in the imposition of a duty of reasonable care on persons whose caring skills are (through no fault or choice of their own) importantly deficient. I shall then argue in Part II in connection with the second facet of equality that an objective standard of due care can, nonetheless, accord with egalitarian intuitions—that is, that this standard features an egalitarian structure. Part III takes up the third facet of equality: I shall maintain that society, acting through its public laws, incurs an obligation to provide the prerequisite background conditions that allow for the egalitarian structure of the duty of due care, as reflected in the first two facets of equality, to flourish.

I. THE FIRST FACET OF EQUALITY

A. The Egalitarian Dilemma of Reasonable Care: A Restatement

I commence this stage of the analysis of the objective standard of care by forestalling two misunderstandings. First, an objective assessment of reasonable care need not imply a unitary standard which is absolutely insensitive to context. Normally, assessing reasonableness on the part of the tort-feasor occurs against the backdrop of the relevant profession (e.g., the reasonable surgeon), sphere of activity (e.g., driving), surrounding circumstances (e.g., emergency), and so on. These features are entirely compatible with an objective standard of care, at least insofar as they do not accommodate the peculiar traits or caring skill of the particular person in a tort action. And second, my analysis of the objective standard should *not* be reduced to, and so confused with, the different question of what counts as the 'reasonable,' 'normal,' or 'average' capacities of persons (men or women).[13] Rather, it seeks to elaborate on a qualitatively *different* distinction between subjective and objective modes of assessing human action. The egalitarian dilemma that I shall articulate and confront below arises even when the test of reasonableness aims higher or lower than the qualities of the 'average' or 'normal' person (whatever they are). This dilemma, in other words, is a defining feature of deviating, even in the smallest measure, from a subjective valuation of human action, by which I

---

associated with John Rawls and more recently with Ronald Dworkin) that political institutions should act in ways that are sensitive to persons' ambitions, but insensitive to their natural or social endowments. My account concerns the question of what a commitment to endowment-insensitivity demands from our legal practice of holding people responsible for wronging others negligently.

[13] This latter question is discussed, e.g., in Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003). Moran uncovers the tendency on the part of courts to cast reasonableness in terms of normalcy, in which case the reasonable person becomes the normal one, at least in some categories of cases. *Ibid.*, p. 133. This drift, on Moran's view, is responsible for a biased application of the standard of reasonable care on the parts of common law courts, especially in connection with gender (in the case of fault liability for boys versus girls) and with cognitive capacities. *Ibid.*, pp. 52-54, 135-38. As I shall argue in future work, there are doctrinal reasons to suspect the latter observation made by Moran (and so the broader argument concerning courts' discriminatory stance toward certain classes of person). At any rate, to repeat, my argument in the main text concerns the implications of an objectively-fixed standard of care for equality, regardless of the socio-legal question of whose powers should be taken to be characteristic of the reasonable person.

mean, following the speech of Lord Macmillan, valuation based on "the idiosyncrasies of the particular person whose conduct is in question."[14]

Now, on a standard understanding of the requirement to exercise an objectively-fixed amount of care, tort law aspires to no higher than keeping itself pragmatic.[15] Indeed, a subjective standard of due care would have left courts up to their necks in the business of *ad hominem* assessment of how much care would be apt in the particular case. They would have had to assess this in relation to the competence, skill, and experience of each and every defendant (and plaintiff).[16] The prohibiting administrative costs of determining fault on subjective grounds render a standard of care short of objective content pragmatically undesirable.[17]

This account may well be right, on average, to emphasize the actual ramifications of a case-by-case evaluation of subjective fault. Yet it goes astray by presupposing that an objective standard of care is a mere stand-in for an ideally subjective standard of care. A duty to exercise an objectively-fixed amount of care need not be viewed as a liability to be justified by reference to the pragmatic impossibility of courts administrating a subjective standard of care; it is better cast as an asset, expressing a freestanding value of equality.

Indeed, a truly egalitarian[18] society, our intuitions suggest, requires the law to treat its subjects as equals because all people's lives are equally important. And an objective standard of care, as been argued before,[19] makes perfect egalitarian sense. If discharging due care, and so being vigilant of the safety of others, is an expression of respectful recognition of persons forming and executing their own plans, subjective judgment of what counts as appropriate care must be avoided.[20] Respect for others as determined, subjectively, from the respecting person's point of view is nothing more than respecting them on *one's own terms*. To be sure, respecting others on one's own terms is not necessarily wrong. In a parent-child relationship, for example, seeking the child's best

[14] Glasgow Corp. v. Muir [1943] AC 448, 457.

[15] Leon Green, "The Negligence Issue", *Yale Law Journal* 37 (1928): 1029, pp. 1029-30: "The qualities of personality are themselves numerous; the conduct of individuals is incalculable at present in its variety; the possible combinations of these are literally infinite, as infinite as space and time… So it is not surprising that in the face of infinity the law … adopts a formula."

[16] The court in Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (C.P. 1837) observes that judgment of subjective fault is "as variable as the length of the foot of each individual."

[17] Richard A. Posner, *Economic Analysis of Law* (New York: Aspen Publishers, 7th ed. 2007), p. 171.

[18] Throughout, I shall use *egalitarianism* in the broader sense of concern for equal respect for all persons, rather than the more narrow usage of this term nowadays employed in connection with distributive justice as applied to resources or well-being.

[19] For different variations on the egalitarian theme, see, e.g., Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999), pp. 86-87; Gregory C. Keating, "Reasonableness and Rationality in Negligence Theory", *Stanford Law Review* 48 (1996): 311, pp. 367-372; Jules Coleman & Arthur Ripstein, "Mischief and Misfortune", *McGill Law Journal* 41 (1995): 91; Ernest Weinrib, "Causation and Wrongdoing", *Chicago-Kent Law Review* 63 (1987): 407, p. 428.

[20] See Moran, *Rethinking the Reasonable Person*, p. 171 (observing that "many justifications of the objective standard [of care] locate the virtue of the standard in its insistence on uniformity or identity of treatment"). Keating (supra, pp. 372-373) has also defended the objective standard, and criticized the subjective one, on the basis that the former provides a far more secure ground on which persons (qua potential tort-victims) could rely in pursuing their practical affairs. In that, his argument is equality

interest may often call for the parent to judge on her own terms what respect for her child requires. However, the ambition of tort law, I take it, is to regulate interactions between persons in general, not merely between intimates or fiduciaries. And to respect others as free and equal *persons*, one should not set the terms of the respect according to one's own view of what respecting others requires. To render this point more vivid, suppose that the test of negligence would require all actors to comply with a norm of due care by reasonably exercising the actual capacities that they have. This subjective test offends against core egalitarian sensibilities, because it subordinates potential victims to a norm that (at first glance) calls for respecting them, but the content of which is fixed by those—viz., risk-creators—who are expected to comply with this very norm.

An objective standard of care, by contrast, transcends the inherently egocentric conception of subjective respect and in this sense appears to be morally sound and, indeed, *required*.[21] Accordingly, treating someone who does not meet the objective standard of care as having acted wrongfully accords with our moral intuitions concerning the respect we owe to our fellow creatures as persons with freestanding claims over their own practical lives, claims for constituting equal worth. I shall hereby call this argument from equality the *first facet of equality*.

Against this backdrop, the duty of (objective) care unleashes an egalitarian dilemma. On the one hand, as I have just argued, an objective standard of care makes perfect egalitarian sense. On the other hand, an objective standard of care purports to regulate the conduct of persons for whom reasonable care, due to consequences beyond their control, is too high a standard of behavior. This would mean that certain of its addressees would faultlessly and systematically fail to meet it even when they *bona fide* do, not merely try to do, their best. The most familiar examples from recent discussions in the literature are infants, mentally ill, cognitively underdeveloped, and the physically disadvantaged individuals. But although the *causal* source of these inabilities may vary significantly (say, from cognitive to physical to skill-based disabilities), the structure of the difficulty just stated remains the same. More generally, it remains the same beyond these familiar examples of pathological infirmities and even beyond the much less dramatic, though real, disadvantages in caring abilities such as being "born hasty and awkward,"[22] "clumsier than average,"[23] stupid,[24] or suffering from "weaknesses of old age."[25]

However, it would be premature to address the egalitarian dilemma by focusing exclusively on these cases (or, for that matter, on particular others). This is because the source of the problem is the conceptual separation of the objective standard from the

[21] I insist on *inherently egocentric conception of respect* since even an impartial regard for others operates on a prior judgment (made from the point of view of the respecting person) of what impartiality requires in general and, more crucially, in the particular case at hand.
[22] Holmes, *the Common Law*, p. 108.
[23] Richard A. Posner, "A Theory of Negligence", *Journal of Legal Studies* 1 (1972): 29, p. 31.
[24] As in the case of *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837) in which the defendant argued that he should not be held responsible for the damage because his failure to discharge reasonable care was the upshot of "the misfortune of not possessing the highest order of intelligence." *Ibid.*, p. 492.
[25] W. Page Keeton et al., *Prosser and Keeton on Torts* (5th ed., St. Paul, Minn.: West Pub. Co., 1984), p. 176.

