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I. INTRODUCTION: AN ANALYTIC FRAMEWORK

The asserted unimportance of the defendant's motive underlying acts giving rise to tort liability is part of the conventional wisdom of most writers of basic tort texts.[1] Frequently, the irrelevance of the defendant's motivation is considered so obvious that many writers fail to discuss it at all, or discuss it only in the limited context of punitive damages. Virtually all of the literature that considers the significance of motive in tort law deals with either altruism, primarily in the rescue context, or spite, primarily in the punitive damages context. However, little, if any, of the literature considers the legal treatment of defendants who act for economic gain. In fact, the premise underlying the vast majority of the so-called "law and economics" literature either assumes a social acceptance of acting for economic gain or affirmatively argues that acting for economic gain is a fundamental social value. The purpose of this Article is not to enter the "is wealth maximization a value" debate.[2] Rather, this Article attempts to demonstrate that, although some commentators claim that the pursuit of economic gain is laudatory, statutory and common-law development reveals a deep-seated social bias against those whose conduct is motivated by a desire for

1. *See, e.g.*, T. COOLEY, TORTS 497 (1st ed. 1888) (stating that "[m]alicious motives make a had case worse, hut they cannot make that wrong which is in its essence lawful"). This remains the English and Australian view. *See* W. ROGERS, WINFIELD AND JOLOWICZ ON TORT 48-49 (12th ed. 1984) [hereinafter WINFIELD & JOLOWICZ]; F. TRINDADE & P. CANE, THE LAW OF TORTS IN AUSTRALIA 12 (1985).

2. *See infra* notes 193-94.

economic gain. In some cases, acting for economic gain is treated more harshly and with greater suspicion than conduct motivated by spite.[3]

This Article reconsiders the conventional wisdom and argues that the actor's motivation is frequently a significant, though unarticulated, factor in the formulation of much tort doctrine. This Article attempts also to demonstrate that when courts develop principles of liability and damages that are truly independent of any consideration of the actor's motive, whether real or perceived, legislatures tend to reject those motivation-neutral principles in favor of liability and damages rules based on the defendant's economic motivation.

Before attempting to discuss any of the cases and legal doctrines in which the actor's motivation plays a role, it is useful to categorize the several types of motivation that a particular actor may have. It is assumed that every actor acts with at least some hope of personal benefit. This anticipated benefit may be either economic, noneconomic, or mixed. Additionally, every action is primarily self-focused or second-party focused.

An actor is economically motivated when he acts to attain immediate, tangible economic gain; future, possible tangible economic gain; or a climate that may facilitate future tangible economic gain by creating goodwill. An economically motivated act is always self-focused even though second parties will necessarily be affected by it.

Noneconomic motivation can be either self-focused or second-party focused. Altruism and spite, for example, are types of noneconomic, second-party focused motivation. In the case of altruistic behavior, one confers a noneconomic benefit on oneself by conferring a benefit, whether economic or noneconomic, on another.[4] In the case of spite, one confers a noneconomic benefit on oneself by performing an act considered detrimental to a second party. Frequently, of course, the motive that underlies such conduct is purely, or at least primarily, self-focused, but still noneconomic. Noneconomic, second-party focused conduct may prove to be to another's detriment or benefit, but the motivating factor is simply to confer a benefit on oneself, regardless of bow it affects other parties. Thus, for example, a speeding driver may be acting either for his own enjoyment or because getting some place sooner will benefit

3. Consider, for example, the commonly held attitudes toward a paid killer, on the one hand, and the individual who kills another because of personal animosity, on the other. The conduct of the professional actor normally would be considered more deplorable. While there are clearly many possible explanations for this judgment, at least part of the attitude involves an instinctive sense that immoral conduct for money is the least defensible form of human behavior.

4. Tbis definition is similar, though not identical, to that commonly used by the economists. Professor Posner, for example, defined an "altruist" as "one who derives utility from the utility of another." *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 188 (2d ed. 1972).

him in a pecuniary manner or otherwise. In either case, his motivation would be considered self-focused because any benefit or detriment conferred on a second party is merely incidental to the actor's reason for engaging in the activity.

Under circumstances in which the conduct is best classified as noneconomic self-focused, motive is truly irrelevant from a legal standpoint. The relevant legal inquiry is whether the actor knew or should have known the consequences of his act to himself or to others. For this Article's purposes, the cases involving truly noneconomic, self-focused conduct are the least important.[5] They become important only in cases in which self-focused conduct is considered to be sufficiently antisocial so as to be treated as the legal equivalent of spite or malice.[6]

Economic and noneconomic motivation, one should note, are not mutually exclusive categories. Consider, for example, conduct that is intended to reduce or eliminate risk to others, or otherwise provide some benefit to others, such as the act of a physician in providing treatment. On one hand, the physician's act clearly will result in economic gain to him. On the other hand, a benefit to the patient is intended.

Interestingly, the law tends to treat certain types of mixed-motive activity differently than other examples of mixed-motive conduct. A physician's profit seeking activity, for example, tends to be treated as altruistic rather than profit oriented—noneconomic rather than economic. As a result, a physician's particular act done in conjunction with providing products and services is judged almost invariably under a negligence standard rather than under a strict liability standard. Furthermore, as this Article will illustrate, there is both a judicial and legislative tendency to relax liability and damages rules so as to favor physicians.[7]

The exact opposite can be observed in the liability imposed on pharmaceutical companies. The drug manufacturer, like the doctor, is providing a benefit to an intended class of patients and, at the same time, acting for economic gain. Yet in the case of the drug manufacturer, the liability rules resemble strict liability, while in the case of the physician the lower negligence standard may even fail to establish liability. The disparate treatment of the two must necessarily be ex-

5. This is not to say, of course, that noneconomic, self-focused conduct is unimportant in the greater scheme of things. The inadvertent, negligent conduct underlying most automobile accidents, for example, generally would be classified as noneconomic self-focused. Obviously, this type of case makes up a large percentage of the total number of tort cases.

6. The test formulated by the courts under these circumstances is generally "conscious disregard for the safety of others." Such a malice equivalent is found commonly in the course of justifying the imposition of punitive damages. *See generally* Note, *Punitive Damages in California Under the Malice Standard: Defining Conscious Disregard*, 57 S. CAL. L. REV. 1065 (1984).

7. *See infra* text accompanying notes 76-77 and *infra* note 115 and accompanying text.

plained in terms of the public perception of the activity. In the case of the doctor, the risk creating conduct is perceived as altruistic, while in the case of the drug maker, risk creating conduct is perceived as profit-seeking.[8]

The disapproval of those who are perceived to be acting with a profit motive is manifested in several important types of legal rules. A perception of altruism may explain outright exemption from liability through an express doctrinal grant of immunity, although this is comparatively rare. More commonly, legal doctrine will provide that individuals acting for their own economic benefit may be expressly held to a higher standard of care, although examples of these doctrinal distinctions, like outright immunity, are somewhat rare and becoming rarer. Finally, most recently, and arguably most significantly, individuals acting for their own economic benefit may be exposed to an increased range of damage remedies, most notably exposure to punitive damages,[9] while those perceived to be acting altruistically are sometimes granted arbitrary limitations on the potential amount of damages.[10]

II. MANIFESTATIONS OF THE "SUSPECT" NATURE OF CONDUCT MOTIVATED BY ECONOMIC GAIN

A. The "No Liability" Rules

1. Express Grants of Immunity—The Charitable Immunity Doctrine

The clearest, but by no means the only, manifestation of the desire to exculpate the altruist is the now discarded doctrine of charitable immunity. For approximately 100 years, "charitable organizations" were considered to be immune from tort liability.[11] Various explanations

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8. The pbarmaceutical manufacturer has been selected to illustrate this phenomenon because its conduct is similar to that of the physician. However, it should be observed that almost any product manufacturer is providing a benefit to a class of persons for its own economic gain.

9. A case also may be made tbat jurors apply legal standards differently depending on whether they perceive the conduct to be primarily altruistic or primarily profit seeking. However, due to a lack of empirical evidence, the jury's application of legal rules (as distinguished from the legal rules themselves) will not be considered here. *But see* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982). Professor Owen notes that "jurors have a natural sympathy for a seriously injured person that is reinforced when tbe defendant is a manufacturer, for many persons are hostile toward major institutions in general and 'big business' in particular. Some jurors may thus be tempted to resort to simplistic explanations of the issue (such as that the defendant callously 'traded lives for dollars') that comport with their preconceived notions of manufacturers' oppression of consumers." *Id.* at 11 (footnotes omitted); *see also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

10. *See infra* notes 148-50 and accompanying text.

11. The charitable immunity doctrine is traced to the English decision in Heriot's Hosp. v. Ross, 12 C. & F. 507, 8 Eng. Rep. 1508 (1846). Although the doctrine was repudiated in England in Mersey Docks v. Gibbs, 11 H.L. Cas. 686, 11 Eng. Rep. 1500 (1866), American courts began to

have been offered for this phenomenon, some more plausible than others. Some historians have explained the doctrine as a product of the pro-business attitudes of the nineteenth century. These historians draw a parallel between the creation of some tort rules, which protected railroads and other industries, and the doctrine of charitable immunity, which protected organizations that were perceived to have consciously eschewed a profit motive.[12]

Rather than attempting to draw such a parallel, however, it would seem far more plausible to recognize that there are two distinct and contradictory trends in American tort law. One trend is an overt tendency to protect economic achievement and the institutions formed for the realization of that economic achievement.[13] This tendency is evidenced not only by such highly criticized "pro-business" rules as the fellow servant doctrine, contributory negligence, and voluntary assumption of risk,[14] but also by the rationalism inherent in the "wealth maximization as a value" principle underlying the law and economics movement.[15] The other trend is a tendency, largely emotional, to protect altruistic acts specifically because of the absence of a profit motive. The independence of this second trend is illustrated by the three distinct forms that the charitable immunity doctrine assumed.

a. Blanket Immunity of Charitable Enterprises

The most extreme application of the charitable immunity doctrine protected the charity regardless of whether the injured plaintiff was a beneficiary of the charitable activity or a stranger, and regardless of whether the defendant's liability was alleged to have arisen from its own primary fault in the selection of employees or its vicarious fault for

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adopt it. *See, e.g.*, Perry v. House of Refuge, 63 Md. 20 (1885); McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876).

12. *See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 416 (1973). Professor Friedman treats all corporate entities alike. Thus, he asserts:

> There is a suspicious parallel between these [early charitable immunity] cases and early cases on the fellow-servant rule. In both instances, the court seemed concerned with distribution of costs. In both cases, they seemed fearful that liability would damage the defendant too badly. Plaintiffs—perhaps some lower courts too—looked on corporations, including charities, as a cat looks on a canary. The appellate courts of the 19th Century felt constrained to fight the impulse.

Id.

13. *Id.*; *see also* Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

14. The obvious addition to this list would be the privity doctrine. However, as this Article argues, the privity doctrine is better understood in terms of a combination of the traditional explanation of business protection and the economic gain explanation under discussion here. *See infra* text accompanying notes 56-69.

15. *See infra* note 194 and accompanying text.

the acts of those employees.[16] For example, in *Gregory v. Salem General Hospital*[17] the plaintiff was injured when a nurse incorrectly applied a hot water bottle. The complaint alleged not only negligent conduct by the nurse, but also negligent conduct by the hospital because it knew that the nurse was incompetent. It was also claimed that the hospital was negligent in failing to provide a call signal that would have enabled the plaintiff to summon for help. In the course of affirming the trial court's decision granting defendant's motion for a directed verdict, the court observed that "[u]niversally there is a reluctance to render anyone liable for an injury to another which he has inflicted while engaged in unselfishly helping others."[18]

The charitable immunity enterprise was immune from liability based on its primary negligence as well as vicarious liability for the conduct of its agents, servants, and employees.[19] Although such immunity generally was limited to liability arising from tortious conduct, there was substantial authority that extended that immunity to liability for breach of contract when the facts alleged also would have supported a tort action.[20]

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16. For cases stating the rule broadly, see Arkansas Valley Coop. Rural Elec. Co. v. Elkins, 200 Ark. 883, 141 S.W.2d 538 (1940); Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905); Davin v. Kansas Medical Missionary & Benevolent Ass'n, 103 Kan. 48, 172 P. 1002 (1918); University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219 (1907); Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 A. 898 (1910); McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876); Dille v. St. Luke's Hosp., 355 Mo. 436, 196 S.W.2d 615 (1946); Gregory v. Salem Gen. Hosp., 175 Or. 464, 153 P.2d 837 (1944); Siidekum v. Animal Rescue League, 353 Pa. 408, 45 A.2d 59 (1946); Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914); Schau v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942).

17. 175 Or. 464, 153 P.2d 837 (1944).

18. *Id.* at 482, 153 P.2d at 844. Interestingly, the court also referred to the closely related situation of "guest passenger immunity," noting "[t]hat reluctance has prompted our legislature to render a driver immune from liability to a non-paying guest unless his fault was extraordinary." *Id.; see also infra* text accompanying notes 117-28.

