# REASONABLE CARE IN TORT LAW: THE DUTY TO TAKE CORRECTIVE PRECAUTIONS

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Courts have repeatedly held that actors are not charged with the duty of anticipating and eliminating risks created by the negligence of others.[1]

1. *See, e.g.*, Bady v. Detwiler, 273 P.2d 941, 952 (Cal. Dist. Ct. App. 1954) (where the city's traffic control device was operating defectively giving a "go" signal to both cars approaching the intersection on intersecting streets and the two cars driven by Perkins and Detwiler collided, the court held, "[t]he law does not impose the duty on either Perkins or Mrs. Detwiler to anticipate negligence on the part of the other."); Arps v. City and County of Denver, 257 P. 1094, 1098 (Colo. 1927) (where a construction company, defendant, in preparation to pave an alley, dumped sand into the street without lights or warnings and plaintiff drove into sand pile and overturned his car, the court held, "[p]laintiff was not bound to anticipate negligence upon the part of defendants."); Elam v. Ethical Prescription Pharmacy, Inc., 422 A.2d 1288, 1290 (D.C. 1980) (where vehicles collided in intersection, the court concluded that: "[a]s the favored driver, appellant was entitled to assume that any traffic approaching from the side street would obey the law and come to a full stop before the intersection. Appellant assuredly was not required to anticipate that a vehicle, like that of appellee's, would ignore the stop sign and proceed directly into the intersection."); *see also* Call Carl, Inc. v. Deadwyler, 187 A.2d 701, 703 (D.C. 1963) (where a transit bus went through a stop sign and hit another vehicle, the court held, "[the victim] has no duty to anticipate disobedience of the law or negligence by the other driver; nor is it his obligation to exercise more than ordinary care under the circumstances."); Janes v. Roach, 290 N.W. 87, 90 (Iowa 1940) (where plaintiff was standing on the shoulder of the highway in front of his stalled auto and defendant negligently struck rear of stalled auto, the court held, "[h]e was not standing upon the travelled portion of the highway and was not required, as a matter of law, to keep a constant lookout for vehicles approaching upon the pavement or to anticipate that another automobile would be driven against the rear of the Chevrolet."); Webber v. Larimer Hardware Co., 15 N.W.2d 286, 288 (Iowa 1944) (where plaintiff was picking up an order for steel sheets at defendant's hardware store, defendant asked plaintiff to help remove the sheets, and the sheets fell on plaintiff breaking his leg, the court held, "[h]e was not required to anticipate any negligence on the part of defendant."); Wood v. Johnson, 219 A.2d 231, 237 (Md. 1966) (plaintiff was a passenger in defendant's car that hit a disabled car operated by defendant, Huffman. The court held, "[i]n any event, the recited circumstances, if found by the jury, would be sufficient, we believe, to relieve Huffman of liability under the rule that in the exercise of due care no one is required to anticipate negligent conduct on the part of others."); Kubasinski v. Johnson, 208 N.W.2d 74, 76 (Mich. Ct. App. 1973) (defendant attempted to pass a vehicle and hit cyclist ahead of him. The cyclist was statutorily obligated to ride as near to the right side of the roadway as practicable and failed to do so. The court held, "[i]t is almost axiomatic that a party need not anticipate a negligent or unlawful act on the part of another."); Williams v. Sossman's Funeral Home, 103 S.E.2d 714, 719 (N.C. 1958) (plaintiff, driving a car, was crossing an intersection through a green light when hit by an ambulance crossing through a red light. The court held, "[h]e must remain alert and see and heed those things which a prudent driver would see and guard against, but he is not required to anticipate negligence on the part of other drivers."); Gralton v. Oliver, 101 N.Y.S.2d 109, 112 (N.Y. App. Div. 1950) (plaintiff, passenger in a car that had slid into another car on icy road, was standing between the two cars trying to separate them when another car slid into rear of second car propelling it into the first car and pinning plaintiff. The court held, "[p]laintiff was not bound, as a matter of law, to assume the happening of the second accident wherein he was injured. He certainly was not bound to anticipate that Oliver would negligently collide with the rear of the Duval car."); Fritsch v. Atlantic Refining Co., 160 A. 699, 700 (Pa. 1932)

A typical case in which this duty issue arises is one in which a plaintiff has negligently turned her car from the breakdown lane onto the traveling lane of the highway without signaling or yielding to oncoming traffic. Did the defendant who hit her have a duty to watch for such negligence and take precautions to correct for the plaintiff's dereliction?

An analogous question arises when a defendant has negligently failed to stop his car at a red light. Did the pedestrian who was struck by the defendant as she attempted to cross the street have a duty to watch out for cars that might run the red light? If an actor has no duty to take precautions to avoid risks negligently created by others, then neither the car driver who failed to watch out for the careless lane switcher nor the plaintiff who failed to retreat to the sidewalk will be found to have been "at fault." Reasonable care would not require any person to take corrective precautions.

The "no duty" rule has considerable emotional appeal. The alternative "corrective precautions" rule requires careful people to adjust their behavior in anticipation that others will be negligent. Failure to adjust will result in an otherwise careful defendant paying damages to a negligent plaintiff (as in the lane changing case) or an otherwise careful plaintiff being unable to recover damages from a negligent defendant (as in the pedestrian case). It seems unfair to allow careless people to impose a burden on careful people, just as it seems unfair to have to clean up someone else's mess. We may feel noble for cleaning up others' litter, but we will certainly resent the burden that lack of care has imposed on us. Actors who create risks are like polluters; they further their own goals at the expense of ours. It is hardly surprising to read a judicial opinion concluding "[i]t is almost axiomatic that a party need not anticipate a negligent or unlawful act on the part of another."[2]

The most fervent modern arguments in support of the "no duty" rule come not from those decrying the injustice of the "corrective precautions" rule but from law and economics scholars.[3] Instead of relying on an appeal to the

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(where the appellee driver of a gas truck came to fill up a gas tank in the basement of appellant's filling station and the gas overflowed and caught fire due to appellant's negligence, the court held, "[a]ppellee was under no duty to anticipate and guard against any negligence on the part of the proprietor or any of his employees."); Atchison, T. & S. F. RY. Co. v. Tack, 130 S.W. 596, 598 (Tex. Ct. App. 1910) (plaintiff, a locomotive engineer, was ascertaining the condition of the engine when he was struck by a cattle guard and injured. The court held, "[p]laintiff was not required to anticipate the negligence of defendant in the construction of a cattle guard too near the track, nor to keep a lookout for such obstructions."); Henderson v. Morris, 476 S.W.2d 471, 472 (Tex. Ct. App. 1971) (plaintiff was driving east through an intersection and defendant was driving south. Defendant stopped at the stop sign and then proceeded through the intersection without yielding to plaintiff and the cars collided. The court held, "[a] party is not charged with a duty of anticipating negligence or unlawful conduct of another party."). *See also* 57A AM. JUR. 2d *Negligence* § 864 (1989) ("Generally speaking, a person has the right to assume that another will obey the law and perform his duty, whether such duty is prescribed by statute or other enactment of like force and effect, or by the common law."). *But see id.* § 866:

> The right to rely upon the performance by another of the duty to use due care is not absolute. The assumption that another will exercise due care must yield to the realities of the situation to the extent that if the plaintiff observed, or should have observed, a violation of duty which imperils him, he must be vigilant in attempting to avoid injury to himself.

2. *Kubasinski*, 208 N.W.2d at 76.

3. John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 333–34 (1973), describes several models of reasonable care and identifies an "Incremental Standard" of care (which we call the "no duty" rule) as being socially optimal:

fairness of a particular rule, the economic approach evaluates whether incentives created by legal rules tend to maximize the wealth of society, either by reducing the costs of human interactions (including injuries resulting from daily activities) or by increasing the benefits produced by those interactions.[4] We will illustrate why the no duty rule is the key to economists' conclusion that all of the various forms of negligence rule—pure negligence (no defenses allowed), contributory negligence, and comparative negligence—create desirable (wealth maximizing) incentives.[5]

Professor Mark Grady, who has critically reviewed the law and economics literature in several articles exploring the efficiency of incentives created by negligence law, concluded that "[p]erhaps because they believe that negligent behavior can never be efficient, orthodox economists also deny that people must use more precautions because someone else has been negligent."[6] Grady's careful attention to the case law illustrates a subset of "last clear chance" cases in which this assumption about the law is wrong.[7] We will demonstrate that the assumption is wrong across the broad spectrum of cases.[8]

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> Here we assume that the judicial system can ferret out complete information about the underlying technology of accident prevention so that negligence for one party is determined on the *assumption that the other party is already acting in an optimal manner....* Solving for the Incremental Standard is equivalent to identifying the social cost minimizing solution.

*Id.*

Brown's assumption about the other party already acting in an optimal manner is fundamental to the optimality of the Incremental Standard model, *see infra* parts A.3, A.4. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 169–71 (4th ed. 1992) [hereinafter POSNER, ECONOMIC ANALYSIS 4TH], asserts that the law entitles actors to makes this assumption. *See infra* part A.3.

STEVEN SHAVELL, ECONOMIC ANALYSIS OF NEGLIGENCE LAW 18 n.18 (1987), assumes that a court would not find a plaintiff contributorily negligent if he failed to avoid an accident that another could have avoided at a lower cost, even if the plaintiff could have avoided the accident at reasonable cost:

> Whether a court would in fact find a victim contributorily negligent for not spending 20 where an injurer could have prevented an accident at a lesser cost of 10 is another question. But the strong suspicion is that were these figures plain, a court would correctly decide not to hold a victim contributorily negligent.

*Id.*

ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 356–58 (1988), assume that reasonable care is defined according to the "efficient" level of precaution and proceed to prove that all fault based rules create incentives for potential victims and potential injurers that tend to minimize costs associated with the risks of accidents. They prudently question whether courts are able to identify this "efficient" level of precautions. *Id.* at 360.

4. *See infra* part A.1.

5. POSNER, ECONOMIC ANALYSIS 4TH, *supra* note 3, at 169–73; *see also* COOTER & ULEN, *supra* note 3, at 356–60.

6. Mark F. Grady, *Multiple Tortfeasors and the Economy of Prevention*, 19 J. LEGAL STUD. 653, 656 (1990) [hereinafter Grady, *Multiple Tortfeasors*].

7. Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15, 41 (1988) [hereinafter Grady, *Strategic Behavior*]. For a discussion of these cases, see *infra* parts B.2.a., D.1.

8. Professor Grady also illustrates that economists studying the law have paid insufficient attention to what the law is as opposed to what it "ought" to be: "[O]rthodox economists must be secretly troubled by the large number of tort doctrines that are inconsistent with their ideas." Grady, *Multiple Tortfeasors, supra* note 6, at 656. The law and economics movement is hardly alone in failing to pay attention to the way in which the law is actually applied in specific cases. Humanist and feminist perspectives are also more often applied to general theories rather than specific rules. *See* discussion *infra,* part C.2. Two notable exceptions in the feminist literature are Leslie Bender, *A Lawyer's Primer on Feminist Theory*

Even in jurisdictions where courts assert that there is no duty to compensate for the negligence of others, numerous cases can be found where such a duty is imposed.[9] Whatever appeal the "no duty" rule may have, it offends our sensibilities to imagine that a person need not suffer even a slight inconvenience to avoid injuring another.[10] But many cases go far beyond this

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*and Tort*, 38 J. LEGAL EDUC. 3 (1988) and Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990). In the humanist literature, an application of theory to tort rules can be found in MARK A. LUTZ & KENNETH LUX, HUMANISTIC ECONOMICS: THE NEW CHALLENGE ch. 6 (1988).

9. One of the clearest examples is the case from which economists take their "economic"definition of reasonable care, United States v. Carroll Towing Co., 159 F.2d 169, 171 (2d Cir. 1947). In *Carroll Towing*, the barge company was held liable for part of the damages to the cargo when their barge sank. The barge sank after having been negligently released from its moorings by a tugboat crew belonging to another company. The barge company's negligence consisted of failing to have a watchman aboard the barge who could have prevented the barge from sinking. It was the barge company's failure to take precautions to correct for the foreseeable negligence of another party that led to their liability:

> At the locus in quo ... barges were being constantly "drilled"in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

*Id.* at 174.

Numerous other cases where courts have imposed a duty to take corrective precautions are cited throughout part B of this Article.

10. While we argue that the corrective precautions rule is preferable to the no duty rule, we are not arguing that there ought to be a "duty to rescue." Courts in the United States do not impose a duty on one person to rescue another who is in peril unless there is a "special relationship" between them. *See* 2 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 9.23, at 1141 (1985 & supp. 1993) ("The law presently imposes no liability upon those who stand idly by and fail to rescue a stranger who is in danger."); 57A AM. JUR. 2d *Negligence* § 98, at 152 (1989) ("As a general rule, in the absence of some special relation between the parties the law imposes no duty on one person actively to protect or assist in the preservation of the person or property of another from injury, even though the means by which harm can be averted are in his possession."). Yet, as this Article will illustrate in part B, there is a duty to take reasonable precautions to avoid injury to oneself or to others even if the risk of harm results from the negligence of the other.

In most cases, the apparent inconsistency between the "no duty to rescue" rule and the "corrective precautions" rule is easily resolved. There are two types of circumstances in which an actor, A, might be required to take corrective precautions: (1) when B's negligence creates a risk of harm to A and (2) when B's negligence creates a risk for B. The first case is easily distinguished from the "no duty to rescue" situation, because the actor is being asked to act to protect himself. These are the cases where the plaintiff is held contributorily negligent for failing to protect himself from risks created by the other's negligence. The rescue doctrine does not apply where the actor is the plaintiff because it absolves an actor only of the duty to rescue another.

The second circumstance where the corrective precautions rule is applied is more like the rescue cases because in those circumstances a duty to rescue another is recognized. In these cases, the actor on whom the burden to take corrective precautions falls is the defendant. The distinction between the rules rests on the general concept of when a duty to another arises. 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS Vol. 2 § 18.6, at 718 (2d ed. 1986), said there is no duty in cases "where the peril to the plaintiff has come from a source in no way connected with defendant's conduct or enterprises or undertaking, past or present." Despite the fact that the defendant has available means to assist the other, "the law has traditionally been said not to find a duty, however reprehensible and unreasonable the defendant's failure to take the precaution may be." *Id.* The cases in which a duty to take corrective precautions is imposed (cited throughout part B) all involve situations where the peril to the plaintiff comes from a source connected with the defendant's conduct, such as the defendant's conduct in driving his vehicle.

humanitarian position and would find fault (and assign liability) in the "typical" cases described above;[11] drivers sometimes do have an obligation to avoid careless lane changers[12] and pedestrians sometimes are denied recovery for failing to retreat from careless drivers.[13] The law as applied is more complicated than the straightforward articulations of the "no duty" rule suggest.

Both the law and the theoretical analysis of situations calling for corrective precautions are unclear. We will explore what is actually going on in these cases, what rule the courts are actually applying, and whether it makes sense analytically and from a policy perspective. We will show that although courts say that there is "no duty," what they must mean is that, in some cases, parties who failed to take corrective precautions were reasonable in failing to do so. By implication, however, reasonable care sometimes requires corrective precautions.

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The policies underlying the no duty to rescue rule also help distinguish those cases from the corrective precautions cases. Primary among these policies are concerns with administrability, particularly establishing who would have breached a duty to rescue when the number of potential rescuers was more than one. *See, e.g.*, HARPER, *supra*, at 718. This difficultly has been recognized by courts. *See, e.g.*, Warren v. Indianapolis, 375 N.E.2d 1163, 1166 (Ind. Ct. App. 1978) ("Such a [no duty to rescue] policy sometimes produces harsh results, but the problems inherent in devising a workable rule have discouraged deviation from the concept of non-liability for mere nonfeasance (*e.g.*, how is liability imposed on one hundred healthy people who fail to rescue an invalid from a fire?)."). These administrative difficulties are not present in corrective precautions cases, because the person with the available precaution is sufficiently connected to the potential victim to be identifiable.

All of these explanations seek some closeness of connection between the defendant's actions and the plaintiff's peril. This sounds to torts scholars like a concern with causation, as Richard Posner recognizes. He describes one of the policies underlying the "no duty to rescue" cases in this way:

> Causation defines the pool of potential defendants: those who in some sense caused the plaintiff's injury. Since the universe of those who might have prevented the injury is not so circumscribed, there would be practical difficulties in limiting good Samaritan liability to those who really could have prevented the injury at reasonable cost.

POSNER, ECONOMIC ANALYSIS 4TH, *supra* note 3, at 190.

The causation issue does not dominate the opinions in cases where the corrective precautions rule is applied. Rather the relevant issues are whether there were any reasonable precautions available and whether the negligence of the other was reasonably foreseeable. *See infra* part B.

11. *See infra* part B.

12. *See, e.g.*, Waldron v. Hardwick, 240 N.E.2d 772, 775 (Ill. App. Ct. 1968); *infra* text accompanying note 52; *see also* Turner v. Roesner, 549 N.E.2d 1287, 1291 (Ill. App. Ct. 1990) ("Here, even though he was within his own lane and driving at less than the posted speed limit, the defendant was under a duty to exercise due care under the circumstances to avoid a collision with a driver proceeding on the wrong side of the road."); Balfour v. Citgo Petroleum Corp., 452 N.E.2d 46, 49 (Ill. App. Ct. 1983) (Thus "[i]t is not true, as appellant seems to contend, that if she was driving on the right side of the road at the time of the accident, she owed no further duty to the plaintiff. One must still exercise due care to prevent injury to oneself and others and to avoid a collision with a driver who may be proceeding on the wrong side of the road." (citing Walling v. Lingelbach, 338 N.E.2d 917, 920 (Ill. App. Ct. 1975), *aff'd* 357 N.E.2d 530 (1975)).