idiosyncrasies of the person—in principle, *any* person. This separation suggests that specific cases of disability are merely surface manifestations of a more general difficulty; and this difficulty, it is important to note, arises *whenever* the law fixes the standard of reasonable care *objectively*. This is just another way to say, as I have asserted above, that the difficulty I identify does not turn on the empirical or sociological question of what counts as 'reasonable' or 'normal' capacities. It applies insofar as the standard is fixed objectively; that is, without taking into account idiosyncrasy on the part of the risk-creator in question—for this reason, it applies even if the objective standard of reasonable care would have been set by reference to human qualities that fall short of the law's *current* view of the 'normal' or 'average' (whatever it is).[26]

Thus, the challenge for the egalitarian is, once again, not in the first instance to consider specific examples of disability in the light of the objectively-fixed requirement to act as the reasonable person would. Let me pause here to emphasize that I do not deny that this kind of consideration is necessary to a fully developed account of the morality of the standard of reasonable care. Certainly, the application of an objective standard of care to someone with Alzheimer disease may raise egalitarian concerns that may be quite different from those arising in the case of people with physical disabilities; furthermore, the important distinction, widely overlooked by tort commentators and theorists, distinction between negligence and contributory (or comparative) negligence may have practical implications on the appropriate implementation of the standard of due care that cuts across the several classes of disabilities, since this distinction focuses on whether the person is tort-feasor or tort-victim, irrespective of the kind of disability this person happens to have.[27] I shall return to these considerations in future work. But as I have just mentioned, before case-specific issues can be thoroughly and systematically addressed, a more fundamental question presents itself. To repeat, *why should an*

[26] There is a limit to how short this standard can fall of the law's current view of the reasonable. In particular, the standard cannot be fixed by reference, say, to the capacities of a very young infant or the very severely mentally or physically disadvantaged person. In short, the conceptual possibility of decreasing the standard of care ends slightly above persons who lack *all* capacity to understand and respond to the danger involved in their conduct. Otherwise, there would be no standard of reasonable care, since by definition everyone would always meet the requirement to exercise the care expected from those lacking entirely the capacity to discharge care. The egalitarian dilemma that arises in connection with the objective standard is called into being when the standard is set anywhere above this threshold. Of course, there exists a separate, normative question—about which people will surely disagree—concerning the capacities that 'reasonable' persons possess for the purpose of fixing the precise content of the objective standard of reasonable care.

[27] There are exceptions to this tendency among tort scholars, a leading one being Calabresi, *Ideas, Beliefs, Attitudes, and the Law*, 43. The distinction in question is especially overlooked in the area of physical disability. See, e.g., *Restatement (Third) of Torts: Apportionment of Liability* § 3 cmt. a (2000); Weinrib, *The Idea of Private Law*, p. 183 n.22(3); Moran, *Rethinking the Reasonable Person*, p. 56. Perhaps the most familiar and stylized statement of tort law's approach to physical disability holds that the reasonable person is identical with the actor. This assertion is often followed by what at first blush seems to be its logical conclusion; namely, that the content of the duty of due care must receive a *subjective* interpretation when employed to assess the conduct of the physically disadvantaged risk-creator. However, it is not inconsistent with an objective interpretation, according to which the same actor must exercise reasonable care despite and, indeed, *regardless* of her disability. As I shall argue in future work, based on a closer study of the case law, both interpretations exist, with the objective one being applied to the physically disabled tort-feasor and the subjective one to the physically disabled tort-victim.

objective requirement of care, which thereby sets a mandatory standard of conduct beyond the reach of some, make sense to the egalitarian at all?[28]

As with any dilemma, the egalitarian version—viz., how to put together respect for the equal worth of *both* tort-victim and -feasor through the standard of due care—seems to call for an either/or solution: insofar as negligence law is concerned, the equal worth of one *can* come at the expense of the other. Thus, it is not surprising that much (if not all) of the current debate concerning the egalitarian dilemma revolves around the question of which horn of the dilemma tort law should choose (with libertarians pulling in the victim's direction while liberals incline to the other side). However, and here is the twist, to complicate matters even more, the egalitarian dilemma is distinctively problematic since even the either/or sort of solution might not be available; therefore, the contemporary pattern of theorizing about the dilemma is off the mark. Indeed, a commitment to a principle of equality (of whatever content) cannot settle on vindicating the equal worth of one at the expense of the other party in a tort interaction. For, rather than vindicating anything, it amounts to violating equality. After all, it would be odd to celebrate the achievement of treating the claim of the tort-victim (tort-feasor) to be regarded as a free and equal human being, whilst at the same time rejecting the same claim coming from the tort-feasor (tort-victim). Equality, in short, requires a solution for both persons.

Thus, a better way of approaching the egalitarian dilemma is to deny its very existence. And, indeed, I shall attempt to make this showing. I will argue that a truly egalitarian society ought, and can, change its attitude entirely. It should not reduce the egalitarian-motivated stance toward the standard of due care to a parochial analysis of equality's demands as applied, *separately*, to the tort-feasor class, tort-victim class, and society as whole.[29]

---

[28] Accordingly, the next stage of the argument will self-consciously abstract from any particular type of affliction and, in its place, adopt a generalized notion of a person who innocently finds the objective standard of care beyond her diminished capacity to exercise that amount of care. As promised, the more particular cases will be the topic of future work. There, I shall attempt to demonstrate and further elaborate the current argument in connection with two categories of cases: that of physically disadvantaged persons and that of mentally disadvantaged persons. Additionally, I shall address the important (albeit neglected) doctrinal distinction between tort-feasor and –victim in connection with the standard of reasonable care and its egalitarian structure.

[29] Perhaps, however, the entire attempt to dissolve the so-called egalitarian dilemma is misguided, because the standard of reasonable care applied to persons who suffer from insufficient caring skill is, in truth, a form of strict liability in disguise. Accordingly, an arguably better way to approach the issue is to divorce these cases from the ordinary cases of negligence and treat them differently; that is, as cases that make no reference to reasonable care and fault, more generally. There are (at least) two different ways—moral and pragmatic—to understand this counterargument, both of which must be rejected. Morally, it may be thought that requiring persons with insufficient caring skill to discharge due care expresses a move toward a conception of responsibility for the outcomes of their acts, rather than for their conduct. I have criticized the moral plausibility of this conception of responsibility elsewhere. Very briefly, there exists an awesome gap in the theory of this conception of responsibility: From the fact that many aspects of our lives are evaluated by reference to our achievements or failures, it does not follow that this view should be extended to *moral* evaluation of our practical affairs. See Avihay Dorfman, "Can Tort Law be Moral?", *Ratio Juris* 23 (2010): 205, pp. 218-220. It seems that cases of insufficient caring skill render this justificatory gap more troublesome when approached from an egalitarian point of view—strict liability grounded in outcome responsibility is really a form of equating a person's undeserved disadvantages to one of the failures for

B. Does an Objective Standard of Reasonable Care Ask for the Impossible?

How could a duty of due care be said to treat all as equals by seeking the compliance of risk-creators if, for the reason mentioned above, they cannot display the level of risk-moderation specified by the duty? The trouble is not, mind you, one of statistics—the extent to which people find themselves unable to comply with the standard of reasonable care. After all, it may (in principle) be the case that there are no such people within a particular community. Nor is it the trouble of lacking awareness of the demands of reasonable care, for many kinds of deficiency (such as, to repeat, being too awkward, clumsy, or stupid) may prevent people from meeting the standard of reasonableness even when awareness obtains. Instead, the point is that tort law can do no greater offence to the equal worth of each person than to insist on a duty that requires a *degree of skill* or *civil competency* which remains beyond certain persons' undeservedly diminished capacities.[30] Bluntly put, a commitment to viewing the lives of all as equally important is at odds with holding, in effect, persons liable for their purely misfortunate circumstances. Or so the conventional wisdom goes.

The egalitarian dilemma mentioned above emerges because the worries just noted stand in direct conflict with the notion that an objectively-fixed standard of care expresses an ideal of respecting, separately, potential victims as free and equal persons. This ideal requires that, in principle, *all* persons must conform their practical affairs to the demands placed on them by this standard.[31] But, as I shall argue presently, there are reasons to believe that the contours of this dilemma, as conventionally perceived, are

---

which one is (arguably) morally responsible. Pragmatically, the counter-argument mentioned above can be predicated upon the thought that an objective standard of care, because it sets too high a standard for people with insufficient caring skill, provides an optimal deterrence because of its *de facto* strict liability implications. But this kind of explanation, although it (arguably) shows why an objective standard is economically superior to a subjective one, lacks the precision required to explain tort law's decisive preference for a standard of reasonable care in particular. Indeed, if according to the economic account reasonable care functions as a form of *de facto* strict tort liability lying on the mentally disadvantaged, it is difficult to understand why we should not impose the latter *in the first place*. More broadly, almost any liability regime (save for liability based on purely subjective fault)—negligence, strict, and absolute liability, etc.—can create the desired incentives toward limiting the range of risky activities engaged by disabled people. For instance, in the case of inherently ultrahazardous activities (such as blasting), the lawyer economist recommends strict tort liability; it is not clear why this economic logic cannot be deployed to deem the mentally or physically disadvantaged to be ultrahazardous persons, as it were, and thereby hold them strictly liable for their risky acts. There is therefore no straightforward reason to believe that efficiency requires the standard of care imposed by the duty of reasonable care. The economic explanation, then, provides an incomplete account since it leaves unaddressed the critical question relating to the precise content of the duty of due care—in short, must reasonable care reign supreme? This question returns me to the argument I pursue in the main text.