19. Bodenheimer v. Confederate Memorial Ass'n, 68 F.2d 507 (4th Cir.) (applying Virginia law), *cert. denied*, 292 U.S. 629 (1934); Wilcox v. Idaho Falls Latter Day Saints Hosp., 59 Idaho 350, 82 P.2d 849 (1938); Old Folks' & Orphan Children's Home v. Roberts, 83 Ind. App. 546, 149 N.E. 188 (1925); Emery v. Jewish Hosp. Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Roosen v. Peter Bent Brigham Hosp., 235 Mass. 66, 126 N.E. 392 (1920); Vermillion v. Woman's College, 104 S.C. 197, 88 S.E. 649 (1916); Schau v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942).

20. *See, e.g.*, Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Durney v. St. Francis Hosp., 46 Del. 350, 83 A.2d 753 (1951); Davin v. Kansas Medical Missionary & Benevolent Ass'n, 103 Kan. 48, 172 P. 1002 (1918); Pikeville Methodist Hosp. v. Donahoo, 221 Ky. 538, 299 S.W. 159 (1927); Roosen v. Peter Bent Brigham Hosp., 235 Mass. 66, 126 N.E. 392 (1920); Greatrex v. Evangelical Deaconess Hosp., 261 Mich. 327, 246 N.W. 137 (1933); Mississippi Baptist Hosp. v. Moore, 156 Miss. 676, 126 So. 465 (1930); Duncan v. Nebraska Sanitarium & Benevolent Ass'n, 92 Neb. 162, 137 N.W. 1120 (1912); Fields v. Mountainside Hosp., 22 N.J. Misc. 72, 35 A.2d 701 (Essex County Cir. Ct. 1944); Lovich v. Salvation Army, 81 Ohio App. 317, 75 N.E.2d 459 (1947); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 A. 1087 (1910); and other cases collected at Annotation, *Immunity of Nongovernmental Charity from Liability for Damages in Tort*, 25 A.L.R.2d 29, 48-50 (1952).

b. Partial Immunity of Charitable Enterprises: Liability to Paying Patients

Mark Twain once wrote: "If you pick up a starving dog and make him prosperous, he will not bite you. This is the principal difference between a dog and a man."[21] Common wisdom thus coupled the preferential treatment accorded the altruist with a distaste for the ingrate. However, to the extent that the charitable immunity doctrine relied on a community sense of the inappropriateness of permitting recipients of charity to bite the feeding hand, the blanket immunity seemed to go too far: the charitable enterprise immunity doctrine barred the claims of those who paid as well as those who did not.

To avoid this "injustice," a number of courts carved out an exception to the charitable immunity doctrine that allowed a paying patient, who therefore was "not a recipient of the charity,"[22] to recover from an organization notwithstanding its charitable activities. Similarly, some jurisdictions distinguished between "beneficiaries" and "strangers," and allowed only the latter to recover from a charitable institution.[23] "Strangers" included those who received no direct benefit from the charity, such as a patient's visitors,[24] private nurses,[25] and those who transported others to charitable hospitals.[26] As the charitable immunity doctrine fell into disfavor, however, the courts became increasingly critical of the stranger-beneficiary distinction.[27]

In applying this second, limited form of charitable immunity, the

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21. M. TWAIN, PUDD'NHEAD WILSON 142 (Harper & Bros. American Artists ed. 1922).

22. Williams v. Union County Hosp. Ass'n, 234 N.C. 536, 67 S.E.2d 662 (1951); *see also* Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); Phillips v. Buffalo Gen. Hosp., 239 N.Y. 188, 146 N.E. 199 (1924). There is also the closely related problem that charging for services may negate the "charitable" status of the defendant. Generally, however, it will not. *See, e.g.*, Boardman v. Burlingame, 123 Conn. 646, 197 A. 761 (1938).

23. *See, e.g.*, Simmons v. Wiley Methodist Episcopal Church, 112 N.J.L. 129, 133, 170 A. 237, 239 (1934) (finding that a denial of liability to a user of a public highway for the negligent operation of a motor vehicle would be "repugnant to one's sense of justice").

24. *See, e.g.*, Alabama Baptist Hosp. Bd. v. Carter, 226 Ala. 109, 145 So. 443 (1932); Lusk v. United States Fidelity & Guar. Co., 199 So. 666 (La. Ct. App. 1941); Walker v. Memorial Hosp., 187 Va. 5, 45 S.E.2d 898 (1948).

25. *See, e.g.*, President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Rose v. Raleigh Fitkin-Paul Morgan Memorial Hosp., 13 N.J.L. 553, 57 A.2d 29 (1948); Sisters of Charity v. Duvelius, 37 Ohio App. 171, 174 N.E. 256 (1930), *aff'd*, 123 Ohio St. 52, 173 N.E. 737 (1931).

26. *See, e.g.*, Kolb v. Monmouth Memorial Hosp., 116 N.J.L. 118, 182 A. 822 (1936). It is interesting to note that in *Kolb* the plaintiff was a volunteer fireman. The court was careful to point out that he received no compensation for his services, and thus the case can be explained as a resolution of the conflicting equities between two altruists.

27. *See* President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 819-22 (D.C. Cir. 1942).

courts focused on the relationship between the plaintiff and defendant rather than the charitable or noncharitable nature of the defendant's enterprise. In these jurisdictions, the immunity was not available if the defendant's relationship with the particular plaintiff was not altruistic, even though, as a general proposition, the enterprise still might be characterized as altruistic. Nevertheless, this class of cases was based on the same underlying rationale as the blanket immunity cases, notwithstanding the limitations imposed in an attempt to refine the doctrine.

c. Partial Immunity of Charitable Enterprises: No Vicarious Liability

The third form of charitable immunity protected the enterprise only from the strict liability that resulted from application of *respondeat superior* principles. In cases in which the liability was alleged to have arisen from the primary fault or negligence of the the enterprise—negligent selection of employees, for example—the immunity was not available.[28] Given the nature of the tendency to exculpate the altruist, it is not surprising to find that tendency most pronounced when the liability of the altruist is based on a nonfault theory. The reason for this is fairly obvious. Even if one accepts the premise that the altruist is worthy of protection, his actual culpability or fault in causing the particular harm may justify holding him liable. When, however, there is no blameworthy conduct by the altruist, but rather liability is imposed for some other reason, it might seem unfair to impose that liability.

Perhaps for this reason, some jurisdictions developed a distinction between a charitable organization's "corporate negligence," for which there was liability, and a subordinate employee's negligence, for which the charity was not liable.[29] This distinction was carried to its logical, though extreme, conclusion in *Jurjevich v. Hotel Dieu*[30] in which the court held that a charitable hospital was not liable for the hospital superintendent's negligence. The court reasoned that because the hospital was a corporate entity, it must necessarily act through its agents and employees. Therefore, there is no difference between the acts of an em-

28. White v. Providence Hosp., 80 F. Supp. 76 (D.D.C. 1943); Haliburton v. General Hosp. Soc'y, 133 Conn. 61, 48 A.2d 261 (1946); Hamburger v. Cornell Univ., 240 N.Y. 328, 148 N.E. 539 (1925); Hoke v. Glenn, 167 N.C. 594, 83 S.E. 807 (1914); Love v. Nashville Agric. & Normal Inst., 146 Tenn. 550, 243 S.W. 304 (1921); Hotel Dieu v. Armendarez, 210 S.W. 518 (Tex. Civ. App. 1919); Canney v. Sisters of Charity, 15 Wash. 2d 325, 130 P.2d 899 (1942).

29. *See, e.g.*, White v. Providence Hosp., 80 F. Supp. 76 (D.D.C. 1943). In these cases the subordinate employee might well be liable individually. This fact, of course, ignores the reality that generally the individual would be unable to pay any judgment assessed against him.

30. 11 So. 2d 632 (La. Ct. App. 1943).

ployee who has management responsibilities and the acts of subordinate employees.[31]

The preliminary question of who is an agent or servant for purposes of the imposition of vicarious liability was itself deeply influenced by the existence or nonexistence of a pecuniary benefit flowing to the party to be held strictly liable for the tortious conduct of another. Although most writers and jurists today generally agree that the decision to impose liability on one person for the conduct of another is based on instrumentalist considerations of efficient loss allocation, internalization of costs and other economic considerations,[32] the prevailing view during the latter part of the nineteenth century and early part of the twentieth century justified that liability allocation on the basis that the tortious act was performed for the benefit of another. Thus, it was appropriate for the party receiving that benefit to bear the loss.[33]

Even after the benefit theory of vicarious liability generally had fallen out of favor, some courts continued to apply the theory to charities. Thus, for example, one line of decisions refused expressly to apply the rules of *respondeat superior* because the principal was not seeking to derive economic gain from its conduct.[34]

Regardless of the variety of the charitable immunity doctrine applied, the different jurisdictions were not uniform in their enunciation of the underlying rationale. While some courts openly acknowledged the basis for the doctrine, others intentionally or unintentionally obscured it, by relying most often on a theory that it would be beyond the powers of a trust to use funds designated for a charitable purpose to satisfy judgments resulting from tort actions.[35]

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31. *Id.* at 635. The court did not decide expressly whether the corporate entity could be held liable for the acts of its officers and directors. *See also* Comment, *Charitable Institutions: Liability for Tortious Conduct*, 17 TUL. L. REV. 621 (1943) (discussing and criticizing the *Jurjevich* decision).

32. *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500-01 (5th ed. 1984) [hereinafter PROSSER & KEETON].

33. *See, e.g.*, Century Ins. Co., Ltd. v. Northern Ireland Rd. Transp. Bd., [1942] 1 All E.R. 491, 497 (Wright, L.J.) (noting that "[t]he act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and at least, generally speaking, not for his employer's benefit. That last condition, however, is no longer essential to fix liability on the employer").

34. It is important to understand that the criticism of these cases on the ground that "the vicarious liability of a master is certainly not limited to profitable businesses" misses the point. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 993 (4th ed. 1971). The distinction underlying this line of cases is not whether the business actually made a profit, but rather whether the business was perceived to be acting for economic gain or not. *See generally* Evans v. Lawrence & Memorial Assoc. Hosp., Inc., 133 Conn. 311, 50 A.2d 443 (1946); Emery v. Jewish Hosp. Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Thornton v. Franklin Square House, 200 Mass. 465, 86 N.E. 909 (1909); Bachman v. YWCA, 179 Wis. 178, 191 N.W. 751 (1922); *see also* cases cited *supra* note 28.

35. For cases relying on a trust fund theory, see Arkansas Valley Coop. Rural Elec. Co. v.

d. Judicial Repudiation of the Charitable Immunity Doctrine

The charitable immunity doctrine was never favored by commentators, notwithstanding the early widespread judicial support for the rule.[36] By the early 1950s, it was clear that the "trend [was] . . . away from immunity and toward liability."[37] The history of the doctrine in New York is illustrative of the national pattern. In 1914 the New York Court of Appeals decided *Schloendorff v. Society of New York Hospital*.[38] Although ultimately the case was not decided on the basis of charitable immunity, Judge Benjamin Cardozo approved of the doctrine on the theory that a recipient of charity impliedly waived any action against the hospital for the tortious conduct of its employees.[39] In 1957 the New York Court of Appeals overruled *Schloendorff*, rejecting the doctrine of charitable immunity.[40] Since then, virtually all jurisdictions have rejected the doctrine, at least in its original form.[41]

2. Immunity from Liability Through "No Duty" Rules

a. Acts and Omissions

The old notion that there may be tort liability for "acts" but not for "omissions" is expressed in the theory of "nonfeasance immunity."[42] Like the charitable immunity cases, the nonfeasance immunity cases

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Elkins, 200 Ark. 883, 141 S.W.2d 538 (1940); Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905); Emery v. Jewish Hosp. Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 A. 898 (1910); Perry v. House of Refuge, 63 Md. 20 (1885); McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876); Whittaker v. St. Luke's Hosp., 137 Mo. App. 116, 117 S.W. 1189 (1908); Jones v. St. Mary's Roman Catholic Church, 7 N.J. 533, 82 A.2d 187 (1951), *cert. denied*, 342 U.S. 886 (1951); Gregory v. Salem Gen. Hosp., 175 Or. 464, 153 P.2d 837 (1944); Bond v. City of Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951).

36. *See, e.g.*, Note, *Torts—Scope of Liability of Charitable Hospitals in New York*, 25 N.Y.U. L. REV. 612 (1950); Note, *Charitable Institutions—Liability for Torts of Their Agents*, 22 VA. L. REV. 58 (1935); Recent Decision, *Charities—Hospitals—Liability to Paying Patients for Negligence of Employees*, 38 COLUM. L. REV. 1485 (1938); Recent Decision, *Negligence—Charities—Immunity from Tort Liability*, 49 MICH. L. REV. 148 (1950); Recent Case, *Illinois Tort Liability of Charitable Corporations*, 16 U. CHI. L. REV. 173 (1948); Recent Case, *Torts—Charities—Liability of Charitable Corporation for Negligence of Servant*, 91 U. PA. L. REV. 571 (1943); Comment, *Tort Responsibility of Charitable Corporations*, 34 YALE L.J. 316 (1924).