13. *See, e.g.*, Dempsey v. Horton, 84 S.W.2d 621, 626 (Mo. 1935) (citing with approval Russell v. Bauer-Berger Grocery Co., 288 S.W. 985, 988 (Mo. Ct. App. 1926), discussed *infra* note 37 and accompanying text); De Winne v. Allen, 277 S.W.2d 95, 98 (Tex. 1955), discussed *infra* note 80. *See also* La Branch v. Scott, 185 P.2d 823 (Cal. Ct. App. 1947). Drivers may also be liable for failing to avoid careless pedestrians. *See, e.g.*, Star Brewery Co. v. Houck, 78 N.E. 827, 828 (Ill. 1906), discussed *infra* note 63 and accompanying text, and Solt v. Godfrey, 479 P.2d 474, 476 (Utah 1971), discussed *infra* note 78.

In order to appreciate the way in which the "corrective precautions" rule serves society, we employ a mixture of economic, humanist, and feminist analysis. The analysis is economic in that it contrasts the incentives created by (and the wealth effects of) the "no duty" and "corrective precautions" rules.[14] It is humanist in its consideration of higher order goals than the satisfaction of material wants and its contemplation of non-monetizable, abstract values.[15] It is feminist in its analysis of the philosophical roots of a "no duty" orientation, the errors resulting from a narrow, linear economic analysis, how autonomy is promoted by a "no duty" rule, and how the values of caring and community are served by the "corrective precautions" rule. We will demonstrate that the corrective precautions rule well serves a society of mixed values.

Our economic, humanist, and feminist analysis of the duty to take "corrective precautions" is presented in five parts. In Part A, we explain the economic argument in support of the rule under which actors have no duty to take precautions to avoid risks created by the negligence of others. Through an examination of tort rules defining the obligations of reasonable people in Part B, we demonstrate that the legal standard is not set at the level of precaution assumed by orthodox economists, even in Judge Posner's jurisdiction. The law does not allow us to assume that others are acting carefully and does require that actors take corrective precautions, reasonable measures to avoid the risks created by negligent others. In Part C, we set out the framework for a humanist and feminist critique of the economic analysis of negligence rules, setting the stage for a reconsideration of the economic analysis of the "no duty" and "corrective precautions" rules and for an efficiency analysis that recognizes the concerns of these alternative perspectives. In Part D, we demonstrate from this combined perspective that the contemporary economic analysis of the "no duty" rule is incorrect. And, in Part E, we discuss the ethical dimensions of the opposing rules. We conclude that, from either an efficiency or an ethical perspective, the corrective precautions rule is superior. We argue further that we might not want the law to permit us the assumption that others are acting carefully, even if wealth maximization were our goal. Even if we do not share the values traditionally associated with human beings who have transcended their need to satisfy basic material needs, the so-called "efficient level of precaution" accepted by economists interferes with our well-being.

## A. THE EFFICIENCY OF NEGLIGENCE-BASED TORT RULES

In this section, we explain the law and economics arguments in support of the no duty rule by focusing on the definition of "reasonable care" implicit in that rule and the economic implications of the incentives it creates. The corrective precautions rule, economists believe, results in excessive expenditure on accident avoidance. The no duty rule, they assert, tends to reduce investment in accident avoidance to an "optimal" level.

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14. *See infra* part D.3.

15. *See infra* parts C.2, E. See also Harry S. Gerla, *The 'Reasonableness' Standard in the Law of Negligence: Can Abstract Values Receive Their Due?*, 15 U. DAYTON L. REV. 199 (1990), for a discussion of the treatment of abstract values in tort law. We believe that the courts' adoption of the corrective precautions rule is one way in which abstract values are considered.

### *1. Efficient Precautions and the Corrective Precautions Rule*

From an economic perspective, it is equally unfortunate to bear the material cost and inconvenience of avoiding accidents as it is to bear the costs in human and property terms of having accidents. Since the costs of having and the costs of avoiding accidents are equally undesirable, the traditional goal of efficiency analysis in torts is to minimize the sum of these costs, which Guido Calabresi first referred to as "primary accident costs."[16] Negligence-based tort rules are inefficient if they fail to reduce to a minimum the societal costs associated with having and avoiding accidents. From the orthodox law and economics perspective, which takes as its ultimate objective the maximization of wealth, failure to minimize costs is a fatal flaw. Failure to minimize primary accident costs is waste, just as failure to assure that each resource is allocated to its most valuable use wastes society's scarce resources.

Judge Richard A. Posner, who has been so influential in breaking the elements of many substantive law areas into their economic components,[17] has defined "reasonable care," the standard by which our behavior is judged in tort actions, in such a way that all of tort law purportedly provides proper incentives to minimize the costs of having and avoiding accidents.[18] As we will show, the key to his definition, and the economic arguments that flow from it, is the assertion that people are entitled to rely on the assumption that others will act carefully. The legal implication of this standard is that we have no duty to avoid risks created by the negligence of others.[19]

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16. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970). Brown, *supra* note 3, at 325, adopts a similar definition of the social goal underlying tort policy ("The social optimum we shall define as that combination of avoidance measures which minimizes the sum of the costs of the controls and the expected cost of the accident.").

17. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); RICHARD A. POSNER & ANTHONY T. KRONMAN, THE ECONOMICS OF CONTRACT LAW (1978); RICHARD A. POSNER & KENNETH E. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (1981); POSNER, ECONOMIC ANALYSIS OF LAW 4TH, *supra* note 3; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973); Richard A. Posner & William M. Landes, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980); Richard A. Posner & Willaim M. Landes, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981); Richard A. Posner & Willaim M. Landes, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981); Richard A. Posner & William M. Landes, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); Richard A. Posner & Willaim M. Landes, *Tort Law as a Regulatory Regime for Catastrophic Personal Injuries*, 13 J. LEGAL STUD. 417 (1984); Richard A. Posner & Willaim M. Landes, *A Positive Economic Analysis of Products Liability Law*, 14 J. LEGAL STUD. 535 (1985).

18. *See infra* text accompanying notes 29–31.

19. Economists tend to take the same approach as Judge Posner and assume that apparent differences between pure negligence (no defenses allowed), contributory negligence, and comparative negligence actually make no difference when it comes to maximizing wealth. An example of the current approach is found in the summary of the economic analysis of tort rules found in a recent law and economics textbook:

> Naturally, the question arises whether one or more of these various forms of the negligence rule are more efficient than the others. Economists have examined this question and have reached the somewhat surprising conclusion that *when the legal standard is set at the efficient level of precaution, every one of the negligence rules creates incentives for efficient precaution by potential victims and potential injurers.*

COOTER & ULEN, *supra* note 3, at 357–58.

The economic definition of "reasonable care" begins with Judge Learned Hand's approach. As described in *United States v. Carroll Towing*,[20] negligence or "failure to use reasonable care" is failure to take cost-justified precautions. Cost-justified precautions are those accident avoidance measures whose cost of implementation is less than the cost of letting the accident occur discounted by the probability that it will occur. Since the goal is to minimize costs, two relevant implications follow from this definition:

i. If there is a cost-justified precaution available to one of the parties confronting a risk, that precaution should be taken, and

ii. If there are two or more cost-justified precautions each of which will avoid the risk, only the least costly precaution should be taken.[21]

If the imposition of liability on a defendant or denial of recovery of damages by a plaintiff creates incentives for the respective parties to take precautions, the law governing tort liability must be designed to impose liability on the party best able to minimize costs. When liability is assigned according to a negligence-based scheme, the potential for inefficiency arises when more than one party has an available cost-justified precaution. Thus, the third implication of the goal of primary accident cost minimization and the Learned Hand definition of reasonable care is as follows:

iii. To minimize costs when two or more parties have available cost-justified precautions, the party with the least cost available precaution should be given the incentive to avoid the risk by having liability imposed on him or her in the event the risk materializes.

A rule imposing an obligation to take corrective precautions creates the possibility that someone other than the "best cost avoider" (the party that can avoid the accident at least cost)[22] will have an incentive to take precautions.

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20. In United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), Judge Hand developed a test for negligence that has become a mainstay in tort law. He stated that an actor is negligent if he fails to take precautions to avoid accidents when the burden of doing so (B) was less than the probability of the accident occurring if he fails to take precautions (P) times the gravity of the loss if the accident occurs (L). This analysis was converted into an algebraic formula that concludes that an actor is negligent if $B < PL$. The probability of the accident times the gravity of the loss is the monetized value of the risk presented by the actor's conduct. The burden is the monetized value of the precautions necessary to avoid the risk. *Id.* at 173.

21. This interpretation of what is a "cost-justified precaution" comes from Judge Learned Hand's interpretation of negligence or "failure to use reasonable care" in *Carroll Towing*. From the context of that case, the "should" means that failure to comply will result in liability for a defendant or denial of recovery to a plaintiff. *Carroll Towing* involved a barge company found negligent for failing to have a watchman aboard the barge. The presence of a watchman would have minimized the harm resulting from another party's negligence.

In the law and economics context, the "should" means that it is desirable that proper incentives be created by assigning liability to the least cost avoider for failing to take precautions in order to minimize primary accident costs. This approach was followed in the opinion of Judge Faulkner in Golden v. McCurry, 392 So. 2d 815, 820 (Ala. 1980) (dissenting in part and concurring in part). In that opinion, Judge Faulkner considered the incentive effects of apportioning liability between parties on the basis of fault and suggested in his analysis that liability might be apportioned in inverse proportion to the cost to each party of avoiding the accident (the least cost avoider of the accident would pay more than the second least cost avoider). *Id.* at 820–21. A description of and an examination of the implications of this approach are contained in David W. Barnes & Mark Baeverstad, *Social Choices and Comparative Negligence: Resurrecting Galena*, 31 DEPAUL L. REV. 273 (1982).

22. CALABRESI, *supra* note 16, at 175, uses "best cost avoider" "to mean that reduction or alteration in activities which gives us the optimal *primary* accident cost avoidance." Harold

Under the corrective precautions rule, when the best cost avoider fails to take his precaution, the burden shifts to the other party to consider whether to take whatever corrective precautions are available to her. If she fails to take available reasonable precautions, the risk materializes, and she is sued, she will be liable to the other (the best cost avoider) for damages. If she sues for her own injuries, she will be unable to recover (at least a portion of)[23] her damages from the other.

Given the implications of the economic approach to liability, if an accident can be avoided by any one actor using reasonable care, it is undesirable, from a wealth maximizing perspective, for any of the following three results to occur:

1. No one avoids the accident, or

2. More than one party incurs the expense of avoiding the accident, or

3. Precautions are taken by a party other than the best cost avoider.

For such "unilateral" accident avoidance cases (where one party acting alone can avoid the accident at least cost), mutual nonavoidance (1. above), duplicative avoidance (2. above), or unnecessarily high-cost avoidance (3. above) are inefficient.

The corrective precautions rule appears to create the potential for all three inefficiencies: (1) Neither party may avoid the accident because each is trying to shift the burden of avoidance onto the other, (2) Both may avoid the accident in order to avoid potential liability, or (3) the best cost avoider may deliberately or carelessly fail to take precautions thereby shifting the burden to another.

### *2. Simple "Unilateral" Accident Avoidance—The Apparent Inefficiency of Contributory and Comparative Negligence Rules*

Most analysis of the efficiency of negligence rules has taken place in the relatively straightforward context of the two party accident where one person, acting alone, could reasonably avoid the accident. This is the "unilateral" accident avoidance case. The potential for inefficiency arises whenever two actors, both prospective plaintiff and prospective defendant, have available to them cost-justified precautionary measures. Historically, the potential for inefficiency appears because the contributory and comparative negligence doctrines become involved. Under these doctrines liability for at least a portion of the damages may rest on the victim, who may not be the least cost accident avoider. This may encourage others in the victim's position to waste resources avoiding accidents that could be more inexpensively avoided by others.

The intellectual history of the economic analysis of the "no duty" rule can be traced through various editions of Judge Posner's law and economics treatise. In the second edition of his treatise,[24] Posner was still struggling with

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Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 28 (1972), adopts a similar criterion ("[I]t is difficult to suggest any criterion for deciding liability other than placing it on the party able to avoid the costly interaction most easily.").

23. Under a comparative negligence regime the amount of recovery would be diminished.

24. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 124 (2d ed. 1977) [hereinafter POSNER, ECONOMIC ANALYSIS 2D].

the awkwardness of the apparent inefficiency resulting from incentives created by placing at least part of the liability on the party whose accident avoidance cost is higher:

> [S]uppose it is the plaintiff who can prevent the $1000 accident at a cost of $100, and the defendant at a cost of $50. If the plaintiff is barred from recovery by the doctrine of contributory negligence, as the Hand formula, applied literally to the plaintiff, would require, the defendant will have no incentive to take what turns out to be the more efficient preventive measure.[25]

In his example, Posner assumed that the plaintiff can be considered negligent even though the defendant, acting alone, could have avoided the accident at least cost. It is implicit in this assumption that plaintiff has a duty to take precautions to avoid risks resulting from the defendant's failure to exercise reasonable care. If not, the plaintiff would not be negligent for failing to take precautions.

Whenever the unilateral precautions of one of the actors involved in an accident scenario would be sufficient to avoid the risk of harm, an efficient incentive is one that motivates the least cost avoider of the risk to take his available cost-justified precautions. As the previous quote indicates, the contributory negligence rule as commonly understood fails to provide that incentive where the defendant is the least cost avoider.

A similar inefficiency arises under comparative negligence, though it may not be as severe. Comparative negligence, by assigning a greater portion of liability to the more negligent actor, might be viewed as addressing this failure to minimize primary accident cost by giving greater incentives to the least cost avoider.[26] If the second least cost avoider has an obligation to take corrective precautions, however, the doctrine sometimes gives incentives for duplicative accident avoidance measures or for mutual non-avoidance.[27]

### *3. Resolving the Apparent Inefficiency by Redefining "Reasonable Care"*

As the third edition of Posner's treatise reveals, this appearance of inefficiency resulted from the failure of lawyers and economists to interpret "reasonable care" properly. They had been laboring under the mistaken impression that when a reasonable person evaluates the risks presented by his activity, he takes into account risks created by the negligence of others. As we illustrate below, law and economics scholars have concluded that this is not an efficient way to make decisions because it leads to excessively high primary accident costs. Apparently, it is prudent to ignore a multitude of risks created by the negligence of others.[28]

By the Third Edition of his treatise in 1986, Richard Posner had reformulated the contributory negligence defense by redefining reasonable care. Posner asserted that an actor is not negligent if her only fault is failure to

25. *Id.*
26. *See supra* note 21.
27. *See* POSNER, ECONOMIC ANALYSIS 2D, *supra* note 24, at 124; Barnes & Baeverstad, *supra* note 21, at 283–85.
28. Economists relying on this interpretation of "reasonableness" do not actually claim to believe that people behave this way, only that the law entitles them to do so.

take precautions to avoid risks resulting from the negligence of someone who could have avoided them more inexpensively. That redefinition eliminates the embarrassment to Posner's defense of the efficiency of negligence-based tort law by eliminating the obligation to take corrective precautions. Referring to the numerical example above, Posner says in the Third Edition:

> It seems that the defendant will be deemed negligent but the plaintiff will be contributorily negligent (because $100 is less than $1000) and so will lose, and that the defendant will have no incentive for the future to take a precaution that by hypothesis is the efficient one. However, the appearance is misleading, provided that the law defines due care—as it does—as the care that is optimal if the other party is exercising due care. Since, in our example, if the defendant is exercising due care the plaintiff's optimal care will be zero, the plaintiff will have no incentive to take care, and knowing this the defendant will spend $50 on care and the accident will be avoided at least cost.[29]

The plaintiff is obliged only to use that care that is "optimal if the other party is exercising due care."[30] Because it is optimal for the best cost avoider to take the precaution, he must assume that the other will not do so. Since she is not the best cost avoider, she has no obligation even to consider the possibility of the defendant's failure to exercise due care or the human or social consequences of the defendant's negligence. The plaintiff apparently cannot, by definition, be contributorily negligent if the defendant has available to him cost-justified unilateral precautionary measures that will avoid the accident at least cost.[31] What is sauce for the goose is sauce for the gander, of course; the defendant need not take precautions if the plaintiff's unilateral actions would be the least cost accident avoidance measure. Neither party is obliged to take precautions if the other could have done so at lower cost; neither has a duty to take corrective precautions if the other has been careless. This analysis was carried over into the 1992 Fourth Edition of Judge Posner's Treatise without alteration.[32]

#### *4. "Joint" Accident Avoidance—Appearance of Inefficiency and Resolution*

It is widely recognized that the preceding explanation of how the common law is transformed into an efficient, primary accident cost minimizing system relies on an artificial model of accident prevention based on unilateral avoidance measures.[33] Many accidents are avoided most inexpensively not by

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29. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 154–55 (3d ed., 1986) [hereinafter POSNER, ECONOMIC ANALYSIS 3RD].

30. Even though each party is entitled to assume that the other will use due care, Judge Posner's rule does not mean that each may assume that the other will avoid the accident. Because it is optimal for the second least cost avoider to do nothing to avoid the risk, due care for her is to rely on the other to take precautions. Because it is optimal for the best cost avoider to take precautions, he must assume that the other will not do so.

31. *But see infra* part A.5., where the possibility of contributory negligence even under this interpretation of reasonable care is explained.

32. POSNER, ECONOMIC ANALYSIS 4TH, *supra* note 3, at 169–71.

33. Posner first presents the unilateral model then goes on to explore the joint accident avoidance case. *Id.* Other considerations of the joint case include Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291 (1992); Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985).

unilateral precaution but by both parties contributing some care. When both parties contribute to the process of accident avoidance, the combined avoidance measures are referred to as "joint" precautions. As the following discussion reveals, it appears that the incentives created by the contributory and comparative negligence rules with respect to the "joint accident avoidance cases" lead to wasteful accident avoidance. Subsequent analysis and reinterpretation of "reasonableness" resolved the problem for these cases as well.[34]

In *Levi v. Southwest Louisiana Electric Membership Cooperative*,[35] the court explicitly recognized the possibility of joint precautions. The plaintiff, Levi, was permanently disabled when he raised the mast of his oil drilling truck into an uninsulated 14,400 volt electrical distribution line. There were cost-justified, unilateral precautions available to both Levi (leaving the work site and moving to a safer place to work on the truck and mast each time it needed repair) and his employer, Southwest Electric (raising the power lines so that the masts of the trucks would not reach them). Neither precaution was taken. The court also suggested a pair of joint precautionary measures that might be a lower cost alternative. If the company attached a warning sign to the power pole and suspended an orange ball from the wire (which they could do at a cost lower than raising the wire), then the driver could easily determine whether there was a risk and use the ball to guide his raising of the mast. Apparently it was difficult to see the overhead wires at the work sites unless they were marked.