[30] I borrow the term "degree of skill" from Patrick S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld & Nicolson, 1970), pp. 116-17, and "civil competency" from Benjamin C. Zipursky, "Sleight of Hand", *William & Mary Law Review* 48 (2007): 1999, p. 2035.

[31] I say *in principle* in recognition of exceptional cases such as the severely mentally challenged. For reasons I discuss below, the more important (and difficult) question concerns the imposition of the duty of reasonable care on persons whose insufficient caring skills are less debilitating (though still substantial) than in the extreme condition.

improperly defined. More specifically, *the prevailing view that care-incompetent persons cannot meet the standard of reasonable care rests on an incoherent, and certainly unnecessary, account of the content of this standard*. And in the absence of a more precise elaboration of the ways in which the standard purports to shape the practical affairs of would-be tort-feasors (including, in particular, tort-feasors allegedly unable to discharge a reasonable amount of care), it would be impossible to dissolve the dilemma and get at the egalitarian structure of reasonable care. The argument about to be presented, therefore, will seek to provide the missing understanding of the precise source of the egalitarian anxiety about the objective standard of care.

To begin with, the egalitarian dilemma as ordinarily presented is (implicitly) predicated upon the familiar distinction between two modes of discharging care: moderating risky activity and moderating the very choice of activity. However, discharging reasonable care need not be associated exclusively with the former mode. Rather than grounding the seemingly inegalitarian foundations of the reasonable care standard in the requirement that persons (with insufficient caring skill) do *more than their best*, I shall argue for a better interpretation of what counts as 'to do their best' in the context of meeting the standard of due care. According to the proposed interpretation, the duty of care does not, after all, call for doing more than the best one can in terms of caring.

Following the familiar thesis of Steven Shavell, the practical influence distinctive of the duty of care in torts of strict liability is often associated with moderating the very *choice* of activity (or the levels thereof), and not just the activity itself.[32] Negligence liability, by contrast, involves only the latter form of caring. Accordingly, it is rational to reduce or even avoid entirely risky activities (and not just to engage in them vigilantly) *only insofar* as this activity is subject to strict tort liability. Indeed, Shavell concludes his thesis by saying that "[f]rom the logic of the arguments presented here, it can be seen that … the variable "level of activity" … is not included in the due care standard."[33]

However, advocates of this characterization acknowledge that, in the end, it cannot drive a wedge between strict and negligence liability.[34] Put simply, moderating the choice of activity is a means of discharging the duty of care available to the two categories of tort liability.[35] Indeed, the tort of negligence can perfectly exert rational pressure on actors to moderate their choice of activities (including, if necessary, to refrain entirely from pursuing a given course of action). It can certainly be the case that one abandons a plan because one has come to believe, or has most reason to believe, that it would be too costly to meet the standard of reasonable care. Everyone routinely does that all the time in connection with activities that require some degree of unusual

[32] Steven Shavell, "Strict Liability versus Negligence", *Journal Legal Studies* 9 (1980): 1, pp. 3-4.
[33] *Ibid.*, p. 23.
[34] Steven Shavell, *Economic Analysis of Accident Law* (Cambridge, Mass.: Harvard University Press, 1987), p. 74.
[35] Nevertheless, some of the cases falling within the category of ultrahazardous activity (such as blasting) are exceptional, because of their peculiarly dangerous nature, *systematically* defying even the extreme measure of utmost care. In these cases, moderating the choice of activity may remain the only adequate means of discharging care.

expertise (such as sailing a ship), regardless of the moral status of lacking the skill of reasonable caring.[36]

Consider, for example, the following pedestrian cases of persons failing to meet the standard of reasonable care due to deficiencies that would not—or would likely not—justify the kind of egalitarian concern raised throughout these pages. Certainly, not every incompetency to comply with the standard of care warrants the conclusion that this standard cannot reflect genuine moral requirements of action. A voluntarily intoxicated person who decides, after several rounds in the pub, to drive herself home, cannot display the level of reasonable care.[37] An English illiterate, unable to read the warning signs,[38] cannot meet the standard of the reasonable person by stepping on an unsafe bridge in Iowa, which then falls down.[39]

The deficiencies picked out by these examples may not offend our egalitarian intuitions concerning the objective standard of care. One possible way to see that is to suppose that the persons concerned can, in principle, overcome their diminished capacities: quit drinking and learn basic English. Thus, in contrast to undeserved deficiencies, their insufficient caring skills are contingent and, to an important extent, amendable.

But there is (at least) one other way to explain these cases, and this explanation is natural to our everyday informal practices of interpersonal encounters. Furthermore, it may possess the right normative materials needed to sustain the egalitarian intelligibility of the standard of due care in the face of the incompetent person. This is because it does not turn on whether this person overcomes her incompetency, for the purpose of discharging care. Nor does it turn on whether the incompetency is a feature of one's choice or under one's control. Indeed, the intoxicated driver can simply find another method of getting home other than driving, regardless of whether or not her intoxication was voluntary. And the illiterate, facing the unreadable signs before the bridge, can make a detour.

More generally, there is nothing in a requirement to act as the reasonable person would that automatically rules out discharging care by moderating the choice of activity.[40] Quite the contrary, it may be perfectly rational to discharge the duty of due

[36] Indeed, most, if not all, people are unprofessional in at least some fields of knowledge and action, which means that the only way to meet the standard of care relevant for these fields is to avoid these activities altogether. For instance, except for emergencies, reasonable laypersons had better not practice medicine at all than do so with whatever degree of vigilance. Likewise, those who can barely walk straight with a cup full of hot coffee would act reasonably by asking the waiter to serve them instead of taking the cups with them to their tables.

[37] See, e.g., Kay v. Menard, 754 A.2d 760, 767 (R.I. 2000): "Intoxication does not relieve a man from the degree of care required of a sober man in the same circumstances."

[38] I assume, for exposition purposes, that the disability in question is not a feature of some cognitive deficiency, but rather of never having enough time (or desire) to learn some basic English.

[39] As reported in Weirs v. Jones County, 53 N.W. 321 (Iowa 1892).

[40] This point is already implicit in an observation made by Warren Seavey, saying that "[t]here is, however, an element of coercion in an objective standard of intelligence since the general tendency is to *restrain action by those of sub-normal mentality* or, at least, to induce them to use greater efforts to prevent harm to others." Warren A. Seavey, "Negligence—Subjective or Objective?", *Harvard Law Review* 41 (1927): 1, p. 12 (italics are mine). See also Tony Honorè, *Responsibility and Fault* 21-23 (Oxford and Portland, OR.:

care by refraining from adopting a given course of conduct, as in the cases just mentioned, or in the case of a criminal lawyer being asked to represent her client in a highly sophisticated business transaction (such as a transnational merger between giant corporations). Furthermore, it may also be required as a matter of duty entirely or partially to withdraw from engaging in a course of action, for (to illustrate) "one who knows that he … is about to fall asleep may be negligent in driving a car."[41] And, indeed, there can be found cases acknowledging that the standard of reasonable care may require that persons must either pursue their affairs with reasonable caution or, when it is impossible for them to do that, not pursue these affairs at al, or at least as they initially planned.[42]

Thus, for example, the hasty and awkward man of Holmes may be unable to deploy all the precautions needed to achieve the level of reasonable care, say, when riding his bike in a crowded park. But his misfortune (of being born the way he was) does not stand in the way of his complying with the obligation to respect and recognize others as free and equal agents through discharging reasonable care. He can get off the bike or pick an alternative route (to mention two possible solutions), and thus avoid violating the duty of due care. Likewise, the low intelligence of Menlove (the defendant in *Vaughan v. Menlove*) may fail him as far as exercising appropriate care toward others is concerned when placing the stack of hay next to the neighbor's close. However, even a stupid person can, in principle, display a sufficient amount of care toward his neighbors. Rather than answering (as he actually did) to his neighbor's repeated warnings that he would chance the risk of his rick catching fire, the defendant could have taken the rick down (as suggested to him by the neighbor) or, perhaps, located it away from the extremity of his land.