37. Annotation, *supra* note 20, at 142.

38. 211 N.Y. 125, 105 N.E. 92 (1914).

39. *Id.* at 128-29, 105 N.E. at 93. For a discussion of the "waiver" or "consent" theory, see *infra* text accompanying notes 176-79.

40. Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

41. The *Restatement (Second) of Torts* § 895E (1979) unequivocally denies the existence of any immunity resulting from the charitable status of the enterprise. This Article argues, however, that the doctrine of charitable immunity has been partially resurrected under the guise of the "Good Samaritan" legislation and medical malpractice reform acts. *See infra* text accompanying notes 89-94.

42. J. FLEMING, THE LAW OF TORTS 139 (6th ed. 1983).

can be explained by the economic motivation of the actor. Professor John Fleming offered the explanation that "[t]he heart of the nonfeasance rule consists in the peremptory refusal to attach legal sanctions to gratuitous undertakings to confer a benefit on the promisee, as there is no more sacrosanct axiom in our jurisprudence than that a promise without consideration will not be enforced."[43] The so-called "rescue cases" demonstrate this rationale for nonfeasance immunity.

The most common illustration of the rescue doctrine points out that a passer-by owes no duty to come to a drowning man's aid,[44] but a lifeguard hired to perform such a service clearly does.[45] The imposition of a tort duty in the latter case cannot be explained in terms of a contractual duty owed to the drowning man, although one might argue that there should be such a duty under a third party beneficiary theory. Rather, such rules must be explained in terms of the imposition of a legal burden on the individual motivated by a desire for economic gain. Moreover, legal rules have evolved that specifically reward and protect the altruistic rescuer. For example, if the rescuer is injured in the rescue attempt, he falls within the scope of the duty owed by a negligent third party to the endangered person, even though the rescuer would not be considered a "foreseeable plaintiff" under an ordinary duty analysis.[46]

The "nonfeasance immunity" rules enjoy widespread, but not universal, support.[47] Perhaps as a result, the common law created a number of exceptions to the nonliability rules. For example, although an innocent passer-by may have no obligation to rescue, the rescuer has a

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43. *Id.* It is interesting to note the rather close connection between the "economic gain" elements of the consideration requirement for the imposition of contractual liability and the economic gain requirement sometimes essential to the imposition of tort liability. Both would seem to be indicative of the same underlying community sense as to when the imposition of liability is appropriate. The problem can be observed again in connection with the early privity requirement for the finding of a duty. *See also* WINFIELD & JOLOWICZ, *supra* note 1, at 80-81 (asserting that the nonfeasance immunity rule is "not surprising in view of the fact that long before the development of the tort of negligence our law had attached the label 'contract' to duties to act for the benefit of others and, moreover, had insisted that a contractual duty could arise only on the basis of a promise, express or implied, supported by consideration or seal").

44. Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928); Horsley v. MacLaren, 2 O.R. 487, 499 (1970) (Jessup, J.).

45. J. FLEMING, *supra* note 42, at 139.

46. Wagner v. International R.R., 232 N.Y. 176, 180, 133 N.E. 437, 437-38 (1921) (stating that "[d]anger invites rescue. . . . The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had"); *see also* J. FLEMING, *supra* note 42, at 156 (observing that "in its anxiety to support the rescuer, modern law has generally evinced little interest in the conventional requirements of 'foreseeability' and 'duty' "). At least under certain circumstances, the rescuer also may be immune from liability if he is negligent in the course of the rescue. *See infra* text accompanying notes 70-94 (regarding the "Good Samaritan" legislation).

47. *See generally* Zeisel, *An International Experiment on the Effects of a Good Samaritan Law*, in THE GOOD SAMARITAN AND THE LAW 209 (J. Ratcliffe ed. 1966).

duty to exercise reasonable care once he commences his rescue attempt.[48]

Furthermore, exceptions to the "no duty of affirmative action" doctrine have been created when the defendant created the dangerous situation, even if he did so nonnegligently,[49] or when there was a specific type of pre-existing relationship between the parties. Several of the types of relationships that serve as the basis for making an exception to the no-duty rule are linked directly to the economic motive of the defendant. Courts have recognized a duty of affirmative action owed by an occupier of land to a business invitee,[50] an innkeeper to a guest,[51] and a common carrier to its passengers.[52] In each of these instances, the legal duty imposed arises from the actual or anticipated economic gain to be derived by the defendant.[53] Professor Fowler Harper explained:

> affirmative duties are imposed only in situations where the one under a duty to act has voluntarily brought himself into a certain relationship with another from which he obtains or expects *benefit*. There is in a sense a "consideration" moving to the person under the affirmative duty, although that "consideration" need not move from the one asserting the right correlative to the duty.[54]

Nonfeasance immunity thus remains an important legal rule, despite its judicial modification.[55] The most significant judicial modification involves a limitation of the immunity when the defendant's economic gain is a factor.

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48. *See* J. FLEMING, *supra* note 42, at 138. The existence of such a duty is not as clear in the United Kingdom as it is in the United States. *See generally* WINFIELD & JOLOWICZ, *supra* note 1, at 83.

49. *See, e.g.*, Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628 (1931); CAL. VEH. CODE § 20003 (West Supp. 1987) (requiring all drivers who are involved in motor vehicle accidents to stop and render "reasonable assistance").

50. *See* Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394, 170 P.2d 5 (1946); L.S. Ayers & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942); Dickey v. Hochschild, Kohn & Co., 157 Md. 448, 146 A. 282 (1929).

51. *See* West v. Spratling, 204 Ala. 478, 86 So. 32 (1920).

52. *See* Layne v. Chicago & A.R.R. Co., 175 Mo. App. 34, 157 S.W. 850 (1913).

53. *See* Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 242-43 (1971).

54. F. HARPER, A TREATISE ON THE LAW OF TORTS 197 (1933). It would appear that Professor Harper has overstated this proposition somewhat because the duty of affirmative action also has been imposed in cases involving parents and children, *see* State v. Staples, 126 Minn. 396, 148 N.W. 283 (1914), and land occupiers and social guests, *see* Tubbs v. Argus, 140 Ind. App. 695, 225 N.E.2d 841 (1967), neither of which can be explained by reference to a benefit rationale. For a further discussion of "social guests," however, see Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960).

55. There have been instances of legislative abrogation of nonfeasance rules. *See, e.g.*, VT. STAT. ANN. tit. 12, § 519(a) (1973) (providing that "[a] person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others"); *see also* Franklin, *Vermont Requires a Rescue: A Comment*, 25 STAN. L. REV. 51 (1972).

b. A Different Look at the Privity Requirement

In 1916 in the United States, in the case of *MacPherson v. Buick Motor Co.*,[56] and in 1932 in the United Kingdom, in the case of *Donoghue v. Stevenson*,[57] courts abandoned the long standing requirement that privity of contract must exist between the plaintiff and defendant before finding that the defendant had a duty to exercise due care.[58] The fact that courts could have grafted a contract requirement on duties that now seem so clearly to arise independently of any contractual obligation has disturbed many commentators.[59] Probably the most common explanation for the formulation of the rule links the restrictive nature of the privity doctrine with a judicial desire to further the industrial revolution. The privity doctrine was said to be "an effective instrument of social policy for a nation bent on promoting the development of its infant industry."[60]

Support can be found in some of the leading cases for the notion that the privity requirement was formulated as an artificial limitation on a manufacturer's liability by, in essence, making the consumer subsidize developing industry. In *Winterbottom v. Wright*, for example, Lord Abinger asserted that "[u]nless we confine the operation of such contracts as this to the parties who entered into them, the most absurd

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56. 217 N.Y. 382, 111 N.E. 1050 (1916).

57. [1932] App. Cas. 562.

58. For a statement of the privity requirement, see National Sav. Bank of D.C. v. Ward, 100 U.S. 195 (1879), and Winterbottom v. Wright, 10 Mees. & Wels. 109, 152 Eng. Rep. 402 (Ex. 1842); *see also* Bohlen, *Liability of Manufacturers to Persons Other than Their Immediate Vendees*, 45 LAW Q. REV. 343 (1929).

59. *See, e.g.*, Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 54-55 (1934) (noting that "the hypothesis of 'privity of contract' was so strong upon the Court of Exchequer in *Winterbottom v. Wright* that they failed to see that in the tort of negligence the defendant's liability ought to be determined without paying any regard to the existence of a contract between the defendant and a third party; that the inoculation of this tort with the idea of duty was inconsistent with many a case of it down to 1842; and that in every previous case of it where there had been no complication of the facts with such a contract, the plaintiff had been able to sue without proving any such [contractual] duty").

Professor Winfield also noted, however, that many different types of cases fell under the old action of assumpsit and therefore in the earlier cases there had been no reason to decide cases by reference to the classifications of tort or contract. He observed: "To the accusation, 'Your *dicta* show a confusion of contract with tort,' the judges in *Winterbottom v. Wright* might well have retorted, 'How can we confuse things which have never been distinguished?' " *Id.* at 86 (emphasis in original).

60. W. KEETON, D. OWEN, & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY, CASES AND MATERIALS 25 (1980); *see also* Bohlen, *The Basis of Affirmative Obligations in the Law of Tort* (pt. 3), 53 AM. L. REG. 337, 355 (1905) (arguing that "[t]o encourage commerce and industry by removing all duty and incentive to protect the public is to invite wholesale sacrifice of individual rights on the altar of commercial greed. . . . It would appear to be high time to consider whether this price is not too high to pay for industrial expansion, and whether those who profit by the operation of a business should not bear at least the burden of exercising reasonable competence and care therein" (footnote omitted)).

and outrageous consequences, to which I can see no limit, would ensue."[61] Similarly, the court in *Curtin v. Somerset*[62] explained:

> If a contractor who erects a house, who builds a bridge, or performs any other work, the manufacturer who constructs a boiler, piece of machinery, or a steam-ship, owes a duty to the whole world, that his work or his machine or his steam-ship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned.[63]

However, the notion that courts formulated the doctrine solely to protect the manufacturer seems incomplete if offered as a unitary explanation. First, in the mid-nineteenth century, when *Winterbottom* was decided, the English judiciary, as a class, was not linked closely to the industrialists.[64] Second, because manufacturers generally sold directly to consumers, the privity requirement did not serve as a bar to the same extent that it did by the time the privity requirement was rejected.[65] By 1916 manufacturers were no longer selling directly to the consumer, most notably in cases involving the marketing of dangerous items likely to cause injury and give rise to tort liability.[66] As Chief Judge Cardozo pointed out in *MacPherson*, the privity rule prevented anyone but the dealer from suing the manufacturer when "[t]he dealer was . . . the one person of whom it might be said with some approach to certainty that by him the car would not be used."[67] Arguably, it was

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61. 10 Mees. & Wels. 109, 114, 152 Eng. Rep. 402, 405 (Ex. 1842).

62. 140 Pa. 70, 21 A. 244 (1891).

63. *Id.* at 80, 21 A. at 245.

64. *See* Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952) (commenting on the decision in Rylands v. Fletcher, 3 H. & C. 774, 159 Eng. Rep. 737 (Ex. 1865)). Professor Morris noted:

> It has been suggested that most of the judges were recruited from the gentry, a class which frowned on the industrial invasion of the stately English countryside. Mills were no longer picturesque grinders of home-grown grain for kitchen-baked bread; they were unsightly, ungainly, "non-natural" textile factories run by men "in trade." They should at least pay their way—which included paying for damage done to neighbors.

Id. at 1175.

65. *See* Jeanblanc, *Manufacturers' Liability to Persons Other than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937) (noting that "[i]n earlier times the one who made the article generally sold it directly to the ultimate user, and thus the consumer, being in privity of contract with the manufacturer, was allowed to recover on the usual warranties for losses caused by defective workmanship").

66. *Id.* at 155-56. Professor Jeanblanc noted:

> [O]ther courts, in an effort to keep law apace with the changing systems of marketing . . . have expanded many theories of legal liability.
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> . . . To obviate the harshness of [the privity] rule exceptions were soon made, and under the guise of the "dangerous instrumentality doctrine" these exceptions became more important than the rule itself.

Id.

67. MacPherson v. Buick Motor Co., 217 N.Y. 382, 391, 111 N.E. 1050, 1053 (1916).

the change in marketing practices that increased the harshness of the privity doctrine to the point at which the doctrine became intolerable.[68]

However, if nothing else, the privity requirement served to ensure that tort liability was linked to the receipt of economic gain in the particular case confronting the court. If the transaction lacked consideration, the seller was immunized from tort liability. Even if there was consideration for the contract between the defendant and some third party, the economic benefit to the defendant did not flow directly from the plaintiff, and therefore the negligent manufacturer logically could be seen as a gratuitous donor with respect to the plaintiff.