The original embarrassment associated with the traditional definition of reasonable care arises in the joint precautions case, just as in the unilateral precautions case. A party whose unilateral precaution is not the least cost avoidance option has an incentive, created by the prospective bearing of at least a portion of the damages, to employ that unilateral precaution. Unlike unilateral precautions cases, in which one party acting alone can most inexpensively avoid the accident, the least cost method of avoiding the accident in joint precautions cases is for each party to contribute something to the avoidance cost. The traditional definition of reasonable care would not, however, give the parties an incentive to take those least cost joint precautions. For example, if the driver in *Levi* is obliged to take the potential negligence of the company into account and will be found contributorily negligent and, hence, at least partially liable for failing to do so, he may employ an inefficiently high cost, unilateral avoidance measure. He may have an inefficient incentive to continue to move his truck to a new location for repairs that could be carefully done in the field if proper warnings were given.

But the appearance of inefficiency in joint precaution cases was, once again, misleading.[36] An efficient negligence-based tort rule will ensure that the parties both take their joint precautions and, under Posner's definition of reasonableness, both have this incentive. Each is entitled to assume that the other will engage in his part of the joint accident avoidance measure. Each party, aware of that entitlement, will know that he faces potential liability for

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34. *See infra* text accompanying notes 36–38.

35. 542 So. 2d 1081 (La. 1989).

36. POSNER, ECONOMIC ANALYSIS 4TH, *supra* note 3, at 170–71; *see also* POSNER, ECONOMIC ANALYSIS 3RD, *supra* note 29, at 155.

failing to participate. Each party, facing this calculus, has an incentive to take his own joint precaution.[37] The efficiency of this outcome again appears to depend on the lack of obligation to take the reasonably foreseeable negligence of others into account.[38]

To see how Judge Posner's interpretation works to create efficient incentives, consider the choices faced by parties in the same position as Southwest Electric and Levi. Posner's definition of reasonableness would require Southwest Electric (or a party in the same position), as the least cost avoider, to act first by identifying the risk. Once Southwest Electric has acted by suspending an orange ball from the wire, then Levi (or a party in his position) is able take his precaution, raising his mast carefully in those sites that the company has identified as presenting particularly serious risks. Levi's obligation to participate in accident avoidance is not created by the negligence of Southwest Electric but by Southwest Electric's contribution to the avoidance effort. Southwest Electric has an incentive to act optimally, by choosing the least cost, joint precautionary measure. Southwest Electric has an incentive to take their precaution, knowing that they will be found negligent, and therefore liable, for failing to do so if an accident results. Levi has an incentive to take his share of the joint precaution because he must assume that Southwest Electric has done so and he knows that he will recover no damages if he fails to do so and an accident results. As in the unilateral case, efficient incentives are apparently created by the economic definition of reasonableness. In Part B, we will show that the law is not as Posner describes it and does not create the "optimal" incentive described above. We will then show in Parts C and D that the incentives created by this definition of reasonableness are both inefficient and undesirable for equitable reasons.

### 5. *Reasonably Foreseeable Risks, Reasonable Precautions, and the Possibility of Contributory Negligence*

One might conclude from the economic interpretation of reasonable care that, in any given case, only one person can be found negligent. It appears that, because only one person has a duty to take precautions to avoid a particular

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37. The reader will reasonably wonder why the victim needs any financial incentive to avoid being electrocuted when the desire for self-preservation ought to be sufficient. One artificiality of economic analysis of incentives created by tort law is an assumption that, when a victim is compensated, she is fully compensated and, having been made whole, indifferent between being injured and not being injured. *See, e.g.*, COOTER & ULEN, *supra* note 3, at 380. This abstraction enables economists to generalize about the effects of incentives, so that the incentives effects on injurers and victims can be treated together and to generalize about both economic and personal injuries. Economists recognize, of course, that the tort system does not compensate fully. *Id.* at 330–31. The fact that a plaintiff must pay legal fees, for instance, is enough to prevent this indifference even if juries could otherwise determine a fully compensatory damage award. Nevertheless, economic analysis tends to isolate individual problems so that they become clear enough to be tractable. *See, e.g.*, Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1233 n.3 (1985) ("The reason that the study of a simple model can be helpful is, of course, that just because it abstracts from so much of the detail of reality, it may allow one to see more clearly than otherwise the importance of particular factors of interest."). Thus, the issue of whether there is full compensation is isolated from the discussion of what incentives are created if full compensation is assumed, for instance, and from the question of the distorting affects of attorney's fees.

38. The outcome also depends on an assumption that people are aware of the law and can appreciate the incentives it creates.

risk, no two people could simultaneously have breached their duties. This is counterintuitive because it seems to eliminate the possibility of contributory negligence and courts regularly find that plaintiffs were contributorily negligent.

The confusion about contributory negligence results from failure to recognize two different types of risks: those resulting from the negligence of others and those existing even without negligence. Even though the law and economics literature is never explicit about this distinction, the no duty rule applies, apparently, only to the first type of risk, which we call "negligence risks," as opposed to the other risks associated with engaging in activity. An actor may have no obligation to avoid risks created by another's negligence (a negligence risk) but both actors may have an obligation to take natural conditions (such as the icy condition of a road) into account in directing their own behavior. Natural conditions are "nonnegligence" risks. Contributory negligence arises when both parties fail to take reasonable precautions to avoid nonnegligence risks.[39]

Courts have recognized the distinction between negligence risks and nonnegligence risks. In *Dempsey v. Horton*,[40] the plaintiff stood in the middle of the street for several minutes without taking the precaution to look for the approach of traffic. He had reason to anticipate automobile traffic and no apparent reason for failing to look. The Missouri Supreme Court recognized that this plaintiff failed to use reasonable care in avoiding risks presented by negligent others as well as other risks:

> A pedestrian who goes upon a much-traveled street, over which he knows automobiles are constantly passing, without looking for approaching automobiles in the direction from which automobiles may be expected to approach, subjects himself to danger from approaching automobiles not necessarily arising from the negligence of drivers, but a danger which is likely to arise though the drivers are in the exercise of the utmost care. If by looking for approaching automobiles, which is but the act of reasonable prudence under such circumstances, he would discover the negligence of an automobile driver which threatens him in time to avoid being injured, he ought not to be permitted to presume, without looking, that the driver would not be negligent.[41]

39. In addition to accidents resulting from negligent behavior, there are so called "unavoidable accidents." The possibility of unavoidable accidents, sometimes called "mere accidents," W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 162 n.1 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS], gives rise to four logical alternatives. An accident (1) may occur without anyone being negligent, (2) may be due to an actor's negligent failure to avoid nonnegligence risks, (3) may be due to her failure to avoid risks created by the negligence of others, or (4) may be due to a failure to avoid both kinds of risks. Under the orthodox economic definition of reasonable care, the actor in situation (3) is not negligent, since there is no duty to avoid negligence risks. The negligence of a defendant may coincide with the plaintiff's failure to avoid a nonnegligence risk, however, as in situation (2), creating a case with two negligent parties. Thus, if the plaintiff is driving too fast given the curve in the road and the defendant is negligent because he is driving on the wrong side of the center line, then both will both be found negligent even if the plaintiff is exercising her right to ignore the defendant's negligence.

40. 84 S.W.2d 621 (Mo. 1935).

41. *Id.* at 626 (citing with approval, Russell v. Bauer-Berger Grocery Co., 288 S.W. 985, 988 (Mo. Ct. App. 1926)).

The dangers likely to arise even though drivers are exercising ordinary care are what we label "nonnegligence" risks. Negligent drivers add "negligence" risks.[42]

Among the negligence risks and other risks, some are reasonably foreseeable and some are not. Since there is no legal obligation to take precautions to avoid unforeseeable risks, the analysis of incentives created by alternative rules focuses on foreseeable risks—reasonably foreseeable negligence risks and reasonably foreseeable other or nonnegligence risks.

Opposing the risks (of all sorts) are reasonable and unreasonable precautions. Available precautionary measures, whether unilateral or joint precautions, may be ones that a reasonable person would be expected to take or ones that would be unreasonably burdensome. The economic approach to reasonableness follows the tradition of Judge Learned Hand in describing those reasonable precautions as being cost-justified, ones for which the risk created is significant enough to outweigh the cost of avoiding the accident.[43] As the following section illustrates, there are alternative, perhaps preferable, definitions of what constitutes a "reasonable" precaution,[44] but whatever definition applies, precautions fall into two subcategories: reasonable and unreasonable. Since the analysis of the effect of alternative rules depends on incentives to take precautions, the definition of what is "reasonable" is critical to the analysis.

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42. The law also classifies risks along a second dimension—whether or not the risks are foreseeable. An unforeseeable risk is not literally impossible to imagine or anticipate in the law. Rather it is such an insignificant risk that a reasonable person would not take it into account in making decisions. If either the likelihood of the harm materializing is too remote or the magnitude of the harm if it does materialize is too insignificant then it would not be worthwhile for a reasonable person to take it into account. *See* PROSSER AND KEETON ON TORTS, *supra* note 39, § 31:

> Those [risks] against which the actor is required to take precautions are those which society, in general, considers sufficiently great to demand preventive measures. No person can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded.... Such events are, in a sense, 'unavoidable accidents,' for which there is no liability.

*Id.*

Cases illustrate that where the probability of an accident's occurrence due to another's negligence is very low, liability will not be imposed. In Washington v. Louisiana Power and Light Co., 555 So. 2d 1350, 1351 (La. 1990), the adult children of a man electrocuted when he allowed his citizens band radio antenna to come into contact with a power line, had sued to recover damages. They appealed an appellate court ruling that had overturned a jury verdict rendered in plaintiffs' favor. The appellate court ruling was affirmed:

> The jury verdict for the plaintiffs was manifestly erroneous. Although the gravity of the injury in a power line accident is usually severe, under the circumstances of this case the magnitude of the risk was not great because the possibility that the radio antenna would have been brought into contact with the power line was very slight: five years before his fatal accident the deceased narrowly escaped death or serious injury in a similar mishap; he expressed concern for his life and afterwards exercised great caution and avoided moving the antenna near the power line; inspections by the power company would have shown only that the antenna was stationed securely at a safe distance from the power line right-of-way....

*Id.* at 1351.

43. See the discussion of United States v. Carroll Towing, *supra* note 9.

44. *See infra* part B.

Because of the recurrence of the qualification, in "reasonable" care, "reasonably" foreseeable, and "reasonable" precaution, our attention is inevitably directed towards the meaning of reasonableness. The difference between the orthodox economic view and ours is whether it is reasonable to take some precautions to avoid reasonably foreseeable negligence risks. All agree that there is a duty to take reasonable precautions to avoid reasonably foreseeable nonnegligence risks.

## B. REASONABLENESS IN THE LAW OF TORTS

While many courts assert that generally there is usually no duty to take corrective precautions, the exceptions to the general rule are so significant that they swallow the rule. We will demonstrate in this section that the duty to take precautions to avoid risks created by the negligence of others is identical to the duty to take precautions to avoid other (nonnegligence) risks. People have a duty to avoid only reasonably foreseeable risks and to use only reasonable precautions to avoid those risks, without regard to what type of risks they are.

Instead of a no duty rule, in general there is a duty to use reasonable care to avoid risks created by the reasonably foreseeable negligence of others.[45] As we will show, this later approach is the law even in those states where courts have articulated a no duty rule as well as in the Federal common law. In many states, the no duty rule is the accepted general principle but numerous exceptions are noted.[46] The exceptions essentially boil down to a recognition of

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45. *See* Isaacson v. Husson College, 297 A.2d 98, 103 (Me. 1972) (A plaintiff "cannot rely blindly on the presumption of the discharge of one's duty, but must at all times exercise ordinary care for his own safety."); Otte v. Taylor, 146 N.W.2d 78, 79–80 (Neb. 1966) (Jury instruction that "a driver is not required to anticipate negligence by another, *in the absence of notice, warning or knowledge of such negligence*, ... defined the knowledge which a driver is required to have in relation to the risk involved.") (emphasis added); Maxwell v. Maxwell, 367 P.2d 308, 311 (Mont. 1962) (Plaintiff *not entitled* to jury instruction which "in substance was that a person exercising ordinary care has a right to assume that others will do likewise and ... was not negligent in failing to anticipate injury which would come to her from violation of a duty of another.").

46. In Smith v. Holst, 549 P.2d 671, 672–73 (Or. 1976), plaintiff was held 35% negligent in suit for personal injuries sustained in collision occurring when defendant motorist attempted to make left turn off of highway as plaintiff motorist was in process of passing defendant's vehicle. Plaintiff's appeal of the holding was granted based on the trial court's failure to instruct the jury according to the state's uniform instruction (OREGON UNIFORM JURY INSTRUCTION 10.05): "Every person has a right to assume that others will obey the law, *unless and until such person knows or should in the exercise of reasonable care know the contrary.*" (emphasis added). In Stickel v. San Diego Electric Railway Co., 195 P.2d 416, 422 (Cal. 1948), Defendants objected to the following instruction (CAL. JURY INSTRUCTIONS (CIVIL) INSTRUCTION 138 (1943)):

> A person who, himself, is exercising ordinary care, has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that presumption. Thus, it is not negligence for such person to fail to anticipate injury which can come to him only from a violation of law or duty by another. *However, an exception should be noted:* The rights just defined do not exist when it is *reasonably apparent* to one, *or in the exercise of ordinary care would be apparent* to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.

*Id.* at 422.

Defendants objected on the basis that the instruction might be misunderstood as creating a duty to anticipate a breach of duty on the part of others. The court, however, thought otherwise.

the duty to take corrective precautions—whenever an actor knows, has reason to know, or should know of the risks created by the negligence of another, the actor has a duty to take reasonable care to avoid them.

Since torts is dominated by state common law, we could take any collection of states to illustrate the obligations included under the duty to use reasonable care. We begin, however, with the State of Illinois, since it is a jurisdiction that, based on some of its other tort rules,[47] seems congenial to the conclusion that we are entitled to assume that others are acting carefully and have no duty to take corrective precautions in response to the negligence of others. It is also Judge Posner's home state and the jurisdiction of the law on which many of his relevant judicial pronouncements are based. The Illinois cases and Posner's federal circuit court opinions interpreting Illinois law illustrate the significance of exceptions to the no duty rule. The discussion is supplemented with footnotes illustrating that other states follow similar rules. After discussing the law in Illinois and Judge Posner's court, we turn to a more general development of the meaning of reasonableness in American law.

### *1. A Typical No Duty Rule and Its Exceptions*

There are inconsistencies in any single state's law that can easily mislead a social scientist. Illinois courts, for instance, have variously stated that there is

"It is but a statement as to that common type of negligence, *the unreasonable failure to observe what is going on about one, including the negligence of others*." *Id.* (emphasis added).

The jury instructions of many other states similarly reflect interpretations of reasonable care consistent with the corrective precautions rule. *See, e.g.*, RECOMMENDED ARIZONA JURY INSTRUCTIONS (CIVIL) 41 (2d ed. 1991) ("A driver is entitled to assume that another motorist will proceed in a lawful manner ... unless it should become apparent to him, acting as a reasonably careful person, that the other motorist is not going to obey the laws of the road."); ARKANSAS, AMI CIVIL 3d 602 ("Every person using ordinary care has a right to assume, until the contrary is or reasonably should be apparent, that every other person will [use ordinary care] [and] [obey the law]."); CALIFORNIA JURY INSTRUCTIONS (CIVIL) INSTRUCTION 3.13 (7th ed. 1986) ("Every person ... has a right to assume that every other person will perform his duty and obey the law, and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate an accident which can occur only as a result of a violation of law or duty by another person."); STANDARD CIVIL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA 5.4 (1981); RIDLEY, GEORGIA REQUESTS TO CHARGE—CIVIL AND CRIMINAL CASES 163 (2d ed. 1985); 4 MINNESOTA PRACTICE JIG 100 (3d. ed. 1986); NEBRASKA JURY INSTRUCTIONS NJI 3.01 (2nd ed. 1991); NEVADA PATTERN JURY INSTRUCTIONS NEV. J.I. 4.09 (1986); OREGON JURY INSTRUCTIONS FOR CIVIL CASES UCJI NO. 10.05 (1984); TENNESSEE PATTERN INSTRUCTION, T.P.I. CIVIL 3.11 (2d ed. 1988); JURY INSTRUCTION FORMS FOR UTAH 16.10 (Crockett ed. 1957); VIRGINIA MODEL JURY INSTRUCTIONS NO. 6.060 (1988); WASHINGTON PATTERN JURY INSTRUCTIONS 12.07 (3d ed. 1989).