As I have insisted above, the conceptual independence of the standard of due care from the peculiar judgments of individuals as to what caring requires is *essential* to the ideal of respectful recognition, understood as the commitment to attend to others and their rights simply by virtue of their (equal) absolute worth as persons. So far I have sought to show that this ideal—the first facet of equality—need not render compliance with the duty of due care impossible. I observed that the standard of the reasonable person is conceptually susceptible to reasons for moderating the choice of activity (rather than just the activity itself). I have argued, therefore, for the practical intelligibility of the duty of due care with respect to those whose capacities fall short (at least in some measure) of that of the reasonable person. Bluntly put, the duty of due care, to play on Prosser, does not require these persons not to be the kind of persons they are, namely, possessing an undeserved insufficiency in caring skills. Instead, it requires them to adjust

---

Hart Pub., 1999), pp. 21-23 (choosing to engage in a risky activity may in itself be faulty); Stephen G. Gilles, "Rule based Negligence and the Regulation of Activity Level", *Journal Legal Studies* 21 (1992): 319, pp. 322-37 (arguing that courts, in fact, do consider activity levels, not only levels of care).

[41] Keeton et al., *Keeton and Prosser on Torts*, p. 176. See also Theisen v. Milwaukee Automobile Mutual Ins. Co., 118 N.W.2d 140, 143 (Wis. 1963): "the driver has the duty to stay awake while he drives and it is within his control either to stay awake, to cease driving, or not to drive at all when sleepy."

[42] *Restatement (Third) of Torts: Liab. for Physical Harm* §3 cmt. J (2010): "On some occasions, the party might claim that the actor's very decision to engage in a particular activity created an unreasonable risk of harm. There is no general rule prohibiting such claims."

their practical affairs in ways that conform to the plans and acts of others. They are not asked to do that which is impossible given their unfortunate disabilities; only to display, *with whatever means of moderation they can furnish*, the respect due, objectively, to their fellow creatures.

C. The Harsh Egalitarian Effects of Reasonable Care

Against this backdrop, it is now urgent to reformulate the egalitarian dilemma so that it renders crystal clear what is at stake. The egalitarian anxiety about the duty of reasonable care does not, as it is commonly thought, stem from the fact that certain people, through no choice or fault of their own, cannot follow a demand to exercise appropriate risk-moderation in whatever course of action upon which they happened to embark. Rather, the original source of the difficulty is that an objective standard of care *affects the range of activities that these people can engage in while in conformity with it*.

Accordingly, the question actually facing the egalitarian is how to make sense of the constraining effects (in terms of the range of possible activities) imposed on people suffering from insufficient caring skills. To be sure, the trouble is not a feature of these effects as such. For these effects visit, in some measure, almost anyone.[43] The trouble, rather, is twofold. First, the duty to discharge reasonable care rules out engaging in certain activities (whatever they are) because of one's undeserved disadvantage (of whatever kind). Thus, tort law does not ask one miraculously to overcome one's incompetency, but rather not to be as active as one would otherwise prefer. In requiring persons to meet the standard of care at the possible cost of moderating their choice of activities, tort law seems to impose, in effect, greater burdens on a particular class of (disadvantaged) person, and thus illegitimately to discriminate against that class. And second, it seems to me that, *very* roughly speaking, the more severe the impairment on the part of the tort-feasor becomes, the greater the likelihood that everyday activities—"the necessities of life"[44]—would be relegated outside the range of activities compatible with the duty of reasonable care. For instance, elderly people suffering from "weaknesses of age" might (reasonably) find that the duty of care gives them compelling reasons to avoid driving automobiles, especially in the dark.

Thus, meeting the standard of reasonable care, though conceptually possible, might be quite burdensome in the sense that it calls for introducing substantial adjustments to one's practical affairs, possibly to the extreme point of abandoning particular courses of action altogether, including ones (e.g., driving in some locations (say, LA), but not necessarily in others (say, NYC)) that are at the center of one's practical affairs. To this extent, grounding this standard in an account of equal rights might eventually come to a dead-end—it would lead us, as Guido Calabresi has argued, to repudiate this standard and to establish a publicly-funded compensation scheme to insure that tort-victims would not bear an excessive burden as a result of implementing a subjective standard in its stead.[45]

[43] See supra text accompanying note 36.

[44] Charles V. Barrett, III, Note, "Negligence and the Elderly: Proposal for a Relaxed Standard of Care", *John Marshall Law Review* 17 (1984): 873, p. 886.

[45] Calabresi grounds this recommendation in egalitarian principles of substantive "equal access," "equal participation," and "equal treatment." Calabresi, *Ideals, Beliefs, Attitudes, and the Law*, 35, 39, 40, 42, 67. His solution presupposes that the vindication of these principles, and of substantive equality more broadly,

Even modern Kantians who endorse a particularly formal ideal of equal rights must acknowledge that under the circumstances just discussed an objective standard might turn this value of equality into empty formalism. Nevertheless, as I shall argue in the next two Parts, an objectively-fixed standard of care need not strike an inegalitarian cord. The reason for this is that *equal* responsibility is as fundamental to the egalitarian ideal (of treating persons as equals) as is equal rights.[46] Respecting the equal worth of persons is not just a matter of displaying equal concern for those persons' rights (to liberty or safety). Rather, it also consists of recognizing them as equals by holding them *equally* responsible for failing to engage other persons with due care.[47] Or so I shall argue.

II. THE SECOND FACET OF EQUALITY

Equality, I have insisted, demands that an objectively-fixed amount of care must be *owed to* the would-be tort-victim. It has been occasionally suggested, either explicitly or implicitly, that this necessity also settles, as a matter of course, the obligation on the part of the would-be tortfeasor to discharge this care.[48] But this thought conflates two different questions about the duty of due care that, at least in the case of caring incompetency, must be approached more cautiously. It is one thing to establish that the duty to exercise an objective amount of care is *owed to* the victim by virtue of her being a free and equal person; it is quite another to show it to be *owed by* the tort-feasor (the

---

could be accomplished through public law only, by which he means an accident compensation scheme financed through general tax coffers. However, as the arguments from the first and second facets I develop seek to show, private law—viz., the necessary place of objectively-fixed standard of care in ordering interpersonal interactions—*must* be part of the egalitarian solution. Moreover, even when considered on its own terms, the public law solution offered by Calabresi—general compensation scheme—falls short of the egalitarian demands placed on society as a whole. Indeed, as I shall argue in the main text below, the third facet of equality renders *ex-post* compensation importantly insufficient. Equality requires that the state design the world in ways that sustain adequate access to begin with.

[46] I owe this way of putting the point to Greg Keating.

[47] There arises a prior question: Can tort law provide sufficient normative space, as it were, for a rigorous conception of responsibility, never mind equal responsibility. If it can, the next question is what it is. These questions cannot be answered adequately without addressing the larger, and more basic, question of what captures the moral center of tort law. On my view, as sketched elsewhere, the distinctive morality of tort law lies in an ideal of thin social solidarity that takes a liberal form and which is expressed by interpersonal norms of respectful recognition of persons as such (that is, in virtue of being free and equal human beings). See Avihay Dorfman, "What is the Point of the Tort Remedy?", *American Journal of Jurisprudence* 55 (2010): 105, pp. 124-130; Avihay Dorfman, "The Property Gap: Private Ownership, Trespass, and the Form/Function Mismatch" (unpublished manuscript) available at: http://ssrn.com/abstract=1806440. My emphasis is on casting the special morality of various tort duties (such as duties of care and against trespassing on another's land) in their solidaristic forms (rather than, for example, in terms of Kantian natural rights). This way of approaching the matter provides the backdrop against which to appreciate the present account's insistence on the appropriateness of 'ought implies can' in connection with *tortious* conduct (and not just with criminal or other forms of morally wrongful conduct).

[48] Versions of this suggestion include Holmes, *The Common Law*, pp. 108-09; David E. Seidelson, "Reasonable Expectations and Subjective Standards in Negligent Law: The Minor, the Mentally Impaired, and the Mentally Incompetent", *George Washington Law Review* 50 (1981): 17, pp. 19-20, 29; Patrick Kelley, "Infancy, Insanity, and Infirmity in the Law of Torts", *American Journal Jurisprudence* 48 (2003): 179, pp. 219-23 (grounding the duty of objectively-fixed care in victim's legitimate expectations that risk-creators comply with tort norms).

*incompete*nt tort-feasor included).[49] Indeed, it is at the very least possible to suppose that there could be reasons not to extend the duty to capture just about any potential tort-feasor; this possibility, moreover, may naturally arise in cases of applying the duty to people with insufficient caring skill. That said, I shall attempt to make the necessary showing, arguing that there are compelling reasons to impose the duty (of objective reasonable care) on tort-feasors, sometimes even when they suffer from an undeserved disadvantage in exercising care. Furthermore, these reasons draw on the egalitarian commitment to regard them as originating authentic claims for equal respect. And insofar as an objectively-fixed standard of care can vindicate the equal worth of *both* parties in a tort interaction, the egalitarian dilemma loses momentum.