What Judge Cardozo and Lord Atkin accomplished in *MacPherson* and *Donoghue*, respectively, was not to eliminate the coupling of tort liability with the economic gain motive of the manufacturer. Rather, the courts, by taking a broader view of the transaction, permitted tort liability even when the defendant's economic gain did not flow directly from the plaintiff. The previously existing rules exculpating the gratuitous donor or bailor, for example, were unaffected by the expansion of the scope of a manufacturers' duty.[69]

3. The Legislative Response to Abrogation of the "No Liability" Rules—The "Good Samaritan" Legislation

To this point, this Article has examined three types of legal rules. The charitable immunity doctrine and the privity rule served to immunize the altruist or gratuitous actor from tort liability. While the nonfeasance immunity rule often imposed liability on the altruist, it also provided the altruistic rescuer with increased rights.[70]

The history of these rules is worth briefly noting. All three doctrines were judicially developed, originating in the mid-nineteenth century. Each developed rapidly and achieved the greatest recognition during the latter part of the nineteenth century and the first part of the twentieth century. At that point, under a flood of academic criticism, the courts repudiated the privity rule and the charitable immunity doctrine. The rule of nonfeasance immunity, on the other hand, remained intact, notwithstanding significant criticism from legal commentators.[71]

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68. Of course, nonpurchasing users and bystanders were prevented effectively from maintaining tort actions against a manufacturer even in cases in which the manufacturer did sell directly to the public.

69. *See infra* text accompanying notes 99-111.

70. *See supra* notes 46, 48 and accompanying text.

71. *See, e.g.*, Note, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301, 1322 (1964) (arguing for the imposition of an affirmative duty to rescue on physicians and concluding that "[t]he imposition of affirmative obligations on any group of persons is neither historically unjustifiable nor repugnant to the moral sensibilities of society").

The public's reaction to the judicial abrogation of the privity and charitable immunity rules and to the failure to abrogate that part of the nonfeasance immunity rule that served to impose liability on the gratuitous actor has been manifested in the legislature's rejection of attempts to impose liability on those perceived to be motivated by altruism. While relevant legislation purports to retain civil liability for those perceived to be acting for economic gain, these statutes have been underinclusive in this regard, immunizing many persons who are in fact economically motivated. For example, since 1959,[72] all fifty states and the District of Columbia have enacted "Good Samaritan" laws immunizing physicians and other health care professionals from liability for negligence that occurs while rendering emergency service when they were under no duty to have acted at all.[73] The "Good Samaritan" legislation not only modified the nonfeasance immunity rule, but also served partially to reestablish both the privity doctrine and the charitable immunity doctrine.

a. Immunity for the Medical Volunteer

i. Modification of the Nonfeasance Rule

As previously noted, one of the major exceptions to the nonfeasance immunity rule imposes a duty to act with reasonable care on the innocent passer-by once he commences his gratuitous rescue attempt.[74] In the case of health care professionals, it was claimed that physicians refused to render emergency treatment outside the hospital for fear of subsequent malpractice liability.[75] Responding to this perception, the states enacted legislation immunizing physicians and other health care professionals who did render emergency treatment.[76] However, it ap-

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72. The first "Good Samaritan" law appears to have heen enacted in California in 1959. The law, 1959 Cal. Stat. 1507, is now CAL. BUS. & PROF. CODE § 2144 (West Supp. 1987).

73. *See* Note, *Good Samaritans and Hospital Emergencies*, 54 S. CAL. L. REV. 417, 428 nn.74-78 (1981) (collecting statutes).

74. *See supra* note 48 and accompanying text.

75. Note, *supra* note 71, at 1301. One commentator, summarizing the frequently expressed perception, wrote:

> A skier who had fallen in pain upon a slope in the Sierra Madre mountains was refused attention by several physicians in the vicinity. On the Bronx Whitestone Bridge, a motorist lay in need of urgent medical attention as a physician drove past and deliberately declined to stop. In each instance the doctors were deterred by the awareness that, in the rendering of assistance, any allegeahle failure to perform the task with reasonable care would expose them to possible suit for malpractice. The physicians realized that, on the other hand, they could ignore the injured person with complete immunity. For at common law it is the "Good Samaritan" who "may find himself liable where those who passed by on the other side will not." *Id.*

76. *See* Colby v. Schwartz, 78 Cal. App. 3d 885, 892, 144 Cal. Rptr. 624, 628 (1978) (asserting that the statutes were enacted "to aid the class of individuals who, though requiring immediate

pears that the statutes provided immunity in circumstances far beyond the road side emergency situation.

Significantly, although much of this legislation sought to immunize health care professionals when they were acting under the pressure of emergencies, attempts were made to claim that such "emergency" language included negligence that occurred in the hospital emergency room.[77] The most likely explanation for what otherwise would be regarded as an anomaly, is that health care professionals generally, and physicians specifically, are perceived to be acting altruistically even when their conduct is clearly economically motivated.[78]

ii. Pre-existing Doctor-Patient Relationship: Reestablishment of the Privity Doctrine

To ensure that the health care professional's civil liability is linked to a motive of seeking economic gain, "Good Samaritan" legislation frequently provided that immunity would exist only when no doctor-patient or nurse-patient relationship existed prior to such emergency.[79] Because the physician-patient relationship is generally contractual,[80] proof of the existence of such a relationship operates to ensure the existence of consideration as a prerequisite to civil liability.[81]

Unfortunately, however, the same problem exists in this context as existed in the products liability cases prior to *MacPherson v. Buick*

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medical care, were not receiving it").

77. In 1976, for example, the definition of "scene of the emergency" in CAL. BUS. & PROF. CODE § 2144 was amended to include "emergency rooms of hospitals in the event of a medical disaster." 1976 Cal. Stat. 824, § 1. When the physician is acting under the pressure of an unexpected emergency such as chancing upon a highway accident, his rendering of assistance would be perceived to be noneconomically motivated even though he could later seek compensation for his services. *See* Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907); Piggee v. Mercy Hosp., 199 Okla. 411, 186 P.2d 817 (1947). Regarding after the fact compensation for the altruist, see generally Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

In a hospital emergency room, however, the E.R. physician clearly has an economic gain motivation having put himself in a position in which he is contractually obligated to render the service. *See generally* Note, *supra* note 73.

78. *See supra* text accompanying note 7.

79. *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1501 (West 1987).

80. Keene v. Wiggins, 69 Cal. App. 3d 308, 313, 138 Cal. Rptr. 3, 6-7 (1977). In this context, it should be noted that the various jurisdictions are by no means agreed as to the precise characterization of the physician-patient relationship. In addition to the *Keene* characterization as "contractual," other courts have called it "quasi-contractual" or simply attempted to avoid the characterization problem by calling it "*sui generis*."

81. Some states have expressly legislated in terms of economic gain motivation rather than "privity." *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 1a (Vernon 1969) (immunity not granted when services provided "for remuneration or with the expectation of remuneration"); *see also* CONN. GEN. STAT. ANN. § 52-557b (West Supp. 1987) ("voluntarily and gratuitously"); NEB. REV. STAT. § 25-1152 (1964) (aid rendered "gratuitously").

Motor Co.[82] By requiring the consideration to flow from the plaintiff to the defendant, rather than from anyone to the defendant, many persons are treated as altruists, even though it is clear that their conduct is economically motivated. In *McKenna v. Cedars of Lebanon Hospital*,[83] for example, the court did not hold the defendant liable for malpractice that allegedly occurred while he was responding to a hospital emergency, although not in the emergency room itself.[84] The court reasoned that because there was no pre-existing physician-patient relationship between the defendant and plaintiff, no liability could be imposed.[85] Similarly, under section 1317 of the California Health and Safety Code, hospital "rescue teams"[86] are not held liable for acts "done or omitted while attempting to resuscitate any person who is in immediate danger of loss of life . . . if good faith is exercised."[87] As one writer observed, "section 1317 constitutes a total obstruction of the rights of the hospital patient. Even if the physician does not remotely qualify as a 'medical volunteer,' he is still provided with immunity from civil liability."[88]

b. Immunity of the Hospital

In addition to the charitable immunity rules that protected hospitals from vicarious liability for the acts of their agents and employees, hospitals could frequently take advantage of common-law agency principles and successfully argue that there was no vicarious liability because the negligent physician was an independent contractor. In *Schloendorff v. Society of New York Hospital*,[89] for example, Judge Cardozo reasoned that a hospital could not exercise sufficient control

82. 217 N.Y. 382, 111 N.E. 1050 (1916); *see supra* notes 56-69 and accompanying text.

83. 93 Cal. App. 3d 282, 155 Cal. Rptr. 631 (1979).

84. *Id.* at 288, 155 Cal. Rptr. at 635. *But cf.* Colby v. Schwartz, 78 Cal. App. 3d 885, 144 Cal. Rptr. 624 (1978) (holding that the immunity provided under CAL. BUS. & PROF. CODE § 2144 was not available to an emergency room physician); *see also* Note, *supra* note 73 (discussing and analyzing these cases).

85. *McKenna*, 93 Cal. App. 3d at 288, 155 Cal. Rptr. at 635.

86. CAL. HEALTH & SAFETY CODE § 1317 (West 1979). This section defines a "rescue team" as "a special group of physicians and surgeons, nurses, and employees of a health facility who have been trained in cardiopulmonary resuscitation and have been designated by the health facility to attempt, in cases of emergency, to resuscitate persons who are in immediate danger of loss of life." *Id.*

87. *Id.*

88. Note, *supra* note 73, at 434. Immunization of the physician from civil liability for negligence that occurs in the emergency room is, incidentally, no small matter. One study indicated that "[s]eventy percent of the malpractice incidents in Maryland between 1960 and 1970 occurred in hospitals, with fourteen percent occurring in emergency rooms." Brook, Brutoco & Williams, *The Relationship Between Medical Malpractice and the Quality of Care*, 1975 DUKE L.J. 1197, 1207 n.51.

89. 211 N.Y. 125, 105 N.E. 92 (1914).

over a physician. Therefore, there could be no vicarious liability.[90]

Today, as a general rule, the majority of states have rejected the professional skill theory and find that there can be such a thing as a "servant-physician."[91] This does not mean, however, that hospitals will be vicariously liable for every instance of malpractice that occurs at the institution. If the physician is an employee or an ostensible agent, the hospital will be responsible. If, on the other hand, the physician is only utilizing hospital privileges to treat a private patient, it is likely that he will be considered an independent contractor.[92]

The mere fact that the physician is statutorily immune from civil liability will not, by itself, inure to the benefit of the hospital. It is generally agreed that there is no derivative immunity in the absence of a statute.[93] It is not uncommon, however, for the "Good Samaritan" legislation to immunize not only the negligent actor, but his principal as well. For example, section 1317 of the California Health and Safety Code not only protects the "rescue team" but also protects the owners or operators of the hospital or authorized emergency vehicle.[94]

Once again, it is clear that the legislative enactments must be explained in terms of the legislature seeking to immunize those individuals who may be perceived to be acting altruistically, notwithstanding the fact that courts previously have rejected as illogical those doctrines that achieved the same result in favor of a motivation-neutral set of rules.

B. Varying Standards of Care

1. Occupier Liability

In addition to those areas of tort law in which the perception of altruistic motivation has been used to justify an outright exculpation of the negligent actor, there are areas in which the perception of the ac-

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90. *Id.* at 131-32, 105 N.E. at 94.

91. *See generally* Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians*, 50 WASH. L. REV. 385 (1975).

92. Mayers v. Litow, 154 Cal. App. 2d 413, 316 P.2d 351 (1951); Lundahl v. Rockford Memorial Hosp. Ass'n, 93 Ill. App. 2d 671, 235 N.E.2d 461 (1968); Fiorentino v. Wenger, 19 N.Y.2d 407, 227 N.E.2d 296, 280 N.Y.S.2d 373 (1967); Smith v. Duke Univ., 219 N.C. 628, 14 S.E.2d 643 (1941).

93. RESTATEMENT (SECOND) OF AGENCY § 217(b)(ii) (1958); *see also* Hamburger v. Henry Ford Hosp., 91 Mich. App. 580, 284 N.W.2d 155 (1979).

94. *Cf.* HAW. REV. STAT. § 663-1.5 (1985). This statute is virtually identical to the California statute and protects the principal from vicarious liability. However, it provides:

> This section shall not relieve the owners or operators of the hospital or authorized emergency vehicle of any other duty imposed upon them by law for the designation and training of members of a rescue team or for any provisions regarding maintenance of equipment to be used by the rescue team or any damages resulting from gross negligence or wanton acts or omissions.