47. Illinois is, for instance, a state where failure of a plaintiff to wear a seatbelt will *not* result in a reduction of damages. Clarkson v. Wright, 483 N.E.2d 268, 270 (Ill. 1985) ("Here, there was no statutory duty to wear a seat belt and the presence of the seat belt in the automobile did not create the duty to wear it any more than would the presence in the automobile of a protective helmet create a duty to wear that. We find no authority which imposed on plaintiff the duty to anticipate and guard against defendant's negligence.") In many states, a plaintiff's recovery is reduced by the amount of damage that is due to the so-called "second collision," the collision with the inside of the plaintiff's car, for instance, that would not have occurred had the plaintiff been wearing a seatbelt. *See, e.g.*, Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986); Law v. Superior Court, 157 Ariz. 147, 755 P.2d 1135 (Ariz. 1988); Askew v. Gerace, 851 P.2d 199 (Colo. Ct. App. 1992); Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447 (Fla. 1984); Karczmit v. State, 588 N.Y.S.2d 963 (N.Y. Ct. Cl. 1992); Waterson v. General Motors Corp., 544 A.2d 357 (N.J. 1988); Foley v. City of West Allis, 335 N.W.2d 824 (Wis. 1983).

no duty to avoid the negligence of others[48] and that there is a duty to avoid the negligence of others.[49] In *Dunn v. Baltimore & Ohio Railroad Company*,[50] the Illinois Supreme Court reaffirmed the rule that there is no duty in general to anticipate and guard against the negligence of others. The court reasoned that imposition of a general duty to anticipate and guard against the negligence of others would place an intolerable extra burden on society, when each person already has the duty to exercise ordinary care. In a second recent case, however, the same court reduced a plaintiff's recovery for failing to remain under cover when he knew that another hunter was likely to fire in his direction.[51]

There are dozens of intermediate Illinois courts who have taken an explicitly "corrective precautions" approach. As just one example, consider the opinion in *Waldron v. Hardwick*,[52] an Illinois appellate court case where the plaintiff was denied recovery even though she had the right of way on the highway when the defendant negligently pulled out into the plaintiff's lane of traffic. The evidence demonstrated that the defendant moved onto the highway, giving no arm or light signal, and without looking into her rear view mirror. Denying recovery to the plaintiff, the court stated that "a motorist proceeding on a preferential street does not have an absolute right of way, but must exercise reasonable care to keep a lookout for vehicles *improperly* entering such preferential highway."[53]

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48. Pollard v. Broadway Cen. Hotel Corp., 187 N.E. 487, 490 (Ill. 1933) ("The law does not charge one with anticipating dangers and negligent conditions, but he may assume that others have done their duty to give proper warning of hidden dangers."); Humbert v. Lowden, 53 N.E.2d 418, 421 (Ill. 1944) ("It was the duty of appellees to operate the crossing gates, or to otherwise protect the crossing. Anticipation of negligence on the part of others is not a duty which the law imposes upon travelers upon the highway. They have the right to presume that trains will be operated in a proper and skillful manner and that the crossing gates, installed for that purpose, will be operated, so as to prevent them from going on the crossing in front of an approaching train.") (cited with approval in Osborne v. Redell, 159 N.E.2d 841, 845 (Ill. App. Ct. 1959)); Clarkson v. Wright, 483 N.E.2d 268, 270 (Ill. 1985) ("here, there was no statutory duty to wear a seat belt and the presence of the seat belt in the automobile did not create the duty to wear it any more than would the presence in the automobile of a protective helmet create a duty to wear that. We find no authority which imposed on plaintiff the duty to anticipate and guard against defendant's negligence."); Geraghty v. Burr Oak Lanes, 125 N.E.2d 47, 50 (Ill. 1955) ("The law does not charge one with anticipating dangers and negligent conditions, but he may assume that others have done their duty to give proper warning of hidden dangers.").

49. Hicks v. Swift, 1 N.E.2d 918, 919 (Ill. App. Ct. 1936) ("That defendant, at the time of and immediately before the collision, was bound to use the care and caution to avoid collision that an ordinarily prudent person would have then and there exercised, is clear."); Waldron v. Hardwick, 240 N.E.2d 772 (Ill. App. Ct. 1968); Balfour v. Citgo Petroleum Corp., 452 N.E.2d 46 (Ill. App. Ct. 1983) ("[T]he duty to exercise ordinary care to avoid a collision is reciprocal, and both parties have a duty to use every precaution to avoid a collision.... One must still exercise due care to prevent injury to oneself and others and to avoid collision with a driver who may be proceeding on the wrong side of the road."); Berner v. Kielnik, 453 N.E.2d 729 (Ill. App. Ct. 1983) ("[W]hen two vehicles approach or enter an intersection from differing roadways at approximately the same time, all drivers have a duty to maintain a proper lookout and to use every precaution to avoid a collision, regardless of who has the right of way."); *see also* Carrell v. The New York Cen. R.R. Co., 52 N.E.2d 201 (Ill. 1943); Greenwald v. The Baltimore & Ohio Railroad Company, 164 N.E. 142 (Ill. 1928) (Stating no one can assume that there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care.).

50. 537 N.E.2d 738, 745 (Ill. 1989).

51. Junker v. Ziegler, 498 N.E.2d 1135 (Ill. 1986).

52. 240 N.E.2d 772 (Ill. App. Ct. 1968).

53. *Id.* at 775 (emphasis added).

Following the conclusions of those Illinois opinions reflecting the "no duty" approach from Illinois courts[54] and ignoring the others,[55] Judge Posner stated in the Third and Fourth Editions of his treatise that the general rule is one that imposes no duty to take corrective precautions under any circumstances.[56] Only in the first judicial opinion he wrote that reaches this issue, *Davis v. Consolidated Rail Corporation*,[57] did Posner recognize any exception to the general rule of no duty:

> We were careful to qualify our statement of the rule that a potential injurer is entitled to assume that potential victims will exercise due care, by saying that was true "in general." A certain amount of negligence is unavoidable, because the standard of care is set with reference to the average person and some people have below-average ability to take care and so can't comply with the standard, and because in any event efforts at being careful produce only probability, not certainty, of avoiding careless conduct through momentary inattention. Potential injurers may therefore be required to take *some* care for the protection of the negligent, especially when the probability of negligence is high or the cost of care very low.[58]

The exception applies to those cases where "a certain amount of negligence is unavoidable" due to people of "below average ability" and "momentary inattention."

In no other case does Judge Posner recognize an exception, notwithstanding the fact that in *Davis* he found that the railroad company had a duty to avoid the negligence of Mr. Davis even though Davis was neither of below average ability or momentarily inattentive. Davis had been a railroad car inspector for six years when, on the day of the accident, he saw a train coming in from the east that halted and was decoupled from its engine. The locomotive pulled away to the west with several cars, leaving the rest of the train stretched for three-quarters of a mile to the east. Because it lay on a curved section of the track, the rear end of the train was not visible from the point of decoupling. Davis began to conduct the inspections, which required him to crawl under the cars to look for cracks. Unbeknownst to Davis, a locomotive had just coupled with the other end of the train. The crew had been ordered to move the train because it was blocking a switch. The crew made the movement, but without blowing the train's horn or ringing its bell. The only warning Davis had of the impending movement was the sudden rush of air as the air brakes were activated. He tried to scramble to safety before the train started up but his legs were caught beneath the wheels of the car as he crawled out from under it. Davis had not "blue-flagged" the train before he began his inspection. It is law as well as custom in the railroad industry that whenever work is being done on a train a blue metal flag is placed at either end to warn employees not to move the train. Davis was quite capable of taking reasonable precautions and had not been "momentarily inattentive." He inspected railroad cars at the yard three or four times a week and never posted or requested the posting of a blue flag.[59]

54. *See* cases cited *supra* note 48.
55. *See* cases cited *supra* note 49.
56. *See supra* text accompanying footnotes 29–32.
57. 788 F.2d 1260 (7th Cir. 1986).
58. *Id.* at 1265–66.
59. *Id.* at 1265.

By blowing its horn, the train's crew could easily have avoided the accident. Judge Posner recognized that this precaution would also have avoided harm to people who were not being negligent, a railroad employee doing repairs on the top of a car, a brakeman straddling two cars, and anyone else who might have business in or on a car. Most surprisingly, however, given the no duty rule on which he bases his economic analysis, he found that because "Conrail could have avoided this accident by the essentially costless step of blowing the train's horn, it may have been duty-bound to do so *even if only a careless person* would have been endangered by a sudden movement of the train."[60]

This qualification of the general duty never appears again. His opinion in *McCarty v. Pheasant Run*,[61] affirmed the district court's verdict for a hotel in a case where an unlocked door gave access to an intruder who attacked a guest. Citing *Davis*, Judge Posner stated "[i]t is a bedrock principle of negligence law that due care is that care which is optimal given the potential victim is himself reasonably careful; a careless person cannot by his carelessness raise the standard of care of those he encounters."[62] If this standard had been applied in *Davis*, the careless railroad car inspector would not have recovered. Posner seems to have fallen into the trap created by the confusion in Illinois law; he treated the general rule as absolute and ignored the critical exceptions.

Judge Posner clarified (and emphasized) his position in *McCarty* in a case decided twelve days later, *Greycas, Inc. v. Proud*,[63] in which the court evaluated the contributory negligence of a lender in failing to properly investigate the creditworthiness of a borrower. Judge Posner stated that due care "is not the higher level of care that would be optimal if potential tort victims were required to assume the rest of the world was negligent."[64]

*McCarty* and *Greycas* do not stand alone as the only times that Posner has made this unqualified statement of the law. He used similar wording in *Pomer v. Schoolman*,[65] as well as in his treatise. In *Pomer*, the plaintiff was hired to drive a truck on a farm during corn harvesting season. Pomer was an experienced truck driver, but he had little experience around farms. The accident occurred on Pomer's first day on the job. He stopped his truck next to a combine so that his truck could be loaded. The combine was stationary, but the corn head attached to the combine had not been turned off; this was standard operating procedure, because it was necessary to keep the corn head on until all the corn was shucked so the machinery would not foul. Pomer left the cab of his truck and walked around to the back to watch the corn being loaded from the combine into the truck. He was standing next to the corn head with his head craned upward in an effort to see whether the bins of his truck were filling up; the next thing he knew he was in the corn head.

In his complaint, Pomer charged his fellow employee, King, with negligence in operating the combine and failing to maintain a proper lookout

60. *Id.* at 1266 (emphasis added).
61. 826 F.2d 1554 (7th Cir. 1987).
62. *Id.* at 1557–58.
63. 826 F.2d 1560 (7th Cir. 1987).
64. *Id.* at 1556.
65. 875 F.2d 1262 (7th Cir. 1989).

for Pomer. The jury found that King was not negligent and the Seventh Circuit Court of Appeals affirmed. In support of the decision, Posner stated:

> A person cannot be deemed negligent for failing to take precautions against an accident that potential victims could avoid by the exercise of elementary care; negligence is failing to take the care necessary and proper to prevent injury to reasonably careful persons.[66]

To support this decision Posner cites to *Davis* and *McCarty*. While the language in *Pomer* does reflect the holding in *McCarty*, it is quite unlike the qualified language and the holding in *Davis*.

Posner's analysis does reflect the kind of analysis in which Illinois courts sometimes engage. But his statements are misleading because they fail to give a full analysis. In *McCarty*, *Greycas*, and *Pomer*, he only presented the no duty rule and gave no indication of when there may be a duty or why there was no duty in the specific case. It may be true, based on the facts in these cases, that the negligence of the other was not reasonably foreseeable or that there were no reasonable precautions to be taken, but one may easily be led to believe that there is *never* a duty to avoid the negligence of others when, in fact, the obligation to take precautions depends on the surrounding circumstances. In *Davis*, for example, there was just such a duty imposed on Conrail even though Davis was careless. Other jurisdictions also impose such a duty.[67]

Posner adopted the absolute statement of the no duty rule in his treatise and by doing so has misled other economists. He states that "the law defines due care as the care that is optimal if the other party is exercising due care." If we

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66. *Id.* at 1268.

67. In Watters v. Querry, 588 P.2d 703, 704 (Utah 1978), plaintiff brought suit against defendant, who had struck plaintiff's auto from behind, and co-defendant, who had abruptly stopped her car in front of plaintiff's. The trial court, pursuant to jury verdict, entered judgment in favor of the co-defendant and Plaintiff made an appeal based, in relevant part, on the following instruction:

> If a driver creates a dangerous condition with a motor vehicle, but this condition is such that another driver, exercising reasonable care, should have observed and avoided the dangerous condition, then the negligence of the latter driver is an independent intervening cause, and, Therefore [sic] the first driver cannot be a proximate cause of the collision.

*Id.*

The Utah Supreme Court vacated the judgment in co-defendant's favor and remanded the case for a new trial:

> It is usually true that a person who is exercising reasonable care may assume that others will also do so, and may rely upon that assumption until something appears to warn him to the contrary. *But this is not always true. The more fundamental test is whether under the particular circumstances he should have foreseen that his conduct would have exposed others to an unreasonable risk of harm; and this includes situations where negligent or other wrongful of others should reasonably be anticipated.*

*Id.* at 704 (emphasis added.).

*See also* Allen v. State of New Hampshire, 260 A.2d 454, 457 (1969) ("As a general rule, persons are not required to anticipate careless conduct on the part of others and may therefore assume that they will act reasonably. *Of course if there are circumstances which would cause a reasonable person to anticipate and guard against careless conduct, then it is negligence not to do so.*") (emphasis added); Wissman v. Wissman, 575 S.W.2d 239, 241 (Mo. Ct. App. 1978) ("Although plaintiff is correct in his general proposition that one is not negligent for failing to anticipate danger arising from the negligence of others, *this principle is not applicable here to relieve him of his duty to exercise ordinary care for his own safety under the circumstances.*") (emphasis added).

apply this language to a typical, recent case decided by an Illinois court, however, we simply do not get the result that Posner suggests.

In *Junker v Ziegler,*[68] the plaintiff brought suit to recover damages for injuries he sustained in a hunting accident. The jury set damages at $112,000 but attributed 65% of the fault to the plaintiff, reducing his award to $39,200. The accident occurred at a commercial hunting club owned and operated by one of the defendants. While hunting, the plaintiff was struck in his left eye by a pellet from a shotgun fired by the other defendant, Ziegler. The hunting club had several goose-hunting blinds or pits, and a guide would accompany hunters to a blind, call the geese, and signal to the hunters when the birds were within range. On the day of the accident, the plaintiff and Ziegler were located in different blinds; Ziegler was 200 yards uphill from the plaintiff, and each blind was visible from the other. Both plaintiff and Ziegler were experienced hunters. Ziegler's guide indicated he could shoot at an approaching goose. Ziegler fired, and the bird descended toward the area between the plaintiff's and Ziegler's blinds. Ziegler's guide said that he could shoot again, and Ziegler fired when the bird was on or near the ground between the two blinds. There was a low cost corrective precaution available to the plaintiff that would have avoided the harm, remaining in his own blind under cover, but he failed to take the precaution. A pellet from Ziegler's second shot struck the plaintiff in the eye. The plaintiff knew that he was within range of Ziegler's blind.

It is apparent from the jury's finding of fault on the part of the plaintiff that the plaintiff knew, had reason to know, or should have known of Ziegler's negligence. Under Posner's approach, the failure to take the corrective precaution would not affect the plaintiff's case. In other words, the plaintiff would receive the full recovery of $112,000. Posner's rule is that because the plaintiff is entitled to assume that others will exercise due care, he needs to take no protective precaution. As the result in *Junker* demonstrates, however, this is not how the law was applied in Illinois. The Illinois Supreme Court imposed a duty on plaintiff to avoid the danger (take corrective precautions) once the danger created by the carelessness of the other became known to him, reducing his recovery to $39,000.

### *2. The Limits of the Corrective Precautions Rule: Reasonably Foreseeable Risks*

Across the broad spectrum of torts cases, the duty to use reasonable care is traditionally limited by the qualification that one is required to recognize only risks that a reasonable person would recognize while exercising "such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have" (unless he has special abilities or knowledge).[69] These are usually referred to as "reasonably foreseeable" risks. One is not liable for failing to take the care that recognition of other risks would require.[70]

A court that treated the duty to avoid negligence risks and nonnegligence risks in the same way would require that a person take reasonable precautions only when another's negligence was reasonably foreseeable. We would expect a

68. 498 N.E.2d 1135 (Ill. 1986).
69. RESTATEMENT (SECOND) OF TORTS § 289 (1965).
70. *Id.*

court to consider whether a reasonable person would perceive the type of risk that materialized. Accordingly, the Illinois Supreme Court found the plaintiff not at fault in *Humbert v. Lowden*,[71] where the conduct of the railroad company gave no clue from which the driver, acting as a reasonable person, might conclude that a train was bearing down on him. The crossing gates, installed for the purpose of warning drivers, were not lowered, the crossing bell was not sounded, and the train was traveling at a speed of seventy mph. There was no evidence that trains customarily speed through such crossings without warnings and the court correctly concluded that a reasonable person is not required to anticipate such negligence.

The position of the *Restatement (Second) of Torts* is consistent with this approach and carefully recognizes that only in those instances where the risk is trivial will there be no obligation to take precautions:

> If the propensity of a small percentage of mankind to act in a manner different from that customary to the mass involves only a slight chance of trivial harm to an unimportant interest, the actor, particularly if the law regards his conduct as useful, is entitled to ignore this risk. This is generally expressed by saying that, under such circumstances, the actor is entitled to assume that others will act with normal propriety or will not be guilty of negligence or intentional misconduct, or that he is not required to anticipate and provide against such misconduct.[72]

Foreseeability of another's negligence may run from an actor's actual (subjective) awareness of that negligence, through an actor's actual awareness of facts from which he has reason to know of that negligence, to knowledge that the actor would have had if he had been acting reasonably. These categories of knowledge are traditionally captured in the law by saying that there is negligence of which an actor *actually knew*, *had reason to know*, or *should have known*.[73] The latter two are logically treated together for our purposes since

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71. 53 N.E.2d 418, 421 (Ill. 1944).
72. RESTATEMENT (SECOND) OF TORTS § 290 (1965).
73. The issue of liability turns on knowledge. In Garr v. Union Carbide Corp., 589 F.2d 147, 150 (3d Cir. 1978), a jury verdict in favor of plaintiff, who fell and was injured when he tripped on a defective sidewalk, was overturned because plaintiff knew—and had known for at least four to six months—the precise location and dimensions of the defect. "Generally, a person has no duty to foresee the negligence of others. However, *the doctrine does not apply where the injured party had prior knowledge of the defendant's negligence*." (emphasis added). The court in *Garr* distinguished Pro v. Pennsylvania R.R. Co., 135 A.2d 920 (1957), another slip and fall case wherein plaintiff's recovery was upheld, because "[i]n Pro the plaintiff was aware of the general condition of the roadway, but there was no evidence that she was aware of the particular defect." 589 F.2d at 150. Liability, or the extent to which each party is held liable, may also turn on whether a party had reason to know of the other party's negligence. In Maine, in order to recover in a malpractice action against an attorney, clients are not required to monitor their attorneys constantly.

> "The exercise of ordinary care could not have led the client to discover the defendant's negligence unless 'ordinary care' implies that a prudent person would not rely upon the attorney's ... opinion but would hire a second attorney to check the work of the first, 'an expensive and impractical duplication, clearly destructive of the confidential relationship between the practitioner and his client.'"