Determining the content of the duty of care is not an exercise in the supposedly natural science of human affliction and disadvantage, but rather a normative expression of the place that persons occupy, as equals, in society's public affairs. I shall attempt to show that it is only by virtue of imposing a duty to exercise reasonable care on people with insufficient caring skill that their equal worth can be made consistent with our egalitarian intuitions, not the other way around. Regarding persons as equals, I shall conclude, is accordingly inconsistent with a relativized standard of care. Indeed, tort law's choice between setting a subjective or objective standard of care reflects, first and foremost, a kind of *public* stance society takes toward the would-be tort-feasor; namely, whether or not a particular tort-feasor belongs to the class of full-fledged legal persons, at least as regards the legal arena of torts.[50] This can explain why tort law is traditionally reluctant to require infants to exercise objective due care,[51] and why it should follow suit in the case of the *very* severely mentally disadvantaged person who lacks *all* capacity to understand and respond to the danger involved in her conduct.[52] These extreme cases of incapacity place a threshold limitation on the extent to which tort law can hold persons responsible for their conduct; these are uncontroversial cases of manifested "[in]effective agency."[53] In legal parlance, tort law may not count them, for the purpose of imposing the duty of care, as constituting legal personalities. Only legal persons—more accurately, "the default legal person[s]"[54]—can be subject to and thus violate duties and (as regards the moral community) only agents can be the proper objects of reactive attitudes such as

[49] Of course, the distinction between *owed to* and *owed by* is just another way of expressing the egalitarian dilemma mentioned above.

[50] Thus, rather than viewing the duty of care merely as a burden—a price—imposed on people according to their ability to pay, my account of the duty begins with the conceptually and normatively prior question concerning the expressive demands of equality in and around society's decision to impose a standard of care on its members.

[51] See, e.g., Bush v. New Jersey & New York Transit Co., 153 A.2d 28, 33 (N.J. 1959): "The question of capacity or incapacity [of infants] is simply a factual inquiry" having to do with "the age, training, judgment and other relevant factors which apply to the particular child."

[52] See Holmes, *The Common Law*, p. 109, urging that "if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse." Cf. Dobbs, *The Law of Torts* (St. Paul, Minn.: West Group, 2000), p. 284 (reporting that "[o]nly limited and somewhat peculiar authority qualifies" the objective standard of care applied to mentally disadvantaged tort-feasors).

[53] Jules L. Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001), p. 50.

[54] Susanna L. Blumenthal, "The Default Legal Person", *UCLA Law Review* 54 (2007): 1135.

resentment (on the part of the victim) and indignation (on society's behalf).[55] Indeed, in subjecting persons with disabilities to a duty of reasonable care, the law of torts judges (and, therefore, treats) this class as equal in all relevant respects to the rest of society. Of course, whether or not this judgment is mistaken in certain cases on empirical grounds is a different question to the one discussed presently concerning the *very commitment* to treating all persons as equals. A mistaken judgment means either under- or over-including persons in the class of legal persons, that is, the class of those recognized by the law as equally responsible to act reasonably careful. Such mistake may count as a reason to *redraw* more accurately the line between duty-holders and the absolved, but not as a reason to reject its importance altogether. Or so I shall argue regarding the *second facet of equality*.

A. The Demands of Equality: Respecting Persons, Not Their Affliction

Begin with the reasons to suspect the inegalitarian principle underlying the delineation of the line between objective and subjective measures of what counts as appropriate care. These reasons include, in particular, the insulting presuppositions and stigmatizing effects involved in drawing classifications of this sort.[56] A standard of care fixed by reference to the peculiar makeup, say, of an unusually clumsy person or of a mentally disabled individual, rather than expressing respect for any such person, communicates the unappealing notions of inferiority and, more generally, hierarchy. To clarify the nature of this claim, I would draw on a rough analogy between the forms of respect and recognition characteristic of subjective care, on the one hand, and identity politics, on the other. This analogy renders vivid the subordination involved in grounding the normativity of the subjective standard of care in facts about the peculiar constitution of the persons concerned.

Politics of identity has emerged out of the recognition that persons are constituted at almost every turn by their distinctive web of attachments even though, and to an important extent *because*, these are not necessarily features of self-conscious choices (e.g., racial identity). This thought attempts to challenge the more orthodox, liberal attitude toward cosmopolitanism and neutrality, formal and substantive. Whereas this orthodoxy—sometimes associated with the reign of heterosexual white gentlemen—seeks to strip people of all characteristics that might render each of them different in some sense, identitarians claim that certain attributes are so deeply embedded in the core of people's respective personalities that overlooking them is not only unwarranted, but also, and more fundamentally, quite impossible.[57]

Thus, politics of identity elevates claims for inclusion and influence found on involuntary attributes (such as ethnicity) to prominence, while demoting claims based on universal aspirations to carve out a common identity, that of persons *as such*. The thrust

[55] Peter F. Strawson, *Freedom and Resentment* (London: Methuen, 1974), p. 9.

[56] There are additional reasons not related to the demand of equality. In particular, the politics in question may be found suspiciously intrusive as regards the private affairs of the tort-feasor.

[57] Overlooking people's distinctive identities might of course be possible, but only at the cost of marginalizing these people, to the point of social and political exclusion.

of the identitarianism, then, is not merely to correct past injustices done to victims by the dominant culture, but rather to transform the ways in which participation (in civil society and in politics) should be made and, moreover, assessed.[58] On the identitarians' view, it is by virtue of being *different* that one claims one's inclusion in the social order. Sonia Kruks has put the point succinctly, observing that "[w]hat makes identity politics a significant departure from earlier, pre-identarian [sic.] forms of the politics of recognition is its demand for recognition on the basis of the very grounds on which recognition has previously been denied: it is *qua* women, *qua* blacks, *qua* lesbians that groups demand recognition."[59] More specifically still, the sort of difference for which identity-based respect is sought is predicated upon the particular traits of each person. On this account, evaluations of people's social and political statuses, their inclusion into forms of respectful social and political living, are processed by reference to the internal worth of the causal events (such as being born Jewish) that have shaped the way people understand themselves and, accordingly, expect others to regard them.

Now let's return to the other side of the analogy, to the case of the subjective standard of due care. And this case, to be more concrete, arises when tort law allows for fixing the standard of appropriate care by the insufficient caring skill that some persons, through no fault or choice of their own, possess.[60] A subjective standard of care measures and, therefore, expresses the amount of care deemed suitable for each person on the basis of each one's peculiar departure from the kind of abilities possessed by the reasonable person, the "ordinary intelligence and prudence."[61] As such, this standard deems most fundamental the differences (in caring skill) that define people's biographies (e.g., being borne hasty and awkward). It expresses respect to its constituents when it regards their deficient qualities of caring as sufficient for the purpose of exempting them from the requirements that would otherwise apply. Put differently, a deficient caring-skill (just as in the analogous case of identity) serves as the very ground for a claim, on behalf of the would-be tort-feasor, to be respected through the rendering of the obligation to discharge reasonable care as skill-sensitive.

But this (arguable) conception of respect for the implications of undeserved caring skills might not withstand egalitarian scrutiny. The analogy to identity politics proves most helpful at this point. It may be possible to understand the unappealing notion of respecting people on account of their incompetency by using the familiar legal distinction between justification and excuse. Whereas identity politics *justifies* recognition of and

[58] See Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), p. 184 (advocating a public commitment to "provide mechanisms for effective recognition and representation of the distinct voices and perspectives of … constituent groups that are oppressed or disadvantaged.").

[59] Sonia Kruks, *Retrieving Experience: Subjectivity and Recognition in Feminist Politics* (Ithaca: Cornell University Press, 2001), p. 85.

[60] Because the argument in the main text takes a broad approach to the egalitarian question, I leave open the extent to which the standard is fixed by subjective attributes. It must not be, however, marginal or otherwise insignificant. Thus, talk of a subjective standard is, following John Rawls, a *range property* that varies, depending on the person in question, from total immunity to a substantially adjusted standard of (subjective) care. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), p. 508.

[61] Holmes, *The Common Law*, p. 108.

respect for differences (in identities), the subjective standard of care regards differences (in caring skill) as *excusing* conditions only, and hardly excusing at that.[62] Indeed, identitarians urge that identity-based forms of political participation must be secured by the legal and political processes against pressures toward marginalization exerted by the dominant culture.[63] Identity politics just is an attempt, philosophical and political, to establish a *public* culture which is, nonetheless, identity-supporting.[64] It represents an attempt to make identity the *currency* of public life.

The subjective standard of care, however, harbors entirely opposite aspirations. Instead of celebrating difference, it seeks to protect people *from* their own (allegedly deficient) qualities. That is to say, difference is the source of normativity for both identity politics and tort law, providing genuine reasons for action (for society and law-makers); but it plays out strikingly differently in each. The reasons in the former case call for bolstering the role of identity in political engagement by commending structural changes in society's arrangement of the public sphere in order to be more respectful and, thus, inclusive of identity. The reasons in the latter case call for excluding, or at least constraining, persons with undeserved disadvantages in caring skill from participation in practices that operate on judgments of responsibility and liability for practical affairs,[65] which are the practices that lie at the moral center of tort law.[66] The existence of difference in the context of torts, then, lays the grounds against which to disqualify the actions of disabled persons from bearing the mark of human action.[67] Accordingly, they

[62] Of course, the excuse is granted against the backdrop of the objective standard of due care.

[63] See Kruks, *Retrieving Experience: Subjectivity and Recognition in Feminist Politics*, p. 85; Charles Taylor, *Multiculturalism and the politics of Recognition* (Princeton, N.J. : Princeton University Press 1992), p. 25: "Due recognition is not just a courtesy but a vital human need."