Id. See generally infra text accompanying notes 95-128 (regarding varying standards of care).

tor's motivation affects the standard of care. One example is the traditional distinction between the standard of care a land occupier owes invitees and the standard he owes licensees. Under the traditional rule, an occupier owes an invitee a duty to exercise reasonable care to prevent damage from unusual dangers of which the occupier knows or ought to know.[95] However, if the plaintiff was merely a licensee, the occupier need only refrain from creating a trap or warn about the presence of a concealed danger of which he has actual knowledge.[96] The *Restatement of Torts*[97] identified the theoretical basis for distinguishing licensees from invitees as one of economic benefits conferred. According to Professor William Prosser, the *Restatement* reasoned:

> The duty of affirmative care to make the premises safe is imposed upon the person in possession as the price he must pay for the economic benefit he derives, or expects to derive, from the presence of the visitor; and that when no such benefit is to be found, he is under no such duty. On this basis, the "business" on which the visitor comes must be one of at least potential pecuniary profit to the possessor.[98]

2. Gifts, Loans, and Bailments

Similarly, one can observe a legal tendency to impose a lower standard of care in cases involving the gratuitous providing of products, regardless of whether the underlying transaction is classified as a loan, gift, or bailment. This is true particularly when the individual who is providing the product is not "in the business" of providing such products.[99] The traditional English rule relating to the gratuitous loan or gift of a chattel was that "there is not even the duty of reasonable care. The donor or lender of a chattel owes no duty except to give warning of any dangers actually known to him."[100] The duty was so limited that it led one commentator to assert that there would be liability only for "willfulness or gross negligence in not revealing a [known] defect."[101]

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95. Indemaur v. Dames, [1866] 1 L.R.C.P. 274.

96. Latham v. R. Johnson & Nephew Ltd., [1913] 1 K.B. 398.

97. RESTATEMENT OF TORTS §§ 332, 343 & 343 comment a (1934).

98. PROSSER & KEETON, *supra* note 32, § 61, at 420; *see also* Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 LAW Q. REV. 182 (1953); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

99. When one "in the business" provides a product gratuitously, his conduct is usually "economic"—falling under the goodwill creation definition. *See supra* text preceding note 4.

100. J. SALMOND, THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 464 (6th ed. 1924).

101. P. WINFIELD, A TEXT-BOOK OF THE LAW OF TORT 539 (4th ed. 1948); *accord* G. PATON, BAILMENT IN THE COMMON LAW 152 (1952) (stating that "[t]he borrower can recover only if the lender knows of the defect"). *But see* Marsh, *Liability of the Gratuitous Transferor: A Comparative Study*, 66 LAW Q. REV. 39, 47 (1950). After a thoughtful analysis of the English cases upon which Professors Winfield and Salmond relied, Professor Marsh concluded:

> [T]here was no reason to except gratuitous bailments and gifts from [the] principles [imposing a general duty of care based on reasonable foresight]. The privileged position of the gratu-

The American cases tend to be consistent with their older English counterparts. In *Ruth v. Hutchinson Gas Co.*,[102] for example, the defendants gratuitously provided the plaintiffs with a propane heater for the plaintiffs to use on a hunting trip. The heater installed in the plaintiffs' trailer was not adequately vented. This caused carbon monoxide to accumulate, injuring one hunter and killing four others. The court held that the gratuitous donor was under no duty. Furthermore, a bailor is under no greater duty to third persons than to the immediate bailee,[103] *i.e.*, a duty to warn of known dangers.

The commercial lessor or bailor for hire, on the other hand, is held to a higher standard of care. In *Hyman v. Nye*,[104] for example, the plaintiff hired a carriage and horses from the defendant. While it was being used, a bolt in the carriage broke, causing the carriage to overturn. The court instructed the jury that if the defendant took reasonable care to provide a fit and proper vehicle, he was not liable. The jury returned a verdict for defendant, finding that the defect was not discoverable by ordinary inspection. On appeal it was held that the instruction was wrong. According to two of the judges, the defendant had a duty to supply a carriage that was as fit for the purpose for which it was hired as care and skill could make it.[105] Although the lessor was not an insurer against all defects, he was an insurer against all defects against which care and skill could guard.[106]

The more modern view, at least in the United States, is to treat the commercial lessor as if he were a seller.[107] This treatment will, at least, impose a duty of reasonable inspection, and increasingly, subject the commercial lessor to strict liability.[108]

Not surprisingly, the liability of a bailee also depends on antici-

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itous bailor or donor bad not been a deliberately conceived exception to a general principle of liability, but merely an illustration of the undeveloped state of the law of tort in tbe nineteenth century.

Id.

102. 209 Minn. 248, 296 N.W. 136 (1942); *see also The Pegeen*, 14 F. Supp. 748 (S.D. Cal. 1936); Davis v. Sanderman, 225 Iowa 1001, 282 N.W. 717 (1940); Gagnon v. Dana, 69 N.H. 264, 39 A. 982 (1897). *But cf.* Nesmith v. Magnolia Petroleum, 82 S.W.2d 721 (Tex. Civ. App. 1935).

103. PROSSER & KEETON, *supra* note 32, § 104, at 717.

104. [1881] 6 L.R.-Q.B. 685.

105. *Id.* at 688, 690 (Lindley & Mathew, J.J.).

106. *Id.* at 687 (Lindley, J.). The English authorities are far from uniform as to the precise standard of care. There are three standards: (a) reasonable care to make reasonably safe, *see* Felston Tile Co., Ltd. v. Winget Ltd., [1936] 3 All E.R. 473, 477; (b) duty to provide reasonably safe thing, *see* Hyman v. Nye, [1881] 6 L.R.-Q.B. 685; and (c) absolute guarantee of fitness, *see* Chew v. Jones, 10 L.T.R. 231 (1847) (Pollock, C.B.). Whatever standard is applied, however, is certain to be stricter than that to which a gratuitous bailor is held.

107. PROSSER & KEETON, *supra* note 32, § 104, at 715.

108. *See, e.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

pated economic gain. The traditional rule holds that if the bailee receives payment, he will be held to a higher standard of care; at the very least he will be held to a standard of reasonable care,[109] and there is substantial authority that his duty may go beyond this.[110] If, however, the bailment is for the exclusive benefit of the bailor, the gratuitous bailee is liable only for gross negligence.[111]

3. Services Provided Gratuitously

When services are provided gratuitously, the older cases appeared to make a distinction between lay and professional actors. In the case of physicians, the blackletter rule was that "[t]he same standards of skill and care apply in the case of gratuitous patients as in the case of those who pay for the services rendered to them."[112] However, in the case of "non-professionals" who provide services similar to professionals, some courts appeared to be willing to use the lack of economic motivation as a point of distinction. For example, in *Higgins v. McCabe*,[113] a case involving a midwife, the court asserted that "[i]t is often said, that a gratuitous agent is liable for gross negligence only; but, without regard to degrees of negligence, it is plain that the duty imposed upon such an agent is less stringent than when the service undertaken is founded upon a consideration paid."[114] Interestingly, a number of jurists also have sought to reduce the standard of care owed by physicians when the rendering of services was not gratuitous in any sense.[115] As previ-

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109. Searle v. Laverick, [1874] 9 L.R.-Q.B. 122. It should be noted that a common carrier is arguably an insurer of goods entrusted to it. *See infra* note 122 and accompanying text.

110. Brabant & Co. v. King, [1895] App. Cas. 632, 640 (stating that "under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred").

111. Houghland v. Low, [1962] 1 L.R.-Q.B. 694, 698; Campbell v. Pickard, 30 D.L.R.2d 152 (1961); *see also* N. PALMER, BAILMENT 330-39 (1979); G. PATON, *supra* note 101, at 97. *But cf.* Recent Case, *Bailments—Gratuitous Bailments—Degree of Care Required of Bailee*, 34 HARV. L. REV. 82, 83 (1920).

112. 41 AM. JUR. 2D *Physicians and Surgeons* § 207 (1981) (footnote omitted); Annotation, *Duty and Liability of Physician or Surgeon in Pregnancy and Childbirth Cases*, 141 A.L.R. 111 (1942).

113. 126 Mass. 13 (1878).

114. *Id.* at 20. Along the same lines, a number of cases have held that when one voluntarily assumes to care for an injured person, he is liable only for gross or wanton negligence. *See* Stater v. Illinois C. R. Co., 209 F. 480 (M.D. Tenn. 1911); Fitzgerald v. Chesapeake & O. Ry., 116 W. Va. 239, 180 S.E. 766 (1935).

115. *See, e.g.*, Whitehouse v. Jordan, [1980] 1 All E.R. 650 (finding that defendant physician's conduct in having pulled too long and too hard with forceps during a delivery amounted only to "an error of clinical judgment and as such was not negligence" as a matter of law), *rev'd*,

ously noted, the same result may flow from various interpretations of "Good Samaritan" legislation.[116] Once again, it is the desire to protect those who act for noneconomic motives that underlies the reduced liability for gratuitous actors.

4. The Guest Passenger Cases and Statutes

The guest passenger doctrine arose out of either the occupier liability cases, the gratuitous bailment cases, or both.[117] During the latter part of the nineteenth century and early part of the twentieth century, Australian, Canadian, and a few American courts developed legal rules that limited an automobile driver's liability to his nonpaying passengers.[118] The rule protected the driver by requiring a finding of some misconduct more extreme than mere negligence—gross negligence, willful or wanton misconduct, or recklessness—as a condition of imposing liability.

By contrast, when the driver was motivated by economic gain, not only did courts impose liability, but they frequently imposed a higher standard of care. The common carrier cases illustrate this tendency. Although the actual standard of care owed by common carriers to their passengers is probably no more than the normal "reasonable man in the circumstances,"[119] courts routinely have described the duty as that of

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[1981] 1 All E.R. 267, 277 (Edmund-Davies, L.J.) (noting that "where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. If a surgeon fails to measure up to that standard in *any* respect ('clinical judgment' or otherwise), he has been negligent and should be so adjudged" (citation omitted) (emphasis added)); *see also* Note, *The Standard of Skill and Care Governing the Civil Liability of Physicians*, 78 U. PA. L. REV. 91 (1929) (suggesting that early in the development of common-law rules, physicians were liable only for gross negligence).

116. *See supra* text accompanying notes 76-88. A significant number of the Good Samaritan statutes are phrased in terms of a reduced standard of care. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. §§ 5-309(c), 5-310(2) (1984); MONT. CODE ANN. § 27-1-714 (1987); OHIO REV. CODE ANN. § 2305.23 (Anderson 1981); TENN. CODE ANN. §§ 63-6-218, 68-27-202 (1983).

117. Professor Prosser traces the guest laws to the "lower level of care assumed by a bailee in a gratuitous undertaking." *See* PROSSER & KEETON, *supra* note 32, § 34, at 215. Professor Fleming finds the origin in the extension of the "regime of occupancy duties . . . to motorcars and other conveyances." J. FLEMING, *supra* note 42, at 439. Professor Fleming also notes, however, that "the analogy of gratuitous bailments lent some support also to the view that guest passengers could only complain of 'gross' negligence." *Id.*; *see also* Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U. CHI. L. REV. 798 (1976).

118. *See* Moffat v. Bateman, [1869] 3 L.R.-C.P. 115; *see also* West v. Poor, 196 Mass. 183, 81 N.E. 960 (1907); MacArthur, *Gross Negligence and the Guest Passenger*, 38 CAN. B. REV. 47 (1960).

119. *See generally* PROSSER & KEETON, *supra* note 32, § 34, at 209. Professor Prosser argued:

> Although the language used by the courts sometimes seems to indicate that a special standard is being applied, it would appear that none of these cases should logically call for any departure from the usual formula. What is required is merely the conduct of the reasonable person

"the highest degree of vigilance"[120] or "the utmost caution."[121] In addition, some courts have required that juries receive an instruction in terms of a higher or the highest degree of care, and failure to give that instruction may constitute reversible error.[122]

The attempt by some judges to protect the altruist by the formulation of different standards of care did not receive widespread judicial support.[123] However, the legislative support for such a result was overwhelming. According to Professor Prosser, between 1927 and 1939, more than half the states enacted some form of automobile guest statute that protected the negligent driver under circumstances in which providing a ride was not motivated by a desire for economic gain.[124]

Most commonly, writers attribute the enactment of this type of legislation to the lobbying efforts of the insurance industry.[125] However, such an explanation is necessarily incomplete even if partially true.[126] Obviously, there are limits on what lobbyists can accomplish when it comes to relatively high profile legislation, such as that which affects the driving public. Had this type of law been politically unacceptable to the voter, the legislative success never would have approached the level actually reached. Clearly, these laws must have had enormous popular appeal. The principal justification of "hospitality protection" for drivers

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of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care. *Id.* (footnote omitted).

120. Orr v. New Orleans Pub. Serv., Inc., 349 So. 2d 417, 419 (La. Ct. App. 1977).

121. Pennsylvania Co. v. Roy, 102 U.S. 451, 456 (1880).

122. *See, e.g.*, Van Hoose v. Blueflame Gas, Inc., 642 P.2d 36 (Colo. Ct. App. 1982); *see also* PROSSER & KEETON, *supra* note 32, § 34, at 209. It is probably also worth noting in this context that when a common carrier accepts goods to be transported, its duty is so high that they are arguably an insurer of the goods. *See, e.g.*, Convey-All Corp. v. Pacific Intermountain Express Co., Inc., 120 Cal. App. 3d 116, 174 Cal. Rptr. 443 (1981).

123. *See* Comment, *supra* note 117, at 798, 811-14. Only a handful of states adopted differing standards of care by judicial decision. The majority of courts rejected the doctrine by holding that "the automobile driver owed his guest passenger a duty of ordinary care—the same duty owed to such strangers as pedestrians and other drivers." *Id.* at 813.