Anderson v. Neal, 428 A.2d 1189, 1192 (Me. 1981) (citing Neel v. Magana, Olney, Levy, Cathcart, & Gelfand, 491 P.2d 421, 428 (1971)). However, comparative negligence is available as a defense in malpractice actions and the plaintiff may be ruled contributorily negligent for having failed to fire her attorney sooner: "[T]he client may not ignore repeated indications that her attorney is inadequately performing over an extended period of time." Pinkham v. Burgess, 933 F.2d 1066, 1073 (1st Cir. 1991).

they reflect alternative types of negligence that is not actually known but is "reasonably foreseeable."

*a. Actual Knowledge of the Other's Negligence*

Cases involving actual knowledge of another's negligence inevitably involve a temporal element, since the actor whose behavior is being judged witnessed the lack of due care by the other before deciding on his own course of action. If there were no duty to take corrective precautions, neither a prospective plaintiff nor a prospective defendant would have an obligation to avoid the risks created by the other's negligence, despite their knowledge of the risks and their ability to take reasonable precautions. Because of the temporal element, these cases are sometimes resolved under the "last clear chance" doctrine,[74] which places liability on the person who knew of the other's negligence but failed to take an available reasonable precaution that would have eliminated the risk. In the context of this discussion of the duty to take measures to eliminate risks created by the negligence of others, this doctrine appears to be a straightforward application of (and illustration of) the corrective precautions rule.

People must take reasonable precautions if they are actually aware of negligent acts of others that may injure them. *Junker v. Ziegler*,[75] the Illinois case discussed above, presents a situation where the defendant acted first, by aiming in the plaintiff's direction, and the plaintiff then did not take the precaution of ducking. The plaintiff actually knew of the other's negligence. Following the corrective precautions rule in this "actual knowledge" case, the court found that a jury could find that a known danger existed and that a reasonable person would have taken cover. The plaintiff had "a duty to protect himself once the danger became known."[76] The plaintiff was contributorily negligent for failing to take corrective precautions. The "attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have" actually revealed to the plaintiff in these circumstances that there was a risk resulting from another's negligence to which he must adjust.

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*See also* Freed v. Redwing Refrigeration Inc., 275 S.E.2d 691, 693 (Ga. App. 1980) ("'The rule that in order for the plaintiff to recover, he must have exercised ordinary care to avoid the consequences to himself caused by the defendant's negligence, *is not limited to the negligence of the defendant which may have been actually discovered, but extends also to the negligence which might have been discovered by the exercise of ordinary care on the plaintiff's part.*'") (citation omitted) (emphasis added); Stewart v. Lowe, 140 So. 2d 231, 234 (La. Ct. App. 1962) ("When the motorist having the right of way should reasonably realize in time that the inferior traffic will continue its approach and will obstruct the superior motorist's passage across the intersection, he is derelict in his duty, and thus guilty of negligence, should he fail to take every precaution possible to avoid a collision."); Eichel v. Payeur, 214 A.2d 116, 119 (N.H. 1965) ("The right to rely upon others to exercise due care *in the absence of notice to the contrary* is well established.") (emphasis added); Highfill v. Brown, 340 S.W.2d 656, 663 (Mo. 1960) ("One is not negligent in assuming and acting upon the assumption that others will not violate the law or fail to exercise due care for their own safety, *in the absence of notice to the contrary.*") (emphasis added).

74. The "last clear chance" doctrine, the reasons behind its adoption, and the analytical weakness in its application are discussed in PROSSER AND KEETON ON TORTS, *supra* note 39, § 66 and sources cited therein.

75. 498 N.E.2d 1135 (Ill. 1986).

76. *Id.* at 1137.

Similarly, people must take reasonable precautions if they are actually aware of negligent acts of others that may injure the others. In *Star Brewery Co. v. Houck*,[77] another Illinois case, a ten year-old boy playing tag in the public streets was run over by a beer wagon. The defendant claimed, even though he had actually seen the boy in danger, the boy could have easily seen, heard, and avoided the approaching wagon and was therefore contributorily negligent. The boy had acted first, by running carelessly into the street. This negligence created an obligation for the driver to take corrective precautions to prevent injury to the boy. The court held the driver liable for damages even though the boy's negligence had exposed the boy to the risk.

The effect of applying the corrective precautions rule to these "actual knowledge" cases affects incentives. Given the way the rule operates, *A* can gamble that *B*, who has a reasonable (though perhaps more costly) way to avoid injury, will observe the risk presented by *A's* negligence and take precautions to avoid the harm. If the parties' conduct results in harm to *B*, *B* will be either wholly or partially liable for her own damages, depending on whether the jurisdiction follows the traditional contributory negligence rules or has adopted comparative negligence. The resulting incentive for people in *B's* position to take such precautions in the future relieves *A's* burden. If people like *B* are not the least cost avoiders of this risk, inefficient incentives have been created. The best cost avoider, *A*, might even *intentionally or strategically* shift all or part of the cost of accident avoidance from himself to *B*.[78]

There are many intersection crossing cases where a driver with the "right-of-way" knew of another driver's negligent behavior and failed to yield to that driver.[79] The negligence of the "inferior" driver (the one without the

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77. 78 N.E. 827 (Ill. 1906). The court stated:

> It was held in Chicago West Division Railway Co. v. Ryan, 23 N.E. 385 (1890), that even though a person's own negligence exposed him to risk, if the proximate cause of his injury was the result of the defendant's failing to use ordinary care to avoid injuring him after becoming aware of his danger, the defendant would be liable. It was also held in that case that it was not necessary to a recovery that the defendant should have actually known of the danger to which the injured party was exposed, but that he would be liable if he has "sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions a prudent man would take under similar notice and belief."

*Id.* at 828.

Similarly, in Carter v. Wiese Corp., 360 N.W.2d 122, 137 (Iowa Ct. App. 1984), it was held that the issue of plaintiff's contributory negligence was for the jury. "Whether a person is negligent for failing to anticipate the negligence of others is to be determined by application of the reasonable person test, i.e., whether a reasonable person of ordinary prudence in like circumstances would have taken precautions against the negligence of another." (citing S.F. HARPER AND F. JAMES, THE LAW OF FACTS 22.10, at 1227 (1956)).

78. The economists' fear of "strategic" shifting of the burden of accident avoidance from a lower to a higher cost accident avoider is discussed *infra* part D.1.

79. Many of the cases explicitly recognize and depend on the existence of actual knowledge, which becomes an issue in the case. In Przybyszewski v. Nunes, 77 A.2d 703, 705 (Pa. Super. Ct. 1951), plaintiff, a member of a funeral procession, proceeded through an intersection in the face of an amber light—even though he had seen defendant's automobile approaching the intersection at a high rate of speed. On appeal, a judgment N.O.V. rendered in defendant's favor was upheld. The assumption that others will perform their duty must yield, like many others, "to the realities of the situation, and, if the car on the left, even though further away from the intersection than the car on the right, approaches the intersection at such a high rate of speed as to make a collision at the intersection likely, should the driver on the right, relying on his 'right of way,' push on, it would be the manifest duty of the latter to yield his

right to go first into the intersection) typically consists of failing to slow down and yield to the superior driver or to stop at the intersection. This behavior might be construed as being "strategic" in the sense that the inferior driver hopes to force the other to slow down so that he will not have to do so. In *Haeg v. Sprague, Warner & Co.*[80] the plaintiff had seen the defendant speeding towards the intersection at least four times at various distance from the point of collision. Relying on his legal right to proceed through the intersection first, the plaintiff simply expected the other to "slack up," as the plaintiff put it,[81] and let him through. The court emphatically rejected the "plaintiff's supposed right:"

> Plaintiff's supposed reliance on [the defendant's] exercise of due care is of no moment for the simple reason that this is a case, if ever there can be one, where such reliance was itself negligence. We stress again the obvious truth of fact and law that it is not due care to depend upon the exercise of care by another when such dependence is itself accompanied by obvious danger.[82]

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'superior right' in the interest of the safety of both motorists and of the public." (citing Adams v. Gardiner, 160 A. 589, 591 (1932)).

In different circumstances, the exercise of "such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable person would have" (as required by RESTATEMENT (SECOND) OF TORTS § 289) will not prevent a plaintiff from recovering. In Browning v. Paiz, 586 S.W.2d 670, 674 (Tex. Civ. App. 1979), a jury verdict rendered in favor of plaintiff, who brought suit to recover for injuries sustained in an accident at an uncontrolled intersection, was upheld. Defendant, Browning, who entered the intersection from a roadway on plaintiff's left-hand side, slowed down to approximately 2–2 1/2 miles per hour before entering the intersection. In his testimony defendant, according to the court, frankly admitted that there was no way the driver of a vehicle, such as plaintiff, approaching the intersection could know that defendant was not going to yield the right of way. "Here there is ample evidence in the record from which the jury could reasonably conclude that Browning's action in failing to yield the right of way did not become reasonably apparent to Paiz in time for Paiz to have avoided the accident."

Many of the cases are explicit in recognizing that either actual knowledge or knowledge that the party should have had is enough to create to duty to use corrective precautions. *See, e.g.*, Courtault v. Government Employees Ins. Co., 169 So. 2d 592, 593 (La. Ct. App. 1964) (Motorist "had every right to assume that those approaching the intersection from the less favored street would obey the law and yield the right-of-way to traffic on the favored street, and he could legally indulge in this assumption until he *saw or should have seen* that" another motorist had not observed or was not going to observe the law.) (emphasis added).

Some of these cases make it sound as though the actual knowledge cases are the only exception to the no duty rule. In Garr v. Union Carbide Corp., 589 F.2d 147, 150 (3d Cir. 1978), a jury verdict in favor of plaintiff, who fell and was injured when he tripped on a defective sidewalk, was overturned because plaintiff knew—and had known for at least four to six months—the precise location and dimensions of the defect. "Generally, a person has no duty to foresee the negligence of others. However, *the doctrine does not apply where the injured party had prior knowledge of the defendant's negligence.*" (emphasis added). As the discussion in part B indicates, however, this is not the rule as it is applied.

80. 281 N.W. 261 (1938).

81. *Id.* at 261.

82. *Id.* at 262. According to commentators and the RESTATEMENT, the rule in *Haeg*, no absolute right to assume that other people are being careful, is the dominant rule. *See, e.g.*, PROSSER & KEETON ON TORTS, *supra* note 39, at 198–99 ("[A] person is required to realize that there will be a certain amount of negligence in the world. The duty to take precautions against the negligence of others thus involves merely the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care." ). The RESTATEMENT (SECOND) OF TORTS, § 466, says "The plaintiff's contributory negligence may be ... (a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know." Section

The last clear chance doctrine has generally been abandoned in most states since the advent of comparative negligence.[83] It is widely agreed that the doctrine was designed to ameliorate the harsh effects on plaintiffs of the contributory negligence rule,[84] which completely barred plaintiff's recovery even though the defendant knew of the plaintiff's peril and could easily have avoided it. Comparative negligence removes the complete bar and requires that the jury balance the relative faults of the parties, thereby providing another way for a jury sympathetic to the plaintiff's case and unsympathetic to the defendant's to allow the plaintiff some recovery.

The abandonment of the last clear chance rule does not indicate an embracing of the no duty rule. Rather it illustrates that a party's failure to take reasonable precautions to avoid the risk to herself or another that results from the known prior negligence of the other is simply one type of negligence, which can be balanced against the fault of another.[85]

*b. Corrective Precautions in the Absence of Actual Knowledge*

Contrary to the assumption of the economists, each party may have a duty to adjust to the negligence of the other, even if he or she does not actually know of the other's negligence.[86] Negligence may be reasonably foreseeable

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302A is generally in accord, though it is addressed to the duty to protect others: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person."

83. HENRY WOODS, COMPARATIVE FAULT 180–181 (1987 & supp. 1993) ("the doctrine of last clear chance has crumbled under the assault of the rash of legislative acts and judicial decisions adopting comparative negligence. It is now an *anomaly* in comparative negligence jurisdictions and exists only in the old comparative negligence jurisdictions, notably Georgia and Mississippi, and in those jurisdictions where the defense of contributory negligence remains to some extent operable. Nebraska and South Dakota are examples of the latter.").

84. PROSSER & KEETON ON TORTS, *supra* note 39, at 464 ("The real explanation [for the last clear chance doctrine] would seem to be a fundamental dislike for the harshness of the contributory negligence defense.") (citing Ratlief v. Yokum, 280 S.E.2d 584, 588 (W.Va. 1981) ("[T]he doctrine of last clear chance was a judicial development to modify the harshness of the contributory negligence rule.")) and cases in accord, Alvis v. Ribar, 421 N.E.2d 886 (1981) (in which the Supreme Court of Illinois abandoned contributory in favor of comparative negligence); Abalos v. Oil Development Co. of Texas, 544 S.W.2d 627 (Tex. 1976); and Mitchell v. Sigrest, 345 So.2d 141 (La.App. 1977)).

85. The last clear chance doctrine has been described by some as a significant step towards comparative negligence, apparently on the view that either the defendant's act (or failure to act) was closer in time to the injury (the "proximate cause" view) or was more faulty, perhaps even wanton, reckless, or intentional. *See* PROSSER & KEETON ON TORTS, *supra* note 39, at 463–64; WOODS, *supra* note 83, at 14–15 (citing Fleming James, Jr., *Last Clear Chance; A Transitional Doctrine*, 47 YALE L.J. 704 (1938); Malcom M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940); and Francis S. Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. PA. L. REV. 572 (1951)).

86. RESTATEMENT (SECOND) OF TORTS § 302A, states:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

*Id.*

The comments indicate that the "possibility" of such negligence creates a duty for the actor to take cost-justified precautions:

> Comment c. Even without such special knowledge, the actor is required to know that there is a certain amount of negligence in the world, and that some human beings will fail on occasion to behave as a reasonable man would behave. Where the possibility of such negligence involves an unreasonable risk of harm, either to

even if not "actually known" if a party (1) has reason to know of the negligence or (2) should know of the negligence if exercising reasonable care.

A representative "reason to know" case is *Daniels v. Moser.*[87] In *Daniels,* the plaintiff employee struck his head on an archway over a gate while riding, facing to the rear, on top of a truckload of hay being driven by the defendant, his employer. On appeal, a judgment N.O.V. rendered in favor of the employer was reversed with instructions that the jury verdict for the plaintiff be reinstated:

> In the described circumstances we think reasonable minds might conclude that defendant did not measure up to the standard of the reasonable man in driving under the archway relying on the assumption that plaintiff would act in self-protection, because *that which he had seen* must have caused him to doubt the validity of that assumption. He had seen the plaintiff place himself on the hay with seeming inattention to the archway, and that he was thereby subjecting himself to grave risk of serious injury. *The right to act on the assumption that another will act in self-protection does not subsist in the presence of knowledge which places the validity of that assumption in doubt.*[88]

Even if there are no specific facts from which a defendant has reason to know about a particular plaintiff's negligence, the defendant may be liable if he should have expected negligence. In *Sulphur Springs Valley Electric Cooperative, Inc. v. Beltran,*[89] an Arizona court held that a jury instruction limiting the defendant's responsibility to avoiding the negligence of others of which it was actually apprised was erroneous: "The defendant is required to know that there is a certain amount of negligence in the world, and that some human beings will fail on occasion to behave as a reasonable man would behave."[90]

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> the person who is to be negligent or to another, the actor, as a reasonable man, is required to take it into account and to govern his conduct accordingly.
> Comment d. If the probability of the negligent conduct of another is relatively slight, or if the harm to be expected from it is relatively slight, and the utility of the actor's conduct is relatively great in proportion, the actor may be entitled to ignore the risk, and proceed on the assumption that others will act in a reasonable manner. On the other hand, if the actors knows or should realize that there is a serious chance of grave harm to valuable interests of others, and the utility of his own conduct is less than the risk, he is required to take precautions against the negligence of others which a reasonable man would take under like circumstances.

*Id.* at cmt. c.

Similarly, in Carter v. Wiese Corp., 360 N.W.2d 122 (Iowa Ct. App. 1984), it was held that the issue of plaintiff's contributory negligence was for the jury. "Whether a person is negligent for failing to anticipate the negligence of others is to be determined by application of the reasonable person test, i.e., whether a reasonable person of ordinary prudence in like circumstances would have taken precautions against the negligence of another." *Id.* at 137 (citing S.F. HARPER & F. JAMES, THE LAW OF FACTS, at 1227 (1956)).

87. 71 N.W.2d 739 (S.D. 1955).

88. *Id.* at 742 (emphasis added); *see also* Board of Water Works Trustees of Des Moines, Iowa v. Alvord, Burdick & Howson, 706 F.2d 820, 825 n.6 (1983) ("A defendant who owes a duty of care to another is often required to anticipate that the other will be negligent, and the defendant often has a duty to take precautions against the negligence of the other."); Fuller v. Southern Pacific Transport Company, 122 Ariz. 588, 596 P.2d 726 (Ariz. Ct. App. 1979) (Where instruction stating that obligation of railroad to give warning only to those persons who were free from negligence was in error.).

89. 478 P.2d 128 (Ariz. Ct. App. 1971).

90. *Id.* at 129–30.