[64] See Young, *Justice and the Politics of Difference*, p. 240: "social justice … requires the realization of a politics of difference."

[65] Ron Amundson, in his "Disability, Handicap, and the Environment", *Journal of Social Philosophy* 23 (1992): 105, p. 114, observes that "treating disabilities as quasi-illness" results in relieving the disabled persons of "normal responsibilities."

[66] See Jules L. Coleman, "Doing Away with Tort Law", *Loyola of Los Angeles Law Review* 41 (2008): 1149, p. 1161 (2008) (referring to the notion of responsibility as a "key building block of a tort"). For related acknowledgments of this point, see Arthur Ripstein, "Private Order and Public Justice: Kant and Rawls", *Virginia Law Review* 92 (2006): 1391; John C. P. Goldberg & Benjamin C. Zipursky, "The Restatement (Third) and the Place of Duty in Negligence Law", *Vanderbilt Law Review* 54 (2001): 657 (2001); Jane Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", *Law Quarterly Review* 111 (1995): 301, p. 312 (1995); Stephen R. Perry, "The Moral Foundations of Tort Law", *Iowa Law Review* 77 (1992): 449, pp. 489-514 (1992). To be sure, I set to one side the secondary question concerning the right conception of the concept of responsibility that underlies tort law (for example, whether it is responsibility for action or for outcome). Elsewhere, I defend the former and criticize the latter in Dorfman, *Can Tort Law be Moral?*, pp. 218-224; Dorfman, *What is the Point of the Tort Remedy?*, pp. 130-139.

[67] At one point, Ripstein observes that exempting a person from the duty to discharge an objectively-fixed amount of care on the basis of insufficient caring skill amounts to treating this person "as a mere natural thing rather than an agent." Ripstein, *Equality, Responsibility, and the Law*, p. 85. That said, Ripstein ultimately grounds the objective standard of care (and the conception of responsibility it underlies) in an ideal of equal rights, rather than in the freestanding value of equal responsibility. See *ibid*, p. 88 (arguing that the objective standard of care "protects the interests in both liberty and security that everyone is assumed to have."); Arthur Ripstein, "Justice and Responsibility", *Canadian Journal of Law & Jurisprudence* 17 (2004): 361, p. 368 ("[t]he reciprocity conception [of responsibility] locates the place of

are disqualified from being *worthy* of our legal judgments of personal responsibility to begin with. On this account, a special accommodation in the form of a diffused standard of care implies that one cannot participate in our legal practices of responsibility- and liability-ascription *unless* tort law grants one a watered-down version of the basic requirements of appropriate behavior while in proximity to others. Rather than regarding people with undeserved disadvantages the way tort law regards all others—viz., as constituting authentic sources of claims for respect for their freestanding, equal worth—the exclusionist nature of the subjective standard falls short of respecting them on their own terms, in spite of the disabilities they possess.[68]

To be sure, the complaint just raised against construing the standard of care by reference to undeserved circumstances is not merely the one that can be leveled from a *managerial* standpoint—that is, from the perspective of the officials in charge of designing and administering the practice of torts as a whole. Nor does it solely aim to figure as a critique of the symbolic negative implications of a tort system that discriminates among its constituents for the wrong kind of reason, although this critique is surely not without weight. Rather, my argument seeks to capture the demeaning character of excusing the disadvantaged (from the duty to discharge reasonable care) as seen from the point of view that either party in a tort interaction could acquire.

To begin with, a violation of the duty of reasonable care normally entitles the victim to resent the tort-feasor and to hold her accountable, legally if not also morally.[69] By engaging in these practices (of resenting and ascribing responsibility), the victim judges the tort-feasor and accords to her a freestanding worth *just as he accords himself.*[70]

---

responsibility within a more general idea of reciprocal limits on freedom."); Arthur Ripstein, *Force and Freedom* (Cambridge, Mass.: Harvard University Press, 2009), p. 171 ("objective standards of conduct are required by a system of equal freedom.").

[68] See also Colin Barnes & Geof Mercer, "Disability, Work, and Welfare: Challenging the Social Exclusion of Disabled People", 19 *Work, Employment & Society* 19 (2005): 527, p. 529 (2005): "Disabled activists" urge that "[h]uman beings, regardless of the nature, complexity and/or severity of impairment, are of equal worth, and have the right to participate in all areas of mainstream community life."

[69] On the moral significance of treating persons as responsible agents from the Strawsonian perspective of reactive emotions, see R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, Mass.: Harvard University Press, 1994), ch. 3, esp. pp. 66-71.

[70] I do not deny that holding persons responsible for some consequences of their acts is valuable not just to the way we stand in relation to each other (which is relevant to the morality of tort interactions), but also to the way in which the individual person held responsible conceives of herself. This latter thought is most famously associated with the theory of outcome-responsibility developed by Honorè and more recently reflected in Joseph Raz's observation that responsibility is essential to the "way we feel about ourselves." Joseph Raz, "Responsibility and the Negligence Standard", *Oxford Journal of Legal Studies* 30 (2010): 1, p. 17. The intimate connection between responsibility and what Raz identifies as "self-directed attitudes" is certainly correct. As I argue elsewhere, however, it is an open question, and one which particularly plagues Honorè, whether a conception of responsibility-for-outcome (as opposed to responsibility-for-action) is plausible to begin with. See Dorfman, *Can Tort Law be Moral?*, pp. 218-220. Moreover, and unlike Raz's conception of responsibility, I doubt that a subjective assessment of responsibility (*viz.*, according to "our powers of rational agency") is more significant to self-respect than an objective one. This is especially relevant in cases where persons are held responsible for the (good or bad) consequences of their conduct toward *other* persons. Self-respect, at least in these cases, is partly determined by how one respects other persons. Recall that on my account of the first facet of equality, respecting others as free and equal persons commands an objective assessment of responsibility.

Indeed, this judgment is especially powerful since it stems from the judging victim's conviction that he would have acted differently (i.e., reasonably) under the circumstance. This form of attending to others is distinctively a feature of human relationships and it can operate only insofar as participants presuppose (or have most reason to presuppose) the importance of respecting one another as free and equal persons.[71] It is certainly odd to resent the bad weather or a pet, for example, and ridiculous to think of holding it accountable. More generally, it is a transcendental condition of the possibility of holding someone legally accountable that one is acknowledged (by the victim) as a being with *equal standing* to make and receive claims from the legal point of view. And insofar as they are excused from liability for not discharging reasonable care, tort-feasors are systematically denied this acknowledgment from the victims.

Furthermore, the legal procedure of granting the excuse exerts built-in pressure toward marginalization. Indeed, its operation is such that persons with an undeserved caring disadvantage need to request courts to take into consideration their unfortunate deviation from reasonableness.[72] The need to invoke disability and to explain how diminishing it is in terms of acting reasonably forces the claimant into, so to speak, an application process for a disability-based waiver of tort responsibility and liability. Indeed, this procedure of self-revelation, and indeed self-stigmatization, is a form of appeal made by those in need of recognition as abnormal to the judgment of non-disabled members of society[73]; from those who find it hard to cope with the legal reality—the objective standard—to those in charge of constructing this reality. While not necessarily an appeal asking for the mercy and pity of the benevolent court, a request to be excused from the duty to exercise reasonable care, as I have already explained, carries self-undermining and, indeed, degrading overtones.[74] On this interpretation, a disabled tort defendant is not so much required to defend the reasonableness of her allegedly wrongful course of action, but rather to prove her deficient ability of being reasonable *tout court*.

B. The Sources of Inequality

For the reasons just mentioned, to the extent it represents an official pronouncement of the governing law (a question I discuss below), a subjective standard of care stamps the

---

[71] I elaborate on this idea in Avihay Dorfman, "The Society of Property" (unpublished manuscript) available at: http://ssrn.com/abstract=1909404.

[72] This kind of request, as Martha Minow has reported, has nothing in common with the authentic self-perception of the disabled person. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990), pp. 278-79.

[73] As Erving Goffman noted almost half a century ago in his seminal study on stigma:

> "The Attitudes we normal's have toward a person with a stigma, and the actions we take in regard to him, are well-known, since these responses are what benevolent social action is designed to soften and ameliorate. By definition, of course, we believe the person with a stigma is not quite human."

Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, N.J.: Prentice-Hall, 1963), p. 5.

[74] See also William J. Curran, "Tort Liability of the Mentally Ill and Mentally Deficient", *Ohio State Law Journal* 21 (1960): 52, p. 65, observing that appeal for mental deficiency as an excusing condition "may hold relatively worse social consequences for the defendant than paying a tort verdict."

inferiorizing judgment it entertains (from both managerial and participant perspectives) with a public seal. There is a general recognition nowadays that words such as infancy, insanity, and infirmity are no longer appropriate (or politically correct) to describe the disabled tort-feasor.[75] The trouble, however, seems to be the very idea of maintaining these (and other) *categories* of tort-feasor, *whatever the term used to signify them*. Insanity may certainly be an inappropriate term, but the original source of the problem is carving out spaces of subjective care for people on the basis of their undeserved disability, however dubbed.