124. PROSSER & KEETON, *supra* note 32, § 34, at 215; *see also* Comment, *The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges*, 1975 B.Y.U. L. REV. 99 n.1 (collecting statutes).

125. PROSSER & KEETON, *supra* note 32, § 34, at 215; *see also* Stevens v. Stevens, 355 Mich. 363, 94 N.W.2d 858 (1959); Allen, *Why Do Courts Coddle Automobile Indemnity Companies?*, 61 AM. L. REV. 77 (1927); White, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326 (1934).

126. It is not clear why the insurance industry would consider such legislation high priority. While decreased exposure to their insureds resulting from such legislation could result in lower premiums or higher profits in the short run if premiums are unchanged, because all companies within the state market would obtain equal benefit, their competitive position with regard to one another would be relatively unchanged. In fact, supposedly there was no complaint when the laws were repealed in Florida and Vermont. *See* PROSSER & KEETON, *supra* note 32, § 34, at 215; Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 676-78 (1974).

is "based upon the apparent unfairness of permitting an ungrateful *non-paying* guest, perhaps a hitch-hiker, to force a large financial burden upon a possibly uninsured host driver, and the resulting discouragement of hospitality by motorists."[127]

The cases that tend to exculpate the gratuitous actor or nonbusiness donee by holding him to a lower standard of care have never been accepted enough to be considered to be in the mainstream of tort theory. However, their very existence suggests an underlying community belief that it is unfair to impose liability on the altruist and, at the same time, that acting for economic gain is a suspect motivation. As in the case of the immunity rules, this community sense is further illustrated by the legislative response to the general judicial reluctance to use the actor's motive to distinguish between otherwise identical cases. For example, while it was clear to judges in a majority of jurisdictions that a negligent driver should be held to the same standard of care, regardless of whether or not he was acting for economic gain, the majority of state statutes use that same economic gain criterion to bring tort doctrine into line with the community's sense of justice.[128]

C. *Nature and Extent of Damages*

1. The Emergence of an Expanded Concept of Punitive Damages Liability

The motivation of the actor also may explain the sudden emergence of punitive damages liability under circumstances in which punitive damages were unavailable under the common law. Traditionally, formal tort doctrine insisted that the defendant must have acted in a willful or malicious manner in order to justify the award of punitive damages. The award of such damages was possible in cases of assault, battery, deceit, or defamation to name a few. The specific tort, however, is less important than "the defendant's motives and conduct in committing it."[129] Generally, the relevant motive had been one of spite or ill-will—a type described earlier as "noneconomic, second-party focused."[130] During the last twenty years or so, however, a virtual revolu-

127. PROSSER & KEETON, *supra* note 32, § 34, at 215 (emphasis added) (footnote omitted).

128. A similar point was made in Comment, *supra* note 117, at 801. The author asserted that the guest statutes were founded on "conscious legislative decisions to adopt the common law rule which distinguished on the grounds of natural justice hetween the duties of care owed by a host driver who is compensated and one who is not." *Id.*; *see also* Elliot, *Degrees of Negligence*, 6 S. CAL. L. REV. 91, 133 (1933).

The idea of "hospitality protection" frequently is cited as the primary purpose this type of legislation serves. *See* Comment, *supra* note 117, at 800.

129. PROSSER & KEETON, *supra* note 32, § 2, at 11.

130. *See supra* text following note 3.

tion has occurred on both sides of the Atlantic in which the traditional notion that punitive damages should be justified only by "noneconomic" motivation has been either rejected in favor of an economic motivation criterion or supplemented by the addition of an economic motivation criterion.

In the United Kingdom the shift occurred abruptly when the House of Lords decided *Rookes v. Barnard*,[131] and in an unusual departure from established law, abolished punitive damages liability in all but three circumstances. The first and third categories, which are not relevant to the discussion here, permit punitive damages in cases in which public officials have abused or grossly exceeded the scope of their authority and cases in which punitive damages are expressly authorized by statute. The second category, however, allows punitive damages in cases in which "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff."[132] Lord Devlin reasoned that:

> Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded wbenever it is necessary to teach a wrongdoer that tort does not pay.[133]

There are at least two observations worth making with regard to the English position on the availability of punitive damages. First, the decision in *Rookes* did not simply expand the definition of malice, as was done in the United States, in order to provide an additional basis for punitive damages awards. Rather, the decision essentially abolished noneconomic, second-party focused conduct as a basis for punitive damages liability. The only exceptions were for the misconduct of public officials and for express legislation—exceptions that are best explained in political or constitutional terms, such as providing a check on the executive and acknowledging legislative supremacy.

The abolition of noneconomic, second-party focused conduct as a basis for punitive damages drew the greatest criticism from the English judiciary. A judge in the Court of Appeal asked:

> Why should the man who commits a tort calculating that he will make more money

131. [1964] App. Cas. 1129, [1964] 1 All E.R. 367 (Devlin, L.J.); *see also* Bell v. Midland Ry. Co., [1861] C.B.N.S. 287, 304; Williams v. Currie, [1845] 1 C.B. 841, 848; Crouch v. Great N. Ry. Co., [1856] 11 Ex. 742, 759.

132. *Rookes*, [1964] App. Cas. at 1226, [1964] 1 All E.R. at 410.

133. *Id.* at 1227, [1964] 1 All E.R. at 410-11.

> out of it than any damages and costs which he will have to pay be less favourably regarded by the law than the man who, out of venomous malice, commits a tort in order to break an innocent neighbour regardless of the cost?[134]

In fact, the reaction to the House of Lords' abolition of punitive damages in noneconomic, second-party focused conduct cases was so extreme that the Court of Appeal, in a truly remarkable, but ultimately futile effort, sought to declare the decision of the House of Lords to have been invalid.[135]

The second point worth noting is that the English courts have been extremely careful to allow punitive damages only if the particular act alleged was motivated by economic gain. The mere fact that the defendant operates a commercial enterprise and that the tortious act occurred in the course of carrying out that enterprise is not sufficient to justify punitive damages under the new rule. The particular tortious act itself must have been economically motivated.[136]

In the United States the shift has been more gradual, though it may prove to be more significant in the final analysis. The expansion of punitive damages liability to encompass economic gain motivation has occurred in two stages. Traditionally, punitive damages were generally not available in the absence of intentional conduct motivated by malice. Malice was defined as "spite or ill will," what this Article has referred to as noneconomic, second-party focused conduct.[137] In an unrelated series of cases, that standard was altered to allow punitive damages in cases in which the defendant's conduct was best characterized as unintentional and self-focused, but high risk.[138] In circumstances in which the defendant's conduct could be fairly characterized as "wilful, wanton or reckless," courts would treat that conduct as the equivalent of malice

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134. Broome v. Cassell & Co., [1971] 2 All E.R. 187, 205, [1971] 2 W.L.R. 853, 869-70, *rev'd*, [1972] 1 All E.R. 801; *see also* McGregor, *In Defence of Lord Devlin*, 34 MOD. L. REV. 520, 525 (1971) (arguing that "the real purpose hehind Lord Devlin's second category is not the punishment of the defendant but the prevention of his unjust enrichment, and that this category is therefore more appropriately viewed as an extension of the remedies available through waiver of tort and an account of profits").

135. Broome v. Cassell & Co., [1971] 2 All E.R. 187, [1971] 2 W.L.R. 853, *rev'd*, [1972] 1 All E.R. 801. To understand the hasis of the Court of Appeal decision one must keep in mind that until the Practice Statement of 1966, the House of Lords refused to recognize its power to overrule its own decisions. The Court of Appeal judges argued that *Rookes* conflicted with earlier House of Lords decisions and this fact was not considered by the House of Lords in the course of deciding *Rookes*. As a result, it was claimed that the 1964 decision was decided *per incuriam*, and was therefore invalid. *Id.* at 199-200, 2 W.L.R. at 870-71; *see* McGregor, *supra* note 134, at 520-22.

136. *See, e.g.*, Manson v. Associated Newspapers, [1965] 1 W.L.R. 1038, 1045; Broadway Approvals v. Odham Press, [1965] 2 All E.R. 523; *see also* Fridman, *Punitive Damages in Tort*, 48 CAN. B. REV. 373, 386-87 (1970).

137. *See supra* text following note 3.

138. *See generally* Kotler, *Imposing Punitive Damage Liability on the Intoxicated Driver*, 18 AKRON L. REV. 255 (1984).

for purposes of imposing punitive damages liability.[139]

Having modified the traditional punitive damages standard, the question became what type of conduct would prove the existence of a state of mind sufficiently culpable to be the equivalent of malice. Given the long standing suspicion towards those acting for their own economic benefit, it is not at all surprising to find judicial decisions describing manufacturers' design choices based on cost considerations as "malicious" or the "legal equivalent of malice" when those choices were made with the knowledge that persons would be injured as a result.[140]

Gryc v. Dayton-Hudson Corp.,[141] for example, was a products liability case in which a young child was seriously burned when her night gown caught fire. The claim against the fabric manufacturer was based on its failure to treat the fabric with a flame retardant chemical. In finding that the defendant's failure in this regard was sufficiently culpable to support an award of punitive damages, the court stated:

> In April 1968, a letter from an official of [the defendant] explained that satisfactory runs were made with flame-retarded flannelette using various chemicals, but that [the defendant] was not going to use these products until federal law so required because of the cost factor. Plaintiffs' witnesses testified that the cost of flame-retardant fabrics would not make them unmarketable. Thus, it may be inferred from this letter that the decision not to use flame-retardant cotton flannelette was merely an economic one for the benefit of [the defendant].[142]

The argument in favor of imposing punitive damages in these cases focuses on the asserted violation of "basic principles of fairness and morality."[143] At the core of this perceived immorality is the judgment that acting to maximize economic gain or profits by marketing products with the knowledge that injuries will result from the chosen design, despite a willingness to pay the associated costs by compensation of those injured, is immoral.[144] One commentator has claimed:

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139. *Id.* at 256-57.

140. This, of course, ignores the fact that many, if not most, cost-based design choices involve a balancing of product cost and accident cost. *See* G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

141. 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

142. *Id.* at 740; *see also* Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), *modified*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (discussed *infra* at text accompanying notes 198-206); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). *Wangen* is an interesting variation on the same theme. It involved a fuel tank explosion in a 1967 Mustang. Plaintiff alleged that Ford knew of the danger but, nevertheless, refused to recall the model "because Ford wanted to avoid paying the costs of recall and repair and wanted to avoid the accompanying bad publicity." *Id.* at 462. The avoidance of bad publicity is a good example of the "goodwill creating" economic motivation mentioned earlier. *See supra* text following note 3.

143. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1291 (1976).

144. To a certain extent, the attitude expressed by the courts in these cases is contrary to that hypothesized by Professor Keeton. He argued that it is frequently socially acceptable to cause

> [A] manufacturer should [not] be permitted to abuse the rule [allowing for post-accident compensation] flagrantly and with impunity by treating the payment of accident costs merely as a "license fee for the conduct of an illegitimate business." Yet absent the punitive damages remedy, many manufacturers may be tempted to maximize profits by marketing products known to be defective and to absorb resulting injury claims as a cost of doing business.[145]

While many of the problems associated with this argument will be discussed shortly,[146] it is worth noting that the threshold question of whether a product is "defective" is itself frequently answered with reference to the same type of cost-benefit analysis that is condemned in the course of urging a punitive damages solution.[147]

2. Restrictions on Damages in Medical Malpractice Claims

During the mid-1970s, in response to what was called a "medical malpractice crisis,"[148] many state legislatures enacted highly restrictive "tort reform" legislation establishing specialized procedures that a plaintiff must follow to pursue tort causes of action against physicians and other health care professionals.[149] In addition to the "procedural reforms" that were simply hurdles placed in the path of the injured individual, many legislatures expressly limited the damages available to victims of medical malpractice.[150]

Substantial similarities exist between the automobile guest statutes of the first part of this century and the damages limitations in actions against physicians enacted almost fifty years later. The automobile guest statutes sought to protect the altruistic driver from liability by reducing the standard of care the driver owed to his guest. The malpractice statutes arbitrarily limited the damages recoverable from the

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harm under circumstances in which the tortfeasor is able and willing to compensate the victim. *See* Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

145. Owen, *supra* note 143, at 1291 (footnotes omitted); *see also* Owen, *supra* note 9, at 26 (stating that "when a manufacturer knowingly sacrifices the public's greater safety interests to reap a profit that it knows is worth much less, punitive damages are in order").

146. *See infra* text accompanying notes 196-206.

147. Professor Owen himself recognized this problem in his 1982 article. *See* Owen, *supra* note 9, at 24-25, 34. *See generally* Phillips, *The Standards for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101 (1977).

148. Interestingly, at the height of the "crisis," one study estimated that only 2.4% of all patients who sustained hospital injuries because of negligence receive any compensation. *See* Brook, Brutoco & Williams, *supra* note 88, at 1208.

149. *See generally* Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 805 (1979); Comment, *An Analysis of the State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417.