This definition of reasonableness applies to defendants and plaintiffs alike. There are dozens of cases where plaintiffs and defendants are admonished to keep a lookout in anticipation of the negligence of others. In *Waldron v. Harwick*,[91] discussed in the Introduction, an Illinois appellate court held that the plaintiff had failed to use ordinary care when she failed to notice the defendant negligently pulling onto the roadway without signalling:

> While it is alleged, and there is evidence that defendant started her standing vehicle when the movement could not be made with reasonable safety in violation of a statute, such is not conclusive upon the issue of plaintiff's exercise of ordinary care for her own safety. The duty of the parties to exercise ordinary care to avoid a collision is reciprocal.[92]

It is not necessary that one party actually know or have reason to know of the other's negligence; it is enough that the negligence of another is reasonably foreseeable. A finding of negligence, or contributory negligence, naturally depends on all the circumstances, even in Illinois. In *Chaplin v. Geiser*,[93] plaintiff housekeeper brought suit against homeowners to recover for injuries sustained after she tripped over a pet toy and fell. On appeal from summary judgment in favor of the property owners, the Illinois Appellate Court held, in relevant part, that the plaintiff could not be held contributorily negligent as a matter of law:

> Plaintiff's failure to look at the floor does not constitute negligence per se. The obligation to look, as one component of the duty to exercise ordinary care, is imposed in those cases where the actor should reasonably anticipate danger. The failure to keep a proper lookout while driving an automobile, for example, is plainly negligence since the driver should reasonably anticipate danger at all times.[94]

And in *Solt v. Godfrey*,[95] an action was brought on behalf of Plaintiff, a two-year, eight-month old infant who was struck by an automobile when he ran into the street following a ball. At the time of the accident the day was clear, the sun was shining and visibility was unlimited. There were no parked vehicles, bushes, trees, weeds or obstructions along or upon a roadway where the shoulders were level and practically flat. At trial, Plaintiff requested the following instruction:

> You are instructed that general human experience supports the inference that when one in possession of his faculties looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence, or the person was negligently inattentive. *The driver of a motor vehicle is charged with the duty of seeing those objects or persons which he would have seen had he been exercising reasonable care.*[96]

The trial court refused to give the requested instruction, and instead, gave the following:

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91. 240 N.E.2d 772 (Ill. App. Ct. 1968).
92. *Id.* at 775.
93. 398 N.E.2d 628 (Ill. App. Ct. 1979).
94. *Id.* at 632 (emphasis added).
95. 479 P.2d 474 (Utah 1971).
96. *Id.* at 476 (emphasis added).

> A person who is exercising due care has a right to assume that others will also perform their duties under the law, and he has a right to rely and act on that assumption unless, in the exercise of reasonable care, he observes or should observe something to warn him to the contrary. In the absence of such warning, it is not negligence for a person to fail to anticipate or avoid an accident which can result only from a violation of law or duty by another.[97]

A jury verdict was rendered against plaintiff and, on appeal, the appellate court held that failure to give the former—which the appellate court deemed proper under the circumstances—coupled with giving of the latter, constituted reversible error.[98]

Given that the law differs from the economists' "optimal" rule, we turn to whether the optimal rule is really ideal.

## C. The Ethics of Negligence-Based Tort Rules

In Part A, we described the basic goal of efficiency analysis as wealth maximization, in particular, the minimization of primary accident costs.[99] It is uncanny how often common law rules are consistent with economic goals, so much so that a small literature has developed around the question of why the common law has evolved toward the efficient rules.[100]

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97. *Id.*

98. *Id.* at 477. As to the given instruction, the court stated:

> This instruction is not inaccurate as an abstract statement of law, nor would it be improper to give it in a case where it applied to any reasonable view of the evidence and contention of either party to the suit. But that is not the case here. There was no contention that the child was violating the law, and the instruction may well have been understood as so suggesting, and thus prejudicial to the plaintiff.

*Id.* at 476.

Many cases are consistent with the view that potential victims and injurers must be alert to risks presented by negligent others. *See, e.g.*, Brock v. Walton, 456 N.E.2d 1087, 1091 (Ind. Ct. App. 1983) ("A motorist has a duty to maintain a proper lookout."); Wilson v. Marshall, 195 S.E.2d 610, 612 (S.C. 1973) (Evidence showing that plaintiff southbound driver was travelling on dominant highway when eastbound automobile failed to stop at stop sign and collided with plaintiff at intersection *where terrain was flat and without obstruction* "is susceptible of the reasonable inference that there was a failure on the part of the plaintiff to exercise due care in keeping a proper lookout ... and that such negligence on his part was a contributing proximate cause of the collision and his resulting injuries."); De Winne v. Allen, 277 S.W.2d 95, 98 (Tex. 1955) ("Every person proceeding along or across a public street is under the duty at all times to maintain a proper lookout for his own safety, and may not proceed blindly and in disregard of dangers that might reasonably be anticipated to exist."); Dempsey v. Horton, 84 S.W.2d 621, 626 (Mo. 1935) ("If by looking for approaching automobiles, which is but the act of reasonable prudence under such circumstances, he (a man standing by the roadside) would discover the negligence of an automobile driver which threatens him in time to avoid being injured, he ought not to be permitted to presume, without looking, that the driver would not be negligent."); cases cited throughout this section.

99. *See supra* text accompanying note 16.

100. So fascinated have scholars been with the uncanny correspondence with what is efficient and what is law that a literature has developed to try to explain the evolution of the common law in an efficient direction. *See, e.g.*, Jeffrey Evans Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L. J. 1447 (1991); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985); Richard S. Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency: A Response to Professor Posner's Reply*, 11 HOFSTRA L. REV. 667 (1983); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges*, 9 J. LEGAL STUD. 139 (1980); John Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978),

Efficiency analysis seems, however, to have failed to predict or explain the corrective precautions rule. This Part explores why it might have failed by examining critiques of the economic approach to tort law and exploring other perspectives that better explain the rejection of the no duty rule.

Some ethical perspectives reject the analytical and behavioral assumptions on which efficiency analysis proceeds. We describe a humanistic critique of efficiency analysis and a critique of the assumptions underlying efficiency analysis drawn from that part of the feminist literature that posits a distinction between male and female reasoning processes and values. The ethics of these two schools of thought combine nicely to offer an alternative perspective for comparing the no duty and corrective precautions rules. We begin with an examination of Learned Hand's formulation of "reasonable care" and then explore the ethical implications of the assumption that others are acting carefully.

### *1. The Economists' "Rational" Person*

Judge Learned Hand described reasonable care as taking those precautions whose cost is justified by the risks they avoid.[101] Discussing the tradeoff of human suffering for material cost savings and inconvenience is hardly ennobling but it is pedagogically and analytically appealing. Law students first perceive the incentives created by the imposition of liability as a way of encouraging safety. By focusing their attention first on the cost of saving property from damage caused by the negligence of others, however, students can be brought around to recognizing that we might not want to entirely bankrupt society in order to save a single car fender. It is easy to demonstrate that the law is consistent with this view.[102] From that point on, it is simply a matter of degree; how much are we willing to pay to prevent personal injury? By focusing on wealth maximization, the efficiency perspective changes the incentives created by the negligence system into a means for encouraging only the optimal amount of human sacrifice.

Because economics need not be focused on the maximization of wealth, economic analysis of tort law need not focus on the optimal human sacrifice. A unifying principle of economic analysis is not the efficiency orientation but its focus on incentives.[103] A less obstructed vision of law and economics sees a

George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

101. *See supra* text accompanying notes 20 and 21.

102. As Judge Breyer said in Rhode Island Hosp. Trust Nat'l Bank v. Zapata Corp., 848 F.2d 291, 295 (1st Cir. 1988), "[o]ne does not, for example, coat the base of the Grand Canyon with soft plastic nets to catch those who might fall in, or build cars like armored tanks to reduce injuries in accidents even though the technology exists."

103. One of us has written about the ability of economic analysis to consider goals other than efficiency:

> The strength of economic analysis of law, however, depends not on its amusement value or its ability to promote wealth maximization. These are only two of a vast array of potential goals and, I agree with Professor Malloy (at least with respect to the latter), far from the most important. Rather, the strength of economic analysis must be tested by its ability to assist in reaching whatever goals are specified for it. The challenge for economic analysis is to focus on goals other than economic efficiency. This would involve consideration of the implications of choices, not just for wealth maximization but for health and welfare, individual

discipline focusing on how incentives can be structured to reach any set of goals we might describe. A broader set of goals might reflect non-economic visions of human beings, a vision, for instance, of a "reasonable" person that is different from the economist's "rational" person.

Incentives designed for a "rational" person exploit that person's focus on maximizing his self-interest, however broadly defined. Judge Posner's explanation of an actor's response to "efficient" incentives reveals a picture of the rational person who, knowing that the other has an incentive to avoid the accident, will refrain from doing so himself. If the rational person is not negligent, he will be fully compensated for any physical injuries he suffers, free from the obligation to compensate the other, and willing to let the other bear the cost of avoidance or injury. The rational individual's desire to live in unsympathetic isolation is indulged by "optimal" rules and, as we will demonstrate in Parts D and E, at both a material and intangible cost to others.

### 2. *The "Reasonable" Person of Humanists and Feminists*

#### *a. A Humanist Perspective on Reasonableness*

In contrast to the economists' "rational" person, the law envisions a "reasonable" person. Section 283 (Cmt. f) of the *Restatement (Second) of Torts* describes the "reasonable man" as one "who is reasonably 'considerate' of the safety of others and does not look primarily to his own advantage." Creating incentives for the law's "reasonable" person faces a difficulty not confronted when doing so for a purely self-interested person. The underlying complexity is the law's definition of the "reasonable" person is that he must balance satisfying his own material needs and self-interest against the safety and advantage of others. Rather than accepting that part of human behavior that addresses materialistic needs of the individual as a description of the whole person, a new, more open-minded law and economics analysis could coordinate individual striving for material well-being with socially-oriented and abstract needs.[104] While the economic approach to what we refer to as "optimal law" does not prohibit a caring, considerate, and selfless attitude, it generally does not recognize, promote, or compensate for such incommensurable interests. The arguments we offer in favor of the corrective precautions rule explicitly recognize interests other than the maximization of wealth. Furthermore, recognizing those other interests helps us create an efficiency argument in

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> freedom, and human dignity: for whatever kind of house "the deciders" want society to inhabit. Wealth might fruitfully be viewed as a need rather than a desire, a constraint rather than a goal.

David W. Barnes, *Economics 2001: A Carpenter's Odyssey*, 42 SYRACUSE L. REV. 197, 198 (1991).

104. The discussion of the difference between the rational man and the reasonable person in LUTZ & LUX, *supra* note 8, is most informative. Chapter 6, which focuses on the reasonable person, follows chapters tracing the history of self-interest and rationality in economics. We also have drawn from Lutz and Lux's treatment of the dual selves our characterizations of the conflict between materialistic and social goals and of humanistic economics:

> Humanistic economics clearly recognizes that economic orthodoxy ends up denying: the possibility of an inner conflict of interest, a conflict between two incommensurable interests, one of the ego-self, the other of the higher self. And such recognition, as we will see, is far from irrelevant when considering economic behavior, institutions, and policies.

*Id.* at 118.

support of the duty to take precautions to avoid risks created by negligent others.

*b. A Feminist Perspective on the No Duty Rule*

Some feminists describe the economic orientation towards the "rational" person as inherently male. This part of the feminist literature augments the humanistic economic critique by providing an alternative set of values the law might be designed to promote. While this brand of feminist critique is generally focused on law as a whole, it applies particularly well to efficiency analysis of tort law. From this feminist perspective, the masculine voice reflects a separation of intellect and analysis from feelings and emotions.[105] The legal system, having been created by men who view themselves as individuals separate from others, reflects this separateness and individuality.[106]

In our context, this separateness is revealed by an expectation that the second least cost avoider of the accident (the individual who has no duty to eliminate the risk to the other person) will not identify with or empathize with the person who may be harmed by the risk. Economists assume that people who will not be held liable will accept risk of harm both to themselves and to others because the compensation system will straighten everything out later.

Described this way, the masculine voice pervades efficiency analysis. The masculine perspective eschews involvement with the emotional aspect of human beings, preferring to deal with situations on an abstract level. The right to assume that others are acting carefully illustrates very nicely this preference for abstract analysis and separation. Negligence rules based on this right allow individuals the freedom to move around in society relying on the clearly unrealistic assumption that everyone is careful—free to rely on an abstraction and remove themselves from the need to evaluate the needs of others. The same separateness that is reflected in the adversarial nature of the legal system, a system that uses a competitive, sparring style of intellectualized jousting for the

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105. According to Carol Gilligan, male separateness develops because for men separation and individuation are critically tied to gender identity since separation from the mother is essential for the development of masculinity. Gilligan argues that since masculinity is defined through separation the male gender is threatened by intimacy. Thus males tend to have difficulty with relationships. CAROL GILLIGAN, IN A DIFFERENT VOICE 8 (1982); *see also* VICTOR SEIDLER, REDISCOVERING MASCULINITY: REASON, LANGUAGE AND SEXUALITY (1989). Victor Seidler states:

> As [men] we learn to discount our need for others, we also learn to grow up as men to discount our history and culture of masculinity .... What is more, it even weakens the quality of our thought, as reason becomes formal and *abstract as it is systematically separated from emotions and feelings.*

*Id.* at 141–42 (emphasis added).

> Somehow we [men] grow up to identify male identity with separateness. This means as men we have a strong sense of ourselves as separate and independent human beings .... [W]e identify strength with not needing anything from others, as if we can only sustain a sense of our independence if we keep people away altogether.

*Id.* at 149.

106. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 892 (1989); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 44 (1988); Bender, *supra* note 8, at 4.

resolution of disputes[107] instead of a cooperative approach, accounts for Posner's bestowing of a "right" to assume that others are careful.

Professor Menkel-Meadow explains this reliance on rights as a way of promoting individual autonomy, individuality, and the separation of self from others,[108] ultimate goals reminiscent of the supposedly instrumentalist assumption of rationality and self-interest in economics.

Carol Gilligan's germinal work on the feminist perspective[109] focuses on the alternative to self-interested materialist needs, the social and higher levels needs of the dual self. Gilligan describes the feminine voice as one that communicates about relationships as "webs of interconnectedness."[110] Gilligan's study indicated that women are less likely than men to privilege abstract rights over concrete relationships and are more attentive to values of care, connection, and context.[111] A general approach that focuses only on the wealth implications of failing to avoid injury to others simply because another's fault is the cause is not a rule based on relationships, interdependencies, or our responsibilities for one another.

Relying on an algebraic equation, the famous Learned Hand formula, for determining whether someone has acted as a reasonable person is particularly abstracted from interpersonal context and caring. The formula places an emphasis on money (implicitly assuming that material well-being is what matters most) and numbers; it challenges the factfinder to place dollar amounts on competing interests and forces the factfinder to ignore what cannot readily be quantified. The Hand Formula is not a cost-benefit analysis in which quantifiable costs and benefits can be considered alongside the intangible or nonquantifiable benefits (or costs) associated with an activity.[112] The Hand Formula gives the bottom line on how the reasonable person is to behave. What results is an attempt to assign dollar values to the harm that human beings suffer, and then balance this harm against the cost of avoidance. As Professor Bender describes the process, "People are abstracted from their suffering; they are dehumanized."[113] Promoting the no duty rule results in the same abstraction while the corrective precautions rule recognizes that accidents cause suffering.

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107. *See* Bender, *supra* note 8, at 7.
108. Menkel-Meadow, *supra* note 106, at 43–44.
109. GILLIGAN, *supra* note 105.
110. *Id.* at 44.
111. *Id.* at 100; *see also*, Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 671, 624 (1990); Robin West. *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 15–17 (1988); Kathleen Daly, *Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice*, 17 INT'L J. SOC. OF L. 1 (1989); Carrie Menkel-Meadow, *supra* note 106, at 43.
112. Judge Learned Hand also recognized that this was true. In Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), he described the jury's role as balancing the nonquantifiable elements of the reasonable care test he proposed:

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

*Id.* at 612.
113. Bender, *supra* note 8, at 31.

By incorporating these insights into efficiency analysis, we will demonstrate in Part D that taking a broader perspective on the goals human beings pursue reveals an alternative formulation of the justification for the corrective precautions rule that balances humanist and feminist concerns with efficiency concerns.

## D. EFFICIENCY AND ETHICAL IMPLICATIONS OF THE OPPOSING RULES

Recognizing that there are two clear alternative rules and alternative philosophical perspectives on which to base support for the rules, we can compare the relative efficiency as well as ethical appeal of the no duty rule and the corrective precautions rule. There is no efficiency difference between the no duty rule and the corrective precautions rule for risks created by the negligence of others that is not reasonably foreseeable. There is probably no equitable reason to impose such a duty either, since, under either approach, it would be futile to give incentives to avoid such risks, since they are either of a magnitude or likelihood (or both) too small to attract the attention of the reasonable person, even if she is not concerned solely with her own self-interest and has a fair regard for the safety of others. Thus, we focus on reasonably foreseeable negligence. This is in accord with the law as explained in Part B.

### *1. Intentionally Forcing Another to Take Precautions—Strategic Misbehavior*

There are two general categories of cases involving reasonably foreseeable negligence where the no duty and corrective precautions rules might give different results. The first is those cases where one party is able intentionally to impose on another an obligation to take corrective precautions. The second is where this opportunity is not available. We begin with the first of these situations because economists have been particularly concerned with the inefficiency that results with the best cost avoider intentionally shifts the burden of avoidance to someone whose precautions are more costly.[114]

In an excellent and provocative pair of articles, Professor Mark Grady deals with the first set of cases and concludes that they present no threat to economic efficiency.[115] The threat to efficiency potentially arises under the corrective precautions rule when the least cost avoider, by deliberately acting negligently, shifts the burden of avoiding the accident to the second least cost avoider. Is this likely to happen given how people actually behave and the law is actually applied?

Grady concludes that this "strategic shifting" is unlikely for both doctrinal and factual reasons. When one party has been negligent and the other

114. One of John Prather Brown's models of reasonable care assumed that a party's obligations depended on what level of precaution the other party had actually chosen, John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 341 (1973). Donald Wittman, *Optimal Pricing of Sequential Inputs: Last Clear Chance, Mitigation of Damages, and Related Doctrines in the Law*, 10 J. LEGAL STUD. 65 (1981), and Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J. LAW & ECON. 589 (1983), have also considered variants of this model. See also, Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

115. Grady, *Multiple Tortfeasors*, *supra* note 6, at 653; Grady, *Strategic Behavior*, *supra* note 7, at 41.

has been reckless, the reckless party will be liable for a greater portion of the damages. Under contributory negligence, the recklessness of the plaintiff would be a complete bar to recovery. If the defendant had been reckless, then the plaintiff's contributory negligence would not bar her recovery. Under comparative negligence, the greater degree of fault implicit in recklessness, compared to mere negligence, would mean that the reckless person would pay a greater share of the damages and therefore have a greater incentive to avoid the risk. If the party who deliberately ignores a risk or creates a risk counting on the other to avoid it is considered reckless, then strategic behavior will not be rewarded. Since this rule shifts the burden of liability to a party who has consciously chosen to impose a risk of injury on another, the rule has ethical appeal as well as appeal to those concerned with primary accident cost minimization.