Now, the confusion underlying the conventional effort to condition participation in public practices of tort responsibility and liability upon introducing adjustments to the standard of care (imposed on the incompetent) is not a feature of scientific truths about the abilities (or disabilities) of people to meet the objective standard of due care. As I have already explained, disabilities may affect the *range* of activities in which one can choose to engage while acting in conformity with the duty of care. But they need not rule out the very possibility of meeting the standard (through either moderating activity or the choice thereof).

More importantly, and more dramatically, the confusion in question arises out of drawing normative inferences from empirical truths about people (whatever these truths are). The fact that people suffer from undeserved deficiency in caring skill does not yield (normative) conclusions concerning how tort law ought to *respond* to this state of affairs—empirical claims about people's distinctive constitution have no straightforward bearing on how these people should be regarded. In particular, it does not imply that the equal status of these people should be diminished by letting their unfortunate circumstances determine their inclusion (or exclusion) from the ordinary judgments of tort law. Of course, it is logically permissible for the law to make its response turn on granting an exemption from the requirements of reasonable care that would otherwise apply to them.[76] But, normatively speaking, it need not. Indeed, factual truths about insufficient caring skill can also trigger a qualitatively different response. This is to change the artificial (or human) environment within which the incompetent person acts so that she could engage in her practical affairs and at the same time be assessed, in terms of tort responsibility, by reference to the objective standard of care. (For instance, in place of adjusting the standard of care to the natural qualities of blind pedestrians, audible traffic signals make the neutralization of the disadvantage possible, at least in principle, without thereby compromising the standard of care against which to evaluate this person's conduct).

The point about changing the environment, it is important to note at once, is not in the first instance a claim concerning technology or scientific progress, although it is not indifferent to that either. Instead, it is a *normative* claim, according to which tort law's response to undeserved disadvantages should not take a diminishing stance toward the disadvantaged (in the form of a diffused requirement of care). Rather, it should work in concert with other branches of the law aimed at restructuring the background conditions

[75] See Kelley, *Infancy, Insanity, and Infirmity in the Law of Torts*, p. 179 n. *.

[76] Recall the earlier discussion, establishing the first facet of equality, where I have argued that an objective measure of care is, in principle, required as a matter of respect for tort-victims.

necessary to provide for the inclusion of the disadvantaged into practices in which respect for the equal worth of participants is a defining feature.

Against this backdrop, it is appropriate to conclude that the egalitarian dilemma dissipates when the inference from empirical observations (about insufficient caring skill) to a certain normative principle of action (the need to impose a subjective standard) gives way to another. And this other inference calls for an objective standard of care. It does not suppose the (normative) problem to rest in the peculiar makeup of any one of us (however the peculiarity is empirically characterized). Rather, it emphasizes that the problem is in the objective, social conditions that stand in the way of manifesting the equal freedom and responsibility of each person in the world. For the true egalitarian, then, undeserved disability is first and foremost a *social problem* concerning the ways society decides to design the world in which it acts.[77] This conclusion naturally takes the argument to its next stage—that which introduces the third facet of equality.

* * *

The objective standard of care expresses respect for the two classes of person involved in any tort interaction. According to the *first facet of equality*, it engenders respect for the point of view of the potentially injured party, meanwhile insisting that the terms of this respect must not be fixed by the tort-feasor. And on the *second facet of equality*, it determines the terms of the respect owed by the tort-feasor toward others without allowing these terms to be diminishing of the freestanding, distinctive personality of the former. In that, tort-feasors, *too*, are respected on their own terms, according to the way *they* conceive of themselves and not, importantly, as others would (patronizingly) *wish* them to be; namely, as persons of 'normal' or 'healthy' constitution.[78]

---

[77] Thus it is not, as proponents of the agency conception of responsibility such as Joseph Raz suppose, a pre-political question about persons' success in manifesting their capacities of reason and control in the world, because what counts as 'success' and 'failure' in exercising these capacities is partly determined by the ways this world is designed by society. To return to the previous example, whether or not a blind person can be held responsible for a particular act cannot be assessed simply by reference to this person's caring skill (say, in crossing the road without bumping into another passerby), because this assessment depends on the prior question concerning the ways society has decided to arrange the road—in particular, the extent to which society has decided (implicitly or explicitly) to incorporate the blind person's natural condition (of being blind) into the artificial world in which she walks. I discuss this point in Part III. For more on the agency conception of responsibility (*vis-à-vis* the reciprocity conception) in the torts context, see Ripstein, *Justice and Responsibility*, pp. 366-373.

To be sure, the focus of Raz's account of responsibility for negligence is not responsibility in law, but rather the concept of responsibility for negligence (which may, but not necessarily, overlap with the idea of responsibility for negligence in the common law of negligence). However, to the extent that it may be deployed in the service of evaluating and, if necessary, reforming the legal practice of negligence accordingly, Raz's account of responsibility for negligence would necessarily be inconsistent with the objectively-fixed standard of care and the egalitarian commitment to the second facet of equality, more generally. Indeed, casting responsibility in terms of "master[ing]" our "capacities of rational agency" leaves little space for the thought that treating everyone alike—*viz.*, by fixing the standard of care objectively—has any bearing on the moral significance of our torts practice of holding people responsible. See Raz, *Responsibility and the Negligence Standard*, pp. 16-18.

[78] It might be possible to understand the commitment to respect someone on her own terms to mean disregarding her involuntary characteristics (say, her physical impairment). That said, it is an open

Accordingly, the unappealing subordination that comes with a subjective standard of care—viz., that of respecting another on one's own terms—has a better solution. Moreover, the solution finds its normative foundations in equality. Indeed, the duty of reasonable care features an egalitarian structure since it brings together different persons that are, nonetheless, treated as equals. That is to say, they are treated as free and equal participants of the legal practice of torts. In a truly egalitarian society, therefore, a duty of reasonable care is not only *owed to* each, but, in principle, also *owed by* each. In other words, it subsumes the first and second facets of equality.

III. SUSTAINING THE EGALITARIAN STRUCTURE OF THE DUTY: THE INTEGRATION OF PRIVATE AND PUBLIC LAW

Although the analysis has so far made important progress in the normative reconstruction of the egalitarian materials underlying the duty of reasonable care, it remains incomplete. Indeed, insofar as the demands of equality require an objective standard of care, there still exists the worry observed above that the effects of this standard would be too harsh when applied to those with insufficient caring skill.[79] In particular, the worry pins down the limitation on the range of activities imposed by a duty to display the vigilance the reasonable person would exercise while engaging in them. And insofar as the limitation often goes to the core of everyday risk-making activities (such as commuting to work), the egalitarian structure of the duty of reasonable care paradoxically allows for inegalitarian consequences such as these.[80]

However, it is important to note that these troubling consequences can be overcome, casting the objective standard into sharp relief. Society as a whole, I shall argue, has an obligation to sustain the egalitarian structure of the duty of reasonable care against these corroding consequences; this obligation, moreover, represents the logical implication of the second facet of equality. The present stage of the argument seeks to explain the reasons for action which society and its alter-ego state have in connection with the equality-based reconstruction of the duty of reasonable care—the *third facet of equality*. Since much of this explanation is quite explicit in the preceding stage of the argument, I shall here outline its main themes only.

A. The Third Facet of Equality

As I have characterized it, an objective standard of care allows for society (including the victim) to respect the tort-feasor on her own terms, irrespective of the differences (in caring skill) that might befall people through no fault or choice of their own. On this account, it specifies, so to speak, a metric on the basis of which to develop (*ex-ante*)

---

question as to how—and, indeed, if—this approach could avoid amounting to arrogance (on behalf of society) and insult (to the physically or mentally impaired person).

[79] This worry is often cast in terms of the right of the disadvantaged "to live in the world." Jacobus tenBroek, "The Right to Live in the World: The Disabled and the Law of Torts", *California Law Review* 54 (1966): 841, p. 852.

[80] Of course, the effects are inegalitarian because they turn on people's undeserved disabilities to profess the caring skill most other people do have.

expectations from and, if necessary, (*ex-post*) criticisms of the acts made by free and equal human beings. Recall that the basic distinction underlying this egalitarian structure of the duty of care is that between the natural and the social or political. The only live question, therefore, is whether or not to incorporate undeserved disadvantages created by the natural order into the artificial order of human society. All else being equal, a society embracing the second facet of equality must give a decidedly negative answer.

Against this backdrop, a social effort to neutralize the inegalitarian consequences of the objective standard of care (when imposed on people with an insufficient caring skill) is not only permissible but also *required*. As asserted a moment ago, in its absence, the egalitarian commitment expressed through the duty of reasonable care will lose its practical bite. Indeed, it is one thing to *announce* that all are regarded as equals when respected on their own terms through an objective standard of care; it is altogether another thing to undertake to turn this announcement into reality. A duty to discharge the care the reasonable person would exercise while crossing the street amounts to empty formalism if the existing system of silent crosswalks incorporates the natural order. Structuring the world in this way fails to accommodate the social reality in ways that render intelligible judgments of responsibility applied to the blind. Thus, by accepting the first two facets of equality, and especially the second, society has thereby incurred another reason to adopt the measures associated with the third facet. Denying the logical progress from the second to the third facet is, for this reason, flatly inconsistent with the very promise of the second facet to accord the disabled tort-feasor equal standing despite nature's influence to the contrary. It would render the second facet nothing more than empty formalism.