150. *See also* FLA. STAT. ANN. § 768.54 (West 1986); IND. CODE ANN. § 16-9.5-2-2(b) (Burns 1975); LA. REV. STAT. ANN. § 40:1299.42(B)(2) (West 1977 & Supp. 1987); N.D. CENT. CODE § 26.1-14-11 (Supp. 1987); WIS. STAT. ANN. § 655.23 (West 1980 & Supp. 1987). *See generally* Grossman, *State-by-State Summary of Legislative Activities on Medical Malpractice*, in A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 12 (D. Warren & R. Merritt eds. 1976).

health care provider. However, it is quite clear that there is a significant factual distinction between the individual protected by the guest statutes and those protected by the malpractice legislation. The former dealt with the individual who gratuitously provided services, while the latter concerns the delivery of health care services, which is clearly a "for profit" transaction.

Because of the "for profit" nature of health services, these two examples of legislation may appear to be inconsistent with the economic motivation argument. In fact, some commentators made this assertion. In a Comment dealing in part with the constitutionality of the states' "malpractice crisis" legislation, the author observed initially that the 1929 case of *Silver v. Silver*[151] upheld the constitutionality of the guest statutes. It was then argued that:

> Since guest statutes completely eliminate a guest's right of action for his host's merely negligent conduct, they can be viewed as a much more drastic measure than the recovery-limiting statutes, which permit at least some recovery. Thus, if the guest statutes withstand due process objections under the Constitution, it would appear that a recovery-limiting statute should also be valid.[152]

However, the circumstances were different, the author argued, in "that guest statutes apply only to drivers who provide gratuitous services, a situation which is seldom found in the provision of health care."[153]

The similarity between the two types of legislation is greater, however, than that writer realized. The factual distinction is, of course, correct. The two protected classes, however, are treated similarly because both the driver's and the physician's conduct is perceived to be altruistic, notwithstanding the factual difference. This perception is far more important than the reality. Neither the host driver nor the physician is perceived to be acting for economic gain, and the legal rule reflects this perception.

The fact that such legislation continues to have broad support, notwithstanding the rather significant equal protection objections,[154] can be explained by the popular perception of physicians as altruists. It is indeed a curious phenomenon that physicians are able to retain the image of altruism notwithstanding the well-known fact that physicians as a group are one of the highest paid professions.[155]

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151. 280 U.S. 117 (1929). *But cf.* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (holding the California guest statute unconstitutional).

152. Comment, *supra* note 149, at 1421.

153. *Id.* (footnote omitted).

154. *See* Note, *supra* note 149; Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143 (1981).

155. BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 93, table 145 (1987) (estimating the average gross income for physicians in

There may be another relationship between the "malpractice crisis" and the perception of physicians' altruism. Some studies have found that "patients who sued doctors reported that the doctors had been unresponsive [to their complaints concerning the outcome of treatment] and had insisted on large payments despite adverse results."[156] It is at least plausible that a patient's decision to file a malpractice suit against the physician is linked to the disillusionment that occurs when a patient's erroneous perception of the physician's altruism is corrected.

III. The Alternative Explanations

At least four separate, though related, theories, in addition to the economic motivation theory, provide possible explanations of the foregoing legal trends. These are: an implied representation and warranty theory; a rationality and intentional conduct theory; a consent and waiver theory; and an economic justification based on notions of internalization of costs and loss spreading.

A. Implied Representation and Warranty

Traditionally, the "implied representation" explanation for some of the legal rules discussed has been one of the most frequently mentioned alternatives to the economic motivation explanation. The *Second Restatement of Torts*, for example, adopted the implied representation theory to explain the disparate treatment of licensees and business invitees.[157] Professor Prosser explained that the reason for imposing on an occupier of land a higher duty of care to a business invitee than to a licensee is not because of the potential pecuniary benefit to the occupier in the former case, but rather because of an implied representation by the occupier.[158] That is, when one holds open his land to others for his own purposes, he represents or warrants implicitly that it is safe for certain purposes.[159]

The appeal of this theory is that it also provides a plausible explanation for some of the other types of cases discussed in Part II of this

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1984 to be $181,300).

156. Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 Duke L.J. 1179, 1183; *see also* Note, *supra* note 71, at 1307 (noting that one study suggests "that certain physicians tend to encourage suits both by charging excessive fees and by falling farthest away from the popular image of a 'model' doctor").

157. Restatement (Second) of Torts § 332(2) (1979).

158. Prosser & Keeton, *supra* note 32, § 61, at 420; *cf. supra* note 97 and accompanying text (discussing explanation given by the *First Restatement*). *See generally* Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. Pa. L. Rev. 142 (1920). Professor Bohlen was the Reporter for the *First Restatement of Torts*.

159. Prosser & Keeton, *supra* note 32, § 61, at 422.

Article. For example, it could explain the liability of the chattel producer or supplier in a commercial context. In addition, the modern notion of strict liability in tort for defective products has its roots in notions of implied warranty and warranty "running with the product."[160]

This theory of implied representation, however, is simply nothing more than another manifestation of the economic motivation theory that this Article advances. Consider, for example, the disparate treatment given to bailors for hire and gratuitous bailors.[161] Bailors for hire are held either to a traditional negligence standard, including a duty to inspect, or to a strict liability standard.[162] Gratuitous bailors generally are not under an obligation to inspect and discover.[163] Suppose each provides a defective product to a potential victim—why claim that the former has warranted the safety of the product, but the latter has not? The answer must lie in the fact that the former was economically motivated but the latter was not. Once economic motivation is established, it then seems to many people to be appropriate to impose a higher standard of care. Inasmuch as the defendant's economic motivation underlies both those rules, which depend on contractual notions of consideration and tort rules pertaining to enhanced liability and damages, seeking to explain the tort rules in terms of the contract principle fails to recognize the common denominator and shared origin of both rules.[164]

Furthermore, an implied representation rationale simply fails to explain some of the rules. For example, while it may be clear that strict liability in tort for a "defective" product is the functional equivalent of implied warranty once the warranty is freed from privity requirements, it fails to explain the availability of an enhanced damages remedy when the "warranty" has been breached for the economic benefit of the warrantor. Similarly, it is difficult to explain the immunity rules in terms of any real or imagined representation made by the defendant.

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160. *See, e.g.*, Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 246, 147 N.E.2d 612, 614 (1958) (action on express warranty not defeated by lack of privity); *see also* Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943). The "warranty" aspects of strict liability in tort for "defective products" are also apparent in those cases in which the courts have adopted a "consumer expectation" test for a finding of "defect."

161. *See supra* text accompanying notes 100-07.

162. *See* PROSSER & KEETON, *supra* note 32, § 104, at 715-17.

163. *See id.* at 717-18.

164. *See* Winfield, *supra* note 59, at 85; *see also supra* note 54 and accompanying text.

B. *The Rationality Model and Intentional Conduct*

Professor William Rodgers has offered two models of tort liability.[165] The first, which he refers to as "the rational decisionmaking model," exists in situations in which "the key ingredients of rational action" exist. These are identified as "foreknowledge of risks, identification of options, deliberate assessment of costs and benefits, and calculated choice over a period of time. . . . [T]ypically [this model] involves a firm, acting over time, aware of regularly recurring risks and faced with investment decisions about reducing those risks."[166] The second model is the "nonrational decisionmaking model" in which the alleged tortfeasor's conduct is "the product of reflex, habit, or snap judgment."[167] According to Professor Rodgers, the rational decisionmaker should be subject to strict liability, while the nonrational decisionmaker should be held only to a "subjective best efforts" standard.[168]

Quite obviously, there is a substantial overlap between this Article's economic motivation explanation and Professor Rodgers' "rational decisionmaking" model. The reason for the overlap is simply that most individuals who are motivated by a desire for economic gain are also rational actors in their attempts to realize that gain. Most of those individuals described as "typical"[169] will fall into both the "rational" and the "economically motivated" categories. Conversely, there is also a substantial overlap between those in the "nonrational decisionmaking model" and the "self-focused, noneconomically motivated" classification.[170]

Distinguishing between the rationality or nonrationality of the actor, however, does not explain the outcome of cases in which the conduct is rational but altruistic. Professor Rodgers seems to assume that altruistic conduct will always fall within the nonrational model, but this is not necessarily true.[171] For example, the rationality model does not

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165. Rodgers, *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1 (1980).

166. *Id.* at 6 (footnote omitted). It is not at all clear to what extent Professor Rodgers would insist on the "acting over time" element. It is assumed for purposes of this discussion that it is a common feature of the cases involving the rational actor, but not an essential ingredient to the finding of "rationality." The reason for this assumption should be reasonably obvious. If a new company begins its business hy making a conscious design choice as to the product it plans to market, presumably it will fall into the "rationality model" even if it goes out of business shortly thereafter. Similarly, a one-time individual actor might also know and identify risk, identify options, and indulge in a cost-benefit analysis. If this should occur, presumably his conduct would be judged to be closer to the rationality model than to its alternative.

167. *Id.*

168. *Id.* at 7.

169. *Id.*

170. *See supra* text following note 4.

171. Professor Rodgers draws heavily upon the rescue cases in seeking to isolate the charac-

explain the charitable immunity doctrine. While the charitable immunity example is an extreme case, one also could envision a situation in which a physician, for example, has an opportunity to behave as a "Good Samaritan," yet have sufficient time to make rational decisions using his superior level of training and skill. The rational decisionmaking model would impose strict liability on the charitable enterprise and the hypothetical unhurried, calculating physician. However, as noted earlier, the case law development and legislative reaction has not followed this pattern.[172] As descriptive devices, the rational and nonrational models are, at the very least, incomplete.

In addition to arguing that the elements of "rational decisionmaking" by themselves justify, or at least explain, harsher treatment under tort doctrine, one could also plausibly assert that when a risk creating actor is motivated by desire for economic gain, "intentional conduct," or at least some state of mind that approaches "intent," must exist.[173] Inasmuch as liability and damages rules tend to treat intentional misconduct more harshly than inadvertent misconduct, the rules that give rise to increased liability or increased damages are arguably related more to the existence of intent than to the existence of a profit motive.

Like the rationality model, an intentionality rationale can explain only a portion of those cases in which the perceived existence of a profit motive seems to be related to certain harsher liability or damages rules. For example, in the course of justifying the imposition of punitive damages, courts often analogize the conduct of the product manufacturer that makes a conscious design choice to a person who commits a battery.[174] Such an analogy, to the extent that it works at all, can only be said to work in a very limited class of cases. For example, the level of "intentionality" of the gratuitous donor or bailor and the vendor or

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teristics of the "nonrational" actor. *See* Rodgers, *supra* note 165, at 20-21. Perhaps for this reason, he does not consider the "professional altruist."

172. *See supra* text accompanying note 77.

173. Problems arise when one deals with cases in which the defendant lacks subjective intent, but the conduct is more than mere negligence. The first part of the problem is merely evidentiary. That is, when one denies that he intended the consequences of his act, should he be believed? Courts have dealt with this problem more or less satisfactorily through use of the familiar assertion that one "is presumed to have intended the natural and probable consequences" of his conduct. *See* R. DIAS & B. MARKESINIS, TORT LAW 170 (1984). *But cf.* PROSSER & KEETON, *supra* note 32, § 8, at 36 (asserting that a jury instruction to that effect is "plainly incorrect"). The more difficult problem arises when the finder of fact is convinced that while anyone else would have realized the probable or inevitable consequences, the particular defendant did not. Under these circumstances, the courts have been forced to equate high risk misconduct with intentional misconduct even though they clearly involve different states of mind. *See, e.g.*, R. v. Parker, 63 Crim. App. 211, 214 (1976); *see also* Note, *supra* note 6.

174. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820-21, 174 Cal. Rptr. 348, 388 (1981) (asserting that "[u]nlike malicious conduct directed toward a single specific individual, Ford's tortious conduct endangered the lives of thousands of Pinto purchasers").

bailor for hire must be judged the same. Similarly, the degree to which a land occupier can be said to be acting intentionally is no different regardless of whether the injured person is an invitee or a licensee. Nevertheless, the doctrinal distinctions that have been made in these cases are clear.[175] Thus, it is necessary to conclude that the relevant distinction between these cases must not be whether the actor's conduct is deemed to be intentional or unintentional or rational or irrational, but whether or not the actor was economically motivated.

C. *Consent and Waiver*

While the implied warranty and representation explanation focuses on the defendant's conduct, some courts have focused on the plaintiff's conduct to explain the existence of some of these rules. Specifically, the issue arises as to whether the injured plaintiff has in some sense agreed to assume the risk.[176] To test the validity of this theory as an alternative explanation to economic motivation, it is necessary to consider whether the notion of consent can be used to explain the disparity between the rules of law that have developed in those cases in which the defendant is not economically motivated and those cases in which the defendant is economically motivated. For example, can the nonliability of a gratuitous donor of a chattel be explained in terms of the plaintiff accepting the risk inherent in the gift? Could the charity patient be said to have assumed the risk of negligent treatment?

Although some courts have relied on such a theory,[177] it is obviously subject to criticism.[178] Not only is it unlikely that the beneficiary of an altruistic act assumed the risk, it is also unlikely that the beneficiary of the act knew of the risk. In the absence of some link between the gratuitous or non-gratuitous nature of the risk creator's act and the knowledge or lack of knowledge of that risk on the part of the injured

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175. *See supra* text accompanying notes 95-111.