Recklessness may not, however, cover all cases where strategic behavior may occur. For example, under the corrective precautions rule, one automobile driver may "strategically" shift the burden of taking precautions to another driver. When the driver carelessly turning out of the breakdown lane onto the highway creates a risk for drivers in the travelling lane, the carelessness is "strategic" if the driver consciously recognizes the risk and deliberately proceeds to disregard it. If this behavior creates an unreasonable risk of harm to others, it may be reckless or it may only be negligent. A principal distinction between recklessness (or willful or wanton misconduct) and negligence is the magnitude of the risk the conduct creates.[116] In the dark of night on a straight, lightly traveled road, turning from the shoulder to the traveling lane of a highway without looking around may not present such a great risk that the conduct would be characterized as reckless.[117] Under these circumstances the driver, however negligent he may be, does not face the sanction provided by the way torts doctrine balances reckless behavior and negligent behavior.[118]

116. *See, e.g.*, PROSSER & KEETON ON TORTS, *supra* note 39, at 36 ("The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton"); RESTATEMENT (SECOND) OF THE LAW OF TORTS § 500 cmt. a ("[T]o be reckless, [the conduct] must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.").

117. *See* RESTATEMENT (SECOND) OF THE LAW OF TORTS § 500 cmt. d, which reports that among those factors to be considered in determining whether a driver's conduct was reckless is the driver's knowledge that there is a strong probability that others with be within the zone of danger created by his conduct.

118. Professor Grady offers two other doctrinal approaches that could be used to eliminate strategic behavior designed to shift the burden of taking precautions to another. The problem, he suggests, could be regarded as an aspect of the law of proximate causation, such that the plaintiff's own deliberate misconduct becomes the sole cause of the loss. Grady, *Strategic Behavior*, *supra* note 7, at 23. The proximate cause approach is a bit awkward because the defendant's failure to take corrective precautions is closer in time to the injury. Closeness in time is a factor traditionally considered in the causal inquiry. PROSSER & KEETON ON TORTS, *supra* note 39, at 282.

Alternatively, Professor Grady suggests, a plaintiff's deliberate misconduct could be regarded as assumption of risk that barred recovery even where the defendant's conduct was regarded as a proximate cause of the plaintiff's injury. Grady, *Strategic Behavior*, *supra* note 7, at 23. The assumption of risk approach is unusual because it requires a plaintiff to assume a risk that has not yet been created, that is, the risk that the defendant will fail to take corrective

The doctrinal treatment of reckless behavior will eliminate cases where serious risks are presented but will leave some cases where the risk is not great enough to result in characterizing the actor's conduct as reckless. Professor Grady argues that the remaining obstacles to successful strategic behavior are so high that the opportunities for strategic behavior are relatively scarce. The would-be strategic shifter of burdens, or "trap setter," must be certain that his negligence is (1) observable to the actor, and (2) early enough for the actor to take corrective precaution, and, in addition, (3) that the corrective precautions are effective enough to make the shifting worthwhile. The period during which the actor has an opportunity to respond to her observation of the trap setter's negligence (4) must be relatively long in order to enable effective precautions, (5) must create no risks for third parties for which the trap setter will be liable other than those imposed on the actor, and (6) must create no risks of injury to the trap setter himself. Professor Grady concludes that the restrictive nature of these conditions, all of which must be present simultaneously, makes strategic behavior unlikely.[119] This leaves only that negligent behavior that Grady describes as "inadvertent."[120]

A review of the cases considered in Part B.2.a. leaves us with only slightly less faith than Professor Grady has in the low probability of strategic behavior. *Junker v. Zeigler*,[121] the case of the hunter who forgot to duck, may very well be a case where the shooter's behavior was observable to the victim in time for the victim to seek the protection of his blind. His motivation, to shoot birds, might have been strong enough to compel his strategic behavior at no risk to anyone but his hunting companion. While the factual prerequisites to strategic behavior might have been present, the incentive to engage in "burden shifting" would not be present if the court found that the shooter was reckless. The defendant did shoot his gun in the plaintiff's direction, thereby exposing him to a risk of serious harm. But the court did not find that the shooter was reckless. Perhaps the high probability that the victim would duck made that likelihood of injury too small to make the shooter conduct rise to the level of recklessness. Reliance on doctrine to prevent the shifting of burdens may be overoptimistic, though one might argue that *Junker* was wrongly decided, that shooting a gun directly in another's direction was reckless.

The factual prerequisites for strategic behavior may also be present in the intersection cases and in a variety of other automobile accident cases, but the strategy is risky. In cases like *Haeg v. Sprague, Warner & Co.*[122] the victim's

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precautions. One situation in which assumption of risk defense is applied requires knowledge by the plaintiff that the defendant will not protect him from some risk. PROSSER & KEETON ON TORTS, *supra* note 39, at 480 (The duty perspective on assumption of risk is represented by a situation where "the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against one or more future risks that may arise from the relation.") In the case of strategic behavior, far from knowing that the other will not protect him, the plaintiff hopes that the defendant will do so. In a second type of assumption of risk situation, "the plaintiff is aware of a risk that has already been created by the negligence of the defendant, yet chooses voluntarily to proceeded to encounter it." *Id.* This situation could not describe the corrective precautions case since the failure of the defendant to take corrective precautions cannot have already occurred. Thus, the assumption of the risk doctrine does not neatly resolve the threat to primary cost minimization.

119. Grady, *Strategic Behavior*, *supra* note 7, at 2527.
120. *Id.* at 23.
121. 498 N.E.2d 1135 (Ill. 1986); *see supra* text accompanying note 68.
122. 281 N.W. 261 (1938); *see supra* text accompanying note 80.

recovery was reduced for failing to take corrective precautions after having actually observed the defendant's negligence; Haeg had actually observed the defendant at least four times before the collision. While the defendant might have been certain that Haeg could see him, he could not be certain that Haeg would perceive that the defendant was not going to yield in time to slow down himself, potentially violating factual prerequisite (2). The most serious obstacle to strategic behavior in the automobile context, however, is the sixth prerequisite. The defendant in *Haeg* and the strategic actor in many, if not most, automobile contexts creates a risk of personal injury and/or property damage for himself. Under comparative negligence, such an actor would not be fully compensated for any harm he might suffer if the other failed to take corrective precautions.[123]

The entire discussion of strategic behavior relies on assumptions about the nature of human beings that are particularly demeaning. The possibility that some people will be considerate towards others further limits the need to be concerned about people willfully imposing risks on others and is at least as appealing as the doctrinal and factual arguments. The very idea that people will shift their obligations onto others assumes more than the desire simply to fail to act to prevent harm to another, nonfeasance. It assumes the willingness to act affirmatively to impose costs or injury on others, malfeasance.

It should not be assumed that all cases where one party actually observes another's negligence involve strategic behavior. Many are like *Star Brewery Co. v. Houck*,[124] where the driver of a beer wagon ran over a boy who was carelessly playing in the street. The driver actually saw the boy but, while the boy *could have* seen, heard, and avoided the approaching wagon, there is no evidence that he actually did. It is possible, of course, that boys are particularly clever at hiding their strategies, but his exposure to risk may have been inadvertent.[125]

### 2. *Inadvertent Negligence and the No Duty Rule*

The no duty rule performs as alleged by economists in both the unilateral and joint precaution cases by giving the least cost avoider of the accident an incentive to take precautions.[126] If there is no duty to take corrective precautions, however, the negligence of the least cost avoider will occasionally result in an accident. The second least cost avoider of the accident has no incentive to take corrective unilateral precautions to avoid the consequences of the other's negligence under any circumstances. She is entitled to assume that the other will not be negligent even if that negligence is reasonably foreseeable or actually known. She will be liable neither for harm to herself nor harm to the other. An incentive for least cost avoiders to avoid the accident is created by this rule.

123. See *supra* text accompanying notes 26 and 27 where the comparative negligence doctrine is discussed.

124. 78 N.E. 827 (Ill. 1906); *see supra* text accompanying note 77.

125. The existence of strategic behavior creates the possibility that primary accident costs will be higher under the corrective precautions rule. This question is considered in part D.4.

126. *See supra* part A.

In *Haeg v. Sprague, Warner & Co.*,[127] the intersection collision case, an incentive for "disfavored" drivers (drivers without the right-of-way) would be created by applying the no duty rule and making Thompson liable for Haeg's injuries. This would give Haeg no incentive to care for herself. If there is no duty for Haeg to take corrective precautions, to slow down to avoid the accident, people in Thompson's position will have an incentive to avoid the accident in the future. If disfavored drivers are the least cost avoiders of accidents, the no duty rule performs as alleged.

In joint precaution cases,[128] the no duty rule also performs as alleged, by giving the least cost avoider an incentive to perform his share of the joint precautionary measure. The second least cost avoider probably has an incentive to do her part of the joint precaution even if the other fails to do so because her obligation is to take "that care that is optimal if the other party is exercising due care." She is required to assume that the other has taken his joint measure. Her joint precaution will be ineffective, however, without the complementary measure provided by the negligent other. The cost of taking the joint precaution will be wasted, of course, but efficient incentives for the least cost "joint" avoider are created by making him liable for the harm created, as illustrated by the discussion of *Levi v. Southwest Louisiana Electric Membership Cooperative* in Part A.[129]

Despite the incentives created, the harm will still occasionally occur in either the unilateral or joint precautions case even though one actor knew or could reasonably have foreseen the negligence of the other. In the unilateral case, Haeg is entitled to proceed with abandon through the intersection, knowing that he will be fully compensated. In the joint precaution case, Levi has incentive only to take his joint precautionary measure rather than a unilateral measure that will ensure his safety, knowing that if Southwest Electric has failed to cooperate (by posting a warning and suspending an orange ball), he will be fully compensated for his complete paralysis.

Curiously, economists create this entitlement and rely on the prediction that no one will act so as to save themselves even though this is clearly contrary to human experience. The failure of people to obey efficient incentives and let themselves be injured is undoubtedly related to the fact that victims cannot rely on being fully compensated under our torts system. There is also the not too remote possibility, which must be disturbing to those creating efficient incentives, that many believe that they would not sacrifice their bodily integrity for any amount of money they are reasonably likely to be awarded by a court.

While appropriate incentives for the least cost avoider are created by the no duty rule, we are left with the important policy question of whether it is better to let the harm occur or, if the negligence of the other is actually known or reasonably foreseeable, to encourage the second least cost avoider to take reasonable corrective precautions.[130] Is it better to encourage Haeg to slow down if he has reason to know of Thompson's negligence than to let him be

127. 281 N.W. 261 (Minn. 1938) (discussed *supra* in text accompanying note 80).
128. For a discussion of joint precautions, see part A.4.
129. *See supra* text accompanying note 35.
130. In the unilateral precautions case, the corrective precaution is that unilateral precaution that the actor had no incentive to take. In the joint precautions case, the corrective precaution that the actor failed to take because the joint precaution was available is the next best option, a unilateral measure.

injured? Is it better to encourage Levi to take precautions even where Southwest Electric has failed to attach a warning sign and orange ball or to let him be paralyzed? We address these questions from both the ethical and primary accident cost minimization angles.

Society would pay a price if "no duty" were the rule. Injuries would result that could have been prevented with an available cost-justified precaution taken by the second least cost avoider. In the future, least cost avoiders have an incentive to use reasonable care, but, whenever they do not, society bears the higher cost of letting the accident occur rather than having the second least cost avoider take the corrective precaution. In ethical terms, the no duty rule sacrifices bodily integrity in order to create incentives in a situation where the sacrifice could have been prevented by a cost-justified precaution available to someone who has no legal incentive to take it.

Recognizing the motivation for the no duty rule (encouraging avoidance by the least cost avoider) and the unfortunate consequences of that rule (the occasional accidents that could have been prevented by alert and properly motivated "second least cost" avoiders), we can identify where the no duty rule is least appropriate.

Cases in which the no duty rule is particularly inappropriate will have the following characteristics:

1. *The probability of the least cost avoider's negligence is high.* In these cases, the risk (in Learned Hand's terms, the probability of an accident times the magnitude of the resulting harm) is great. In these cases it is relatively more important, other things equal, to encourage the second least cost avoider to take corrective precautions.

2. *The risk associated with the other's negligence is severe.* As with the "high probability" characteristic, the risk is great in these cases and avoidance by the second least cost avoider is relatively more desirable, other things equal.

3. *The cost of corrective precautions is small relative to the risk.* When the least cost avoider is likely to be negligent, society's choice is between the cost of the accident and the cost of corrective precautions. Where avoidance, even by the second least cost avoider, is much less costly than the risk, corrective precautions should be encouraged. In this case, even duplicative precautions may be preferred to accepting the risk.

4. *The cost of corrective precautions is not much greater than the least cost avoidance measures.* A threat to primary accident cost minimization from the traditional interpretation of "reasonableness" in the contributory negligence context arises from the possibility that the second least cost avoider (rather than the least cost) will have an incentive to avoid the accident. The closer are the costs of the least and second least cost avoiders, the less it matters who avoids the accident.

A rule that substitutes for the no duty rule only in cases where these four characteristics are present would be superior to the no duty rule.

### *3. Efficiency Characteristics of the Corrective Precautions Rule*

The corrective precautions rule will be most consistent with the principles of primary accident cost minimization if it provides incentives for the second least cost avoidance measure only where expected accident costs (probability of harm multiplied by magnitude of harm) are high relative to the avoidance cost and where the second least cost avoidance measure is not significantly higher than the first. To consider the efficiency characteristics of the corrective precautions rule, we must identify the kinds of situations in which the law requires that corrective precautions be taken. We will argue that, because the corrective precautions rule only applies in cases where the no duty rule would be undesirable *from an efficiency perspective*, the corrective precautions rule is superior to the no duty rule. The second least cost avoider's calculus of avoidance considers two types of risks. The first, which we have referred to as nonnegligence risks, are risks created by natural conditions including the activities of others who are acting reasonably. The second are risks created by the known or reasonably foreseeable negligence of others (negligence risks).[131] We consider these separately.

*a. Nonnegligence Risks and Corrective Precautions*

The additional expense required to take corrective precautions is likely to be very low. An actor may be found negligent under either the no duty rule or the corrective precautions rule for failing to use reasonable care to avoid nonnegligence risks, but only under the latter rule for failing to take those *additional precautions* that are justified by the existence of negligence risks.[132] Since either rule would find negligence for failure to avoid nonnegligence risks, the corrective precautions rule only makes a difference when the negligence of others requires additional precautions that are not already being taken. This limits the cases in which there is any possibility that unnecessarily costly avoidance measures will be required by the corrective precautions rule. Moreover, for many activities, precautions necessary to avoid nonnegligence risks (such as avoiding hitting a rock in the road) are sufficient to avoid negligence risks (such as avoiding hitting a negligent pedestrian in the road). The cost of corrective precautions may be zero. It follows that any increase in avoidance cost created by the corrective precautions rule is likely to be small, given that both rules require all parties to use reasonable care to avoid nonnegligence risks.

*b. Negligence Risks and Corrective Precautions*

If there are any additional precautions justified by the existence of negligence risks, their cost is likely to be very small. The additional precautions required by the corrective precautions rule are proportionate to the risks they avoid. Among those additional precautions necessitated by the other's negligence, only the subset of cost-justified precautions are required. If the possibility of the other's negligence is slim or the harm that will result is

131. *See supra* text accompanying notes 39–42.

132. If there are nonnegligence risks confronting an actor that could be avoided by the exercise of reasonable care and these cost-justified measures would also avoid the negligence risk, an actor failing to take these precautions will be found negligent and share in liability. It does not matter in tort law how a harm comes about as long as the person(s) injured and the general type(s) of harm that result are reasonably foreseeable. This actor is not faulted for failing to take corrective precautions. She is faulted for failing to avoid the risks present without regard to the other's negligence. An incentive for the actor to avoid nonnegligence risks is maintained without a duty to take corrective precautions. No inefficiency results from the incentive for accident avoidance in these cases because there were other risks that justified the precautions.

insignificant, only small additional precautions, if any at all, will be required by the corrective precautions rule. If the additional precautions are costly relative to the harm to be avoided, then they are less likely to be cost-justified. The rule only requires that actors take corrective precautions where the risks associated with the other's negligence are great, either because the harms are great or the probability of the harm materializing is great.

Cases in which the corrective precautions rule will be applied will, therefore, have three characteristics: Either (1) the probability of the other's negligence will be relatively high or (2) the harm associated with the other's negligence will be relatively severe (or both) and (3) the cost of additional precautions will be small relative to the risk (the product of (1) and (2)). Because the no duty rule is particularly costly when these characteristics are present, the corrective precautions rule is preferred. These three characteristics of cases in which the corrective precautions rule is actually applied are three of the four characteristics discussed above of cases in which the no duty rule is particularly inappropriate. The fourth characteristic is discussed in the next section.

Reviewing the cases where corrective precautions were required by the court, we find that they share the three characteristics identified above. Since a driver's attention to his surroundings is required even without the corrective precautions rule, the rule requires only the additional effort of slowing down or swerving when the other's negligence actually materializes and it is reasonably safe to do so. In *Davis v. Consolidated Rail Corp.*, the only case in which Judge Posner recognized an obligation to take corrective precautions,[133] the engineer of the train was only required to blow a whistle. By contrast, in *Pomer v. Schoolman*, where Posner did not recognize such an obligation, the corrective precaution would have required redesign of an entire line of machinery to prevent an accident that was unlikely to occur because of the obviousness of the risk.[134]

The pattern of recognizing a duty when there are reasonable available corrective precautions and denying its existence when there are none[135] may have led to the confusion regarding the rule. The rule is that there is such a duty, but the duty is not breached (there is no negligence) when there are no reasonable precautions available. The lack of reasonable precautions may be due to the low probability of another's negligence or the inability to do anything practical about it. In *Humbert v. Lowden*, for instance, the probability

133. *See supra* text accompanying notes 57–60.