B. The Scope of the Duty of Reasonable Care

Any *normative* account of an egalitarian social order is, in some measure, an ideal theory. The egalitarian reconstruction of the duty of reasonable care is no exception. The implication is that the duty (imposed on society) to question nature's authority might not extend to capture every possible case calling for neutralizing natural impediments to participation in a tort practice that features an objective standard of care. This is, once again, a familiar limitation on the possibility of neutralizing natural disadvantages as acknowledged by liberal egalitarians.[81] Because this limitation pertains to the *scope*, rather than the *character*, of the egalitarian structure of the duty, I shall offer some general, though brief, observations concerning the scope. A more detailed account of the empirical conditions for a full-scope implementation of the duty must wait for another occasion.

To begin with, there may be good reasons for society to moderate its commitment to reform its initial incorporation of the natural order of things even though it entails a partial withdrawal from a vigorous pursuit of the duty to discharge reasonable (objective) care. Three such reasons are worth emphasizing. First, it may be very difficult, in terms of technological solutions, and so prohibitively costly to change the social and political

[81] See, e.g., Ronald Dworkin, "What is Equality? Part 2: Equality of Resources", *Philosophy & Public Affairs* 10 (1981): 283, p. 300.

orders so as to neutralize insufficient caring skill. For example, currently there is no available comprehensive treatment to insure epileptic people against seizures, casting doubt over these people's ability to participate fully in the practice of torts (say, operating one's own automobile). Second, it may be impossible to introduce adjustments to the way our social world is organized if the purpose or result of so doing is to include very young children and very severely mentally challenged in our practices of responsibility and liability ascription. The reason is that these two classes of people are not only lacking in caring skill, but also lacking any minimal ability (cognitive or otherwise) that most other human beings master, even if poorly so. And third, there may be compelling reasons to limit attempts at neutralizing insufficient caring skill insofar as this sort of state intervention (in the social order of things) amounts to oppression. Indeed, a *liberal* state oversteps its legitimate authority when it substitutes paternalism and oppression for accommodating the social order. For instance, forcing medication upon the mentally disadvantaged, however beneficial it would be in terms of enhancing their caring abilities, is hardly compatible with the freedom and self-determination of these people, at least when they are not entirely devoid of these capacities. Vindicating equality has a point, in other words, only insofar as it arises among the free.

In the case of the first two kinds of difficulty just mentioned, the natural caring-skill-lottery successfully resists human efforts to undo its work. In the former, however, the resistance is contingent upon underdeveloped scientific progress. For example, a century ago it was impossible, in technological terms, for many physically disabled people to practice reasonable motoring (until automobiles designed to serve a disabled driver were introduced).[82] In the latter case (of the very young and very severely mentally impaired), natural determination may seem beyond *social* repair in as much as it aims toward participation, on equal basis, in the practice of tort law; thus, a three-month old baby can never be held responsible for the acts that are causally connected with her bodily movements and this holds true irrespective of the changes made in the social order.[83]

Thus, the three reasons sketched above suggest that, although the egalitarian structure of the duty of reasonable care requires that all the necessary accommodations to the existing social framework be introduced, justified exceptions may, nonetheless, arise. They will be justified insofar as they are grounded in compelling reasons to exclude people from participating (as free and equal persons) in the legal practice of torts. These are, recall, prohibitive costs, lack of minimal human functioning, and oppression-attendant paternalism. But even when these reasons obtain, the egalitarian commitment to reasonable care importantly enables society to see what is at stake; namely, that nature is not in itself a reason for excluding people from participating in responsibility-based practices. Moreover, all else being equal, the demands of equality immanent in the duty of care exert pressure toward altering existing social structures, rather than leaving undeserved caring disabilities to lie where they (accidentally) fall.

[82] This is not to deny that political and economic forces—human forces—influence technological progress at almost every turn. That said, there still exist limitations on the ways and extent to which these forces can bring about any desirable progress.

[83] Perhaps this characterization is also a matter of contingency. It differs from the first case (featuring technological difficulty) in the nearly non-existing extent to which technology and science could (one day) change social reality in the appropriate direction.

Indeed, the preceding account suggests that the strict dichotomy between a fully implemented third facet of equality and inequality writ large misses the point of this very facet. For it is through the lens provided by the third facet that we can devise appropriate non-ideal solutions insofar as nature cannot be neutralized successfully *without abandoning the achievements of the first two facets of equality*. Consider the case of elderly motorists who develop poor sight, hearing, and reflexes, among other natural symptoms of getting old. Even if the first two deficiencies need no longer prevent people from engaging in motoring (and reasonably at that), the third one, reflexes, remains beyond repair. Thus, unlike hearing devices, science has yet to come up with technology that compensates for a substantial reduction in the ability to respond quickly and accurately to the changing conditions of the road.[84] On the account I have developed, instead of relaxing the duty of reasonable care, equality demands that this duty should not be part of the solution (because otherwise equality is undermined). Rather, the state, the egalitarian state, should make the necessary arrangements to alleviate the harsh consequences of the objective standard. Accessible and affordable public transportation suggests itself. This may be complemented by elderly-oriented programs that seek to sustain (in a second-best manner) self-reliant mobility when public transportation is inadequate; a municipality-sponsored transportation program for the elderly may be a case in point. At any rate, it is of less urgency at this stage of articulating the egalitarian account of the duty of due care to propose a comprehensive guide for implementing the third facet of equality under non-ideal conditions. It is urgent, however, to note (as I just did) that subjectivizing the duty of reasonable care is neither entailed nor recommended by the move from the ideal to the non-ideal world, even in cases (such as the elderly motorists) where overcoming nature's impact is still not a viable option for us. Bluntly put, in an egalitarian society, private law need not be public law's rain date; the egalitarian account allows us to see that, and thus to insist that disability should be seen as a problem with the human arrangement of the world, not merely with nature, nor with any one person in particular.

* * *

As I have asserted at the outset, the egalitarian reconstruction of the duty of reasonable care adopts a wholesale solution; a restricted, retail account, say, of the part of equality that pertains to the tort-feasor only necessarily falls short of unearthing the egalitarian structure of the duty of reasonable care. Thus, I commenced with the equal respect and recognition owed to victims (which is the first facet of equality) *and* owed by tort-feasors (the second facet); now the argument ends up endorsing the demands of distributional egalitarianism placed on society as a whole (the third, and final, facet). On this account, equality *requires* that tort-victims be protected by an objective standard of care; it also *requires* that tort-feasors be held responsible for their success and failure in meeting this very standard; and it, therefore, *requires* the state to organize the social and political orders accordingly. This expansion from equal respect and recognition to equality of opportunity, and (respectively) from private law to public law, is not surprising. Equality

[84] This reduction is not distinctive of elderly persons, of course, but its effective hold on them is distinctive for being systematic and almost naturally unavoidable.

is an all-encompassing commitment which exerts rational pressure across the entire institutional structure of society—it therefore defies the notion, sometimes associated with libertarians and corrective justice theorists, that private law theory could proceed as though private law and public law are genuinely independent, either ontologically, conceptually, or normatively.

CONCLUSION

In a memorable passage from *The Common Law*, Holmes observes that

> The law [of torts] 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 reason.[85]

These pages have articulated a novel reason: a comprehensively egalitarian-based reason. I argued that tort law's disregard of idiosyncrasy— to play on Holmes, *its manifested relinquishment of God's point of view*—expresses its radically universal commitment to equality. This commitment, however, cannot be accounted for unless the egalitarian structure of the duty of reasonable care is understood against the backdrop of a wider ideal of living in a society of equals, a point which has largely been ignored by tort scholars who are interested in the more narrow aspects of equality characteristic of private law ordering. Thus, on the one hand, the demands of equality embodied in the duty of reasonable care defy their superficial restriction in the realm of private legal ordering (as some libertarians may argue). However, they do not reject this realm as a genuine expression of egalitarianism (as some liberal egalitarians may say). Instead, I have shown that the demands of equality require an interlocking effort on the parts of *both* private and public law.

The account I have developed sets the necessary theoretical stage for an adequate explanation of the doctrinal aspects of the duty of due care. In particular, the egalitarian structure of the duty, as I shall argue in future work, may illuminate the otherwise unexplained preference of tort law to assess the conduct of either physically or mentally disabled people using an objective standard of care. It may further explain the moral significance of distinguishing between tort-feasor and tort-victim for the purpose of determining what standard of care, objective or subjective, there should be. More generally, the account I have developed provides the theoretical framework necessary to approach systematically the explanation and the justification of the doctrine surrounding the requirement to discharge due care in different cases of disability.

[85] Holmes, *The Common Law*, p. 108.