134. *See supra* text accompanying note 65.

135. The law regarding our duty to take corrective precautions would be clearer if courts would simply recognize that there is such an obligation and then, when there are no available reasonable precaution, conclude that the obligation to take available reasonable precautions had been met. Courts very often do not take this approach, which may have lead to the economists' confusion. Many cases reveal that although a court states that there is no duty, the reasoning is that there was no reason to anticipate negligence on the part of another under the facts of that case. In J.R. Beadel & Co. v. De La Garza, 690 S.W.2d 71, 73 (Tex. Ct. App. 1985), for instance, the court stated that "Whether a duty exists under the facts and circumstances of a particular case is a question of law." In that case, there was no reason for the plaintiff to have known that the defendant would be negligent. For that reason, the court declined to hold that the plaintiff had a duty to anticipate. *Id.* at 74. A more sensible approach, it seems to us, would be to recognize that people generally do have such an obligation but that whether the obligation is met or not depends on whether the actor behaved as a reasonable person would have given his knowledge and his available options.

that the railroad company would act as it did was so low that the plaintiff was justified in taking no corrective precautions.[136] In *Arps v. City and County of Denver*,[137] there was little the plaintiff could do to avoid injury once he discovered that the defendant had dumped sand in the street right in front of his car. Only measures proportionate to the risk and reasonably available to the second least cost avoider of accidents are required.

#### *4. The Relative Cost of Corrective Precautions*

The least appropriate context for the no duty rule is where the cost of corrective precautions is not significantly greater than the cost of the least expensive avoidance measure. This is the fourth characteristic described above for when the corrective precautions rule is preferred. In such cases, economists would be almost indifferent between having the accident avoided by the least cost or second least cost accident avoider. To explain the nature of avoidance measures required under the corrective precautions rule, we consider representative unilateral and joint precautions cases.

##### *a. Unilateral Accident Avoidance Measures*

*Haeg v. Sprague, Warner & Co.* is a favorable example for our argument that the cost of corrective precautions is not significantly greater than the cost of avoidance by the best cost avoider. In *Haeg*,[138] the corrective precautions rule would require that a driver who has reason to know that the other may very well not yield the right of way in an intersection take corrective precautions by slowing down. The probable harm and probability of collision were great and the cost to Haeg of slowing down was small. The no duty rule results in occasional accidents, whenever the oncoming driver fails to yield and the favored driver behaves in a way that economists describe as "optimal." The corrective precautions rule avoids the accident (a great savings because the risk greatly exceeds the cost to the favored driver of avoiding it) but at a higher cost than is necessary (the slightly higher cost of having the favored driver rather than the disfavored driver yield). Given the facts of *Haeg*, this seems like a cost-minimizing result unless it will lead defendants to avoid precautions strategically. In *Haeg*, the court applied the corrective precautions rule, rejecting the "plaintiff's supposed right to assume that Mr. Thompson would have exercised ordinary care to avoid a collision."[139]

##### *b. Joint Precautions Cases*

In joint precautions cases, corrective precautions are only required where reasonable given the risks. The least cost avoidance measure is joint. In *Levi v. Southwest Louisiana Electric Membership Cooperative*,[140] the court identified that joint solution as having the company suspend a warning ball from the wire

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136. *See supra* text accompanying note 71.
137. *See supra* note 1.
138. *See supra* text accompanying note 80.
139. 281 N.W. at 262 ("Plaintiff's supposed reliance upon Mr. Thompson's exercise of due care is of no moment for the simple reason that this is a case, if ever there can be one, where such reliance was itself negligence. We stress again *the obvious truth of fact and law that it is not due care to depend upon the exercise of care by another when such dependence is itself accompanied by obvious danger.*") (emphasis added.).
140. 542 So. 2d 1081, 1089 (La. 1986).

and having the driver use the ball to guide him when raising the mast of his truck.[141] A second best precaution may be having the company raise the wire so that the truck's mast would not hit it. The corrective precautions rule would substitute the least cost unilateral measure as the second least cost avoidance method whenever it was foreseeable that the joint measure would fail.

In *Levi*, if Southwest Electric were the least cost unilateral avoider and had reason to know that drivers would not check carefully even if there was a warning provided, Southwest Electric would have an obligation to take their next best avoidance measure, to raise the wire. The court said this cost would be "minimal."[142]

Given the severity of the likely injury in *Levi*, the cost minimizing solution would be to require Southwest Electric to take these precautions where employee negligence was reasonably foreseeable. The corrective precautions rule would require these precaution only *if* Southwest Electric knew, had reason to know, or should have known of the negligence and *if* this measure was cost-justified, which it would be if the resulting injury is likely to be serious enough and if the probability of driver carelessness is high enough relative to the burden of the corrective measure.

In *Levi*, the court found that Southwest Electric should have been aware of the risks created by the activity of the drivers near the power lines and the possibility that an inattentive worker might raise the mast while parked too near the power line. The court concluded that "reasonable minds must agree that the minimal burden of adequate precautions was clearly outweighed by the product of the chance and the gravity of the harm." The power company had actual knowledge of previous incidents involving workers' negligence and inattentiveness and had warned crews of the danger:

> The power company complains that it should not be charged with recognition of any risk that takes effect through a victim's negligence. But the ordinary reasonable person, and even more so the power company, is required to realize that there will be a certain amount of negligence in the world. When the risk becomes serious, either because the threatened harm is great, or because there is an especial likelihood that it will occur, reasonable care may demand precautions against "that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated." Murphy v. Great Northern R. Col, 2 Ir.Rep. 301 (1897); see Prosser and Keeton on Torts § 33 at p. 198 [5th ed. 1984]; Restatement (Second) Torts § 302A [1965]. *It is not due care to depend on the exercise of care by another when such reliance is accompanied by obvious danger.*[143]

The corrective precautions rule thus requires additional measures in those cases where the no duty rule presents high costs to society. The obligation to take corrective precautions is greatest in precisely those cases where the alternative rule would create the greatest loss in wealth, those where the harm most significantly exceeds the second least cost of accident avoidance. The corrective precautions rule avoids the costs of the no duty rule, the cost of having accidents that could be avoided by the second least cost avoider.

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141. *See supra* text accompanying note 35.
142. *Levi*, 542 So. 2d at 1089.
143. *Id.* (emphasis added). The court was not presented with the question of whether the employer should have foreseen that the drivers would also have ignored warning signs and orange balls.

The corrective precautions rule does not specifically require that the cost of the least and second least costly avoidance measures be approximately the same. In the cases where the obligation to take corrective precautions is imposed, however, that second least costly measure is very often quite inexpensive so it is not likely to be much greater than the least cost method. Because of the relatively low cost of the corrective precautions that are actually required, the corrective precautions rule is preferred to the no duty rule.

### *5. The Corrective Precautions Rule as a "Second-Best" Solution*

While the corrective precautions rule only applies to cases where risks are great relative to the cost of corrective measures, the corrective measure may, theoretically, be costly relative to the least cost avoidance method. Thus, the corrective precautions rule is not a first best solution. The best thing to happen would be for the least cost avoider to avoid the accident. If, in most cases where the corrective precaution rule is applied, the cost of corrective precautions is not much greater than the least cost avoidance measure, the corrective precautions rule will be preferable to the no duty rule.

#### *a. Incentives and Duplicative Accident Avoidance*

The no duty rule and the corrective precautions rule have at least one characteristic in common; neither is a first best solution. Every time the least cost avoider is negligent, it is accident cost minimizing to encourage the second least cost avoider to avoid the accident whenever avoidance by that person is preferable to letting the accident occur. The no duty rule never provides that encouragement. The corrective precaution rule encourages the second least cost avoider to evaluate whether there are available cost-justified precautions.

Consider the various situations in which the corrective precautions rule is applied. When the risk is slight and the cost of corrective precautions is great, wealth maximizers should be indifferent between the corrective precautions rule and the no duty rule. Neither rule requires that the corrective precautions be taken.

When the risk is great and the cost of corrective precautions is slight, wealth maximizers should prefer the corrective precautions rule to the no duty rule if the first three condition discussed above—high negligence probability, severe probable harm, low cost additional measures—are met, which they are likely to be.[144] The corrective precautions rule is unlikely to apply if they are not.

When the three conditions are met, the corrective precautions rule presents the possibility of duplication of efforts, which is wasteful. Duplication occurs when the prediction that the other will be negligent is erroneous. But the corrective precaution prevents the harm at a cost that is "slight" relative to the risk and the least cost measure is even less costly. The relative insignificance of the two parties' costs of avoidance mean that the combined cost of duplicative efforts may still not be as great as the cost of accepting the risk, again, as long as the three conditions are met.

Moreover, where the risks are great, they may be great because the probability of negligence is high, which means that the probability of

144. *See supra* part D.3.b.

duplication is low. Recall also that the potential for duplication of avoidance arises only when measures taken to avoid nonnegligence risks are not enough also to avoid the negligent risks. Most of the cases involve the requirement that the actor look around carefully to see what risks there are. If the actor is already on the alert for nonnegligence risks, there is no duplication is requiring her to be alert for the negligence of others. Beyond looking around carefully, there is often only a small additional requirement, for example, the duty to slow down, to swerve, or maybe even to stop, and this obligation is imposed only when the other's negligence actually appears and there is no duplication. Thus, duplication is unlikely and the cost of duplication, in the event that it occurs, is slight. On balance, the corrective precautions rule comes out a winner.

*b. Incentives and Efficiency When Second Least Cost Avoidance is Relatively Expensive*

It is when the cost of corrective precautions is not slight relative to the least cost avoidance measure that the greatest potential for inefficiency appears. As identified in Part A, the problem with the corrective precautions rule is that it creates improper incentives in contributory and comparative negligence cases. Relieving the least cost avoider of at least a portion of liability, as the contributory and comparative negligence rules do, may lead the least cost avoider to be negligent more often, increasing the foreseeability of his negligence, and increasing the number of times the second least cost rather than the least cost precaution will be taken.

The costs associated with the corrective precautions rule are greatest when the difference between the two parties costs of avoidance is great and the risk to be avoided is relatively slight. But for two reasons, the threat to primary accident cost minimization is small. The first reason is that high cost corrective precautions are unlikely to be required. The higher the cost of the corrective precaution, the less likely it is that any additional precautions will be cost-justified. Secondly, the high cost of corrective precautions is only one way in which a great difference might occur. It might also be that the cost to the least cost avoider is very slight. We suspect that the easier it is for the least cost avoider to avoid the accident, the less likely it is that he will engage in strategic behavior and the more likely it is that he will avoid the accident. Thus, where the corrective precautions rule is most likely to be inefficient, there are no corrective precautions required.

*c. The No Duty Rule as a Third Best Rule*

The corrective precautions rule as applied does exactly what we would expect the common law rule to do in response to these conflicting characteristics of the alternative rules. It requires corrective precautions only when the no duty rule would impose particularly high costs in terms of injuries. In the actual cases where a duty was imposed, the harm was high (collision with a train or car) and the cost of avoidance low (looking around, slowing down). This is precisely the set of cases where the cost (in terms of injuries) of a no duty rule is high and the cost (in terms of inefficient incentives) of a corrective precautions rule is low.[145]

The no duty rule does not share these same saving graces. The problem with the no duty rule is that we suffer harms for the sake of incentive creation. The costs associated with the no duty rule are greatest where harms are serious, where the probability of the other's negligence is high, and the actor's avoidance costs are low. The no duty rule applies equally to these situations and to the slight harm, low probability, high burden cases. The no duty rule cannot be applied in such a way as to reduce the price society pays for incentive creation because the blanket rule lacks the flexibility to adjust liability according to all the circumstances present in a particular case. It is more likely that significant inefficiencies will be created by the no duty rule than by the corrective precautions rule. If the corrective precautions rule is a second-best rule, then the no duty rule is no better than a distant third.

## E. Ethical Dimensions of the Corrective Precautions Rule

Our argument in favor of the corrective precautions rule is buttressed by the ethical perspectives of humanistic economics and the feminist literature discussed in Part C. The analysis of individual responses to incentives is based an "invisible hand" model of wealth maximization that assumes that each individual acting to maximize his own wealth will inadvertently contribute to the maximization of society's wealth.[146] The form of analysis leads one to think of people as autonomous rather than interconnected, independent and isolated rather than dependent and caring. If autonomy leads to wealth maximization, then it must be protected by rights guaranteeing an individual's right to act independently. The no duty rule does exactly that; it entitles us to assume that others are exercising some fixed level of precautions and frees us from any obligation for their failing to do so even if we know they are careless. If everyone meets our assumptions, by obeying their incentives, then everything works out just fine. But if people were never careless, we could teach tort law in a week.

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145. Liability will not be imposed, for instance, where the actor lacks sufficient time to take corrective precautions. In Brock v. Walton, 456 N.E.2d 1087, 1093 (Ind. Ct. App. 1983), plaintiff brought suit to recover for injuries sustained in head-on collision with vehicle which had swerved into plaintiff's lane. Even where one has an obligation to avoid the negligence of another once one has notice of it, and even though one has a duty to maintain a proper lookout, under these circumstances a verdict rendered in defendant's favor was overturned since the plaintiff had neither sufficient time nor distance to avoid the accident. "A motorist is not required to be constantly prepared for every conceivable circumstance, and to insure against every accident, particularly where the dangerous condition was created by the negligence of another." *Id.* at 1093.

146. The notion of the "invisible hand" directing individual behavior towards those choices that simultaneously maximize individual and societal welfare comes from ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (E. Cannan ed., The Modern Libr. Ed. 1937) (1776):

> Every individual endeavors to employ his capital so that its produce may be of greatest value. He generally neither intends to promote the public interest, nor knows how much he is promoting it. He intends only his own security, only his own gain. And he is in this led by an invisible hand to promote an end which was no part of his intention. By pursuing his own interest he frequently promotes that of society more effectively than when he really intends to promote it.

In a world where people are negligent, the autonomy model fails. The no duty rule protects autonomy by a costly system of "optimal incentives" that protects our right to be independent. While the incentives may encourage wealth maximizing least cost accident avoiders to do their duty, they do not reduce primary accident costs to a minimum. Focusing, we can only hope subconsciously, on the creation of incentives to preserve autonomy, wealth maximizers have focused on an intermediate goal, proper incentives, and forgotten their own ultimate goal, primary accident cost minimization. We have argued that the corrective precautions rule more successfully minimizes primary accident costs *even though* it does not create "optimal" incentives.

We arrived at this approach by reflecting on the human cost associated with creating of individualistic incentives. First we noticed that people (second least cost avoiders) have no incentive to avoid risks caused by the negligence of others that they could reasonably avoid. They are, in effect, encouraged to let the accident occur for the sake of desirable incentives. They are encouraged to let the accident occur if they are about to injure another and even if they are about to become victims. This seems absurd.

Second we noticed that the cost that is being paid for these incentives to let injury occur is often measured in terms of personal injury while the benefit is measured in terms of dollars saved from investment in accident reduction or the inconvenience of paying closer attention to what is going on around one. However we might feel about the monetization of human suffering, this balancing at least encourages us to look for an alternative to the no duty rule that is likely to be at least as good at minimizing costs while preventing more injury.

The no duty rule is particularly offensive from the feminist perspective briefly described. The "masculinist" perspective, which purportedly deals with situations on an abstract level, eschews involvement with the actual failings of human beings and therefore adopts as a right an abstract and factually implausible assumption that others are acting carefully. Assuming the desirability of promoting autonomy, the masculinist perspective identifies a rule that ignores our opportunity to protect others from their negligence rather than one that reflects the interconnections between people and the ways in which one may protect the other. The masculinist perspective, the perspective of the bringer home of bacon, focuses on the materialistic rather than caring and concern for others.

The corrective precautions rule could easily have emerged from a feminist perspective that reflects a realistic view of the interactions and interconnections of people and the caring and concern for others. The imposition of liability for failure to take reasonable measures to prevent accidents caused by the negligence of others reflects a recognition that people act carelessly and an acceptance of the responsibility for preventing harm when it can be accomplished at reasonable material sacrifice.

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*Id.* at 456.

## F. CONCLUSION: ECONOMICS AS AN EXPLANATORY DEVICE

The tremendous influence of economics on law is accounted for neither by the realism nor the ethical appeal of its assumptions. Rather, Richard Posner has demonstrated in area after area how the law is inexorably economic. Rule after rule serves the ultimate end of wealth maximization, though often based on artificial assumptions about the way people respond to incentives. We believe that in many areas it does so remarkably well. In the particular context of the obligation to avoid risks created by the negligence of others, however, we think it has failed miserably. When economic analysis showed that application of the contributory negligence rule resulted in failure to minimize primary accident costs, the meaning of reasonable care was reinterpreted by orthodox economists so that it made what appeared to be economic sense.

Realizing the discomfort that some must have felt with an economic reinterpretation that was inconsistent with the law, Professor Grady engaged in a fairly convincing efficiency explanation for why the actual law in some of those cases presented no threat to efficiency. But courts might very well have been motivated by the humanist and feminist ideals articulated in this paper rather than by economic efficiency. From either perspective, the courts were likely to adopt a rule that punished (or made liable) those who recklessly exposed themselves or others to harm.

Professor Grady's explanation of strategic behavior is based on an assumption of individual self-interest, of course, beginning with the basic assumption that people will impose costs on others if they are able. While we find it persuasive in its context, it does not account for the law in cases where there is an obligation to adjust to the inadvertent negligence of others that is reasonably foreseeable.

While we have offered a plausible "second best" efficiency justification for the rule in the "reasonably foreseeable negligence" cases based on an assumption of self-interest, we are at least as persuaded by the view that the definition of reasonable person evolved as reflection of our human inclination to care for each other, our appreciation of our interconnectedness and reliance on one another. If society were attempting to derive a rule that would reflect these values, it would create a rule that favored incurring accident avoidance over suffering harms for the sake of creating proper incentives. The interpretation of reasonable care underlying the corrective precautions rule does this, and quite possibly has the side benefit of reducing primary accident costs.