176. *See supra* note 39 and accompanying text. It is worth noting that Professor Rodgers has argued that assumption of risk should be a valid defense in cases in which the plaintiff's conduct falls into the "rationality model." *See* Rodgers, *supra* note 165, at 26.

177. *See, e.g.*, Schloendorff v. New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914) (discussed at *supra* text accompanying notes 38-40 & 89-90); *see also* Powers v. Massachusetts Homeopathic Hosp., 109 F. 294 (1st Cir.), *cert. denied*, 183 U.S. 695 (1901); Wilcox v. Idaho Falls Latter Day Saints Hosp., 59 Idaho 350, 82 P.2d 849 (1938); St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924); Forrest v. Red Cross Hosp., 265 S.W.2d 80 (Ky. 1954); Duncan v. Nebraska Sanitarium & Benevolent Ass'n, 92 Neb. 162, 137 N.W. 1120 (1912).

178. *See* W. PROSSER, *supra* note 34, at 994 (observing that "apart from any question whether a sick or injured man is competent to assume such a risk, the 'waiver' theory again, in many cases, does violence to the facts. The patient goes to the hospital because he expects better care than he would receive at home, and certainly does not in reality consent to be treated with negligence"); *see also* Lindler v. Columbia Hosp., 98 S.C. 25, 32, 81 S.E. 512, 514 (1914) (Fraser, J., dissenting).

individual, any attempt to explain different treatment of cases on the basis of a consent theory must necessarily fail. It has been correctly reasoned that "[i]f A gives a firework with a lighted fuse to B, and the firework explodes in B's hand, B may be precluded from suing A by reason of the doctrine of *volenti non fit injuria*; but A would equally not be liable if he had sold the firework in this condition."[179]

D. The Instrumentalist Justifications: Loss Spreading and Internalization of Costs

At this point, it becomes necessary to analyze differently the various manifestations of the societal suspicion of the economic gain motivation. As noted in Part II of this Article, the different manifestations include distinctions in liability rules and distinctions in damage rules. While some of the rules that result from this social bias against economic gain motivation are logically indefensible, some result in the internalization of costs, which spreads those costs over an appropriate group of consumers.[180] Thus, the result may be defensible, regardless of the reason for it.

Compare, for example, the liability of the gratuitous bailor to the liability of the bailor for hire in light of the instrumentalist goal of internalization of accidents costs. Consideration of an actor's motivation serves to further the goal of internalization by assigning liability to the profit seeking enterprise. In other words, the central problem facing the enterprise liability theorist is determining which costs should be assigned to which enterprise. Historically, attempts to solve the problem can be observed in the formulation of agency principles that sought to assign the costs of an agent's activities to his principal. The "test" developed was whether the agent's act was done in the course and scope of his principal's enterprise.[181] The course and scope of employment issue was resolved traditionally by inquiring whether the agent's conduct was for the principal's benefit. The principal's benefit frequently meant the principal's pecuniary advantage, although pecuniary benefit never became firmly entrenched as part of the legal doctrine.[182] Because the cases frequently involved a principal who was engaged in a profit seeking activity, furtherance of the principal's goals meant furtherance of

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179. Marsh, *supra* note 101, at 49.

180. For the purposes of this Article, Professor Calabresi's definition of "internalization" (*i.e.*, placing the cost of an accident on the party who is in the best position to avoid that cost) will be used. *See generally* G. CALABRESI, *supra* note 140; Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

181. *See, e.g.*, PROSSER & KEETON, *supra* note 32, § 70, at 501-02. *See generally* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 141 (1964).

182. *See supra* notes 34-35 and accompanying text.

his profit seeking activity. Similarly, it is not inconsistent with an internalization goal to assign accident costs flowing from leased chattels to the commercial lessor, even though other assignments of cost may be preferable. On the other hand, the gratuitous bailor is probably not a commercial lessor, and the assignment of accident costs to him will probably not result in cost spreading over a consumer group.[183]

This is also probably true in the occupier liability cases. If a pecuniary benefit inures to the occupier, it is not inappropriate that he internalize and then spread the cost. The accident costs of a true social guest on the same premises, however, are generally not part of the occupier's enterprise, and thus there is a defensible reason not to require him to internalize those costs.

Just as the legal rules that can be explained by the "rationality model" overlap substantially the rules that can be explained by the economic gain motivation theory,[184] the rules that can be explained in terms of economic gain motivation also overlap the rules that can be explained in terms of the instrumentalist notions of loss spreading through an enterprise liability system. Again, the reason is fairly obvious: just as those seeking economic gain generally are rational actors, those seeking economic gain frequently are in the best position to absorb losses and spread them through the mechanism of increased prices of the products produced by the profit seeking enterprise. The problem with the instrumentalist justification in this context, however, is that the liability and damages rules, which appear to be based on the existence of economic gain motivation, are not limited to those cases in which instrumentalist goals will be realized.

There are two reasons for this. First, the legal rules that have developed tend to disfavor not only those who are acting for economic gain, but also those who are inaccurately perceived to be acting only for economic gain.[185] Even more significantly, the converse is true. Those perceived to be acting altruistically are exempted from normal liability and damages rules even under circumstances in which it is clear that their conduct is economically motivated.[186]

The instrumentalist rules are formulated without regard for or consideration of this built-in legal bias. The inquiries are functional ones—if liability is assigned to a given enterprise, will it be able to

183. The exception to this rule would occur when the gratuitous bailor was acting to create goodwill, in which case his conduct is economically motivated, and thus, he should be treated as an economically motivated actor.

184. *See supra* text accompanying notes 169-70.

185. *See supra* text accompanying note 8 and text following note 153.

186. *See supra* text accompanying notes 70-94 & 148-56; *see also infra* text accompanying notes 191-94.

spread the cost through increased prices?[187] Will a given enterprise be able to insure against the risk?[188] Will assignment of liability exert a general deterrent pressure?[189] The motivation of the actor plays no role in answering any of these questions, nor is there any reason why it should. Allowing the economic or noneconomic motivation of the actor to influence the choice of the liability or damages rule can serve only to distort a system based on the instrumentalist considerations.

Furthermore, it is clear that instrumentalist concerns are unable to justify either the enhanced damages remedies or the artificial limitations on damages spawned by the suspicion of those who are economically motivated. Notions of cost internalization depend on accurate quantification of costs, as well as the appropriate assignment of costs to cost generating activities. When there are artificially inflated damages, as in the case of punitive damages, accurate quantification is not possible.[190] When there is an artificial limitation on damages, rational assignment of cost to a given activity also is not possible, which invariably results in the externalization of some costs.

IV. Profit Motive and the Law and Economics School

The "law and economics" movement makes three separate, though related, claims regarding "economic motivation" that are relevant in this Article. The first is the purely descriptive assertion that individuals and business entities act to maximize their gain. This form of conduct is described as wealth maximization, profit maximization, or, for those economists who seek a somewhat broader application of the underlying theory, "utility maximization."[191] The second assertion, also descriptive, is that the common-law judges have, in fact, been formulating legal doctrine to further the wealth maximization goal.[192] The third is the normative judgment that courts should formulate legal doctrines that allow maximization of wealth.[193] This assertion is based on the disputed claim

187. *See, e.g.*, Morris, *supra* note 64, at 1176-77.

188. *Id.*; *see also* Ehrenzweig, *Negligence Without Fault*, 54 Calif. L. Rev. 1422, 1462 (1966) (proposing that liability be assigned to an enterprise "if the harm was of a kind which could have been calculated—and therefore insured against—as typical for the particular enterprise").

189. *See, e.g.*, G. Calabresi, *supra* note 140, at 244-65.

190. One reply to this argument posits that punitive damages are necessary because claims are not made for all injuries, especially minor injuries. Thus, by inflating the damages in some cases, it makes up for the costs in other cases that should be internalized but are not. *See infra* text accompanying note 211.

191. *But see* Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. Legal Stud. 103 (1979)(distinguishing utilitarianism and the wealth maximization principle).

192. R. Posner, *supra* note 4.

193. Posner, *supra* note 191; *see also* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, in Law, Economics, and Philosophy: A Critical Introduction, with Applications to the Law of Torts (M. Kuperberg & C. Beitz eds. 1983). *But*

that the public has consented implicitly to the formulation of rules that further wealth maximizing activities.[194]

Quite apart from the question of which philosophical position is better, however, is the validity of the second descriptive assertion in view of the social bias against economically motivated conduct.[195] The shortcomings of the descriptive power of economics theory as applied to the judicial formulation of tort doctrine is nowhere more apparent than in the recent expansion of corporate punitive damages liability for the marketing of "defective" products.

The economists' position on punitive damages for unintentional conduct is entirely predictable given their basic assumptions. First, it is argued quite appropriately that society does not seek to avoid all accidents, but only "inefficient" accidents.[196] Prohibiting punitive damages in negligence cases is "consistent with the economic criterion implicit in the Hand formula. If the defendant's liability exceeded the expected accident cost, he might have an incentive to incur prevention costs in excess of the accident cost, and this would be uneconomical."[197] When confronted with a situation in which it appears that a defendant has done precisely what the economists assert the defendant should be doing, judges and jurors reject the notion that such economically efficient behavior is socially acceptable behavior.

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compare Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) *and* Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980) *with* Posner, *The Value of Wealth: A Reply to Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980).

194. *See* Dworkin, *supra* note 193; Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 1980 HOFSTRA L. REV. 563. Professor Dworkin argues that "counterfactual consent," *i.e.*, the "proposition that I would have consented had I been asked," is not consent at all and will not justify the judicial application of a wealth maximization principle. *Id.* at 575.

195. The first descriptive assertion also may be questionable, particularly if one seeks to distinguish "wealth maximization" from "utility maximization" as Professor Posner has done. For example, while an altruist is, hy definition, one "who derives utility" from his conduct, it is not clear in what sense he could be said to he acting to increase his wealth. *But see* Posner, *supra* note 191, at 123-24; Landes & Posner, *supra* note 77, at 95.

196. G. CALABRESI, *supra* note 140, at 17-18; *see also* Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973).

197. R. POSNER, *supra* note 4, at 143. Significantly, punitive damages are deemed appropriate under certain conditions. If the defendant's conduct is intentional, punitive damages serve the function of preventing one from "substituting legal for market transactions." *Id.* Thus, for example, if I decide that I want your automobile, a mechanism is necessary to prevent me from simply taking it and allowing you to sue me for conversion. Given the fact that I can ascertain your identity, efficiency considerations require me to negotiate a mutually agreeahle price, which assures that the chattel is in fact more valuable to me and, at the same time, avoiding the transaction cost of enmeshing both of us in the legal system. The legal mechanism, it is argued, is punitive damages liahility.

Such a rationale, however, is clearly inapplicable to transactions in which the identity of the potential plaintiff is not known in advance or the class of potential plaintiffs is too large to make individual negotiation feasible.

In *Grimshaw v. Ford Motor Co.*,[198] for example, Ford was alleged to have engaged in a premarketing cost-benefit analysis, balancing the production cost of increasing the safety of the fuel tank design against the company's anticipated liability for personal injury and property damage if an automobile were marketed without the design changes. Having concluded that the cost of design change would be more than the cost of accidents, Ford marketed the Pinto without incorporating the safety features, which the plaintiffs asserted would have prevented their injuries.[199] The jury's response was to find Ford liable for compensatory damages and 125 million dollars in punitive damages.[200] On appeal, the punitive damages award as modified by the trial judge was affirmed. Commenting on the defendant's cost-benefit analysis, the court asserted:

> There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.[201]

The basis of this decision is fundamentally inconsistent with the economists' vision of the suitability of punitive damages, not simply a variation on the justifications that economists themselves have developed. In upholding the award of punitive damages, the court implied that the case was analogous to an intentional misconduct case.[202] It would follow then, that the economic justification for punitive damages—not permitting the defendant to substitute the legal system for the market place—would be applicable.[203] While there may well be valid reasons for treating certain types of conduct as the legal equivalent of intentional conduct,[204] the foregoing justification is inapposite under these circumstances. The simple fact is that, outside the legal system, there is no market for the right to inflict pain or injury.[205] Furthermore, because victims are not known in advance and their identities cannot be ascertained in advance, any discussion of punitive dam-

198. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

199. *Id.* at 790-91, 174 Cal. Rptr. at 369-70.

200. On a motion for new trial, the trial judge found the punitive damages excessive and reduced that portion of the verdict to $3.5 million. *Id.* at 772, 174 Cal. Rptr. at 358.

201. *Id.* at 813, 174 Cal. Rptr. at 384.

202. *Id.* at 820-21, 174 Cal. Rptr. at 388; *see also supra* note 174 and accompanying text.

203. *See supra* note 197.

204. *See generally supra* text accompanying notes 141-45.

205. One colleague has gone so far as to argue (semi-seriously) that there is a rather specialized market for pain in the S & M bars and bathhouses. Nevertheless, I think we can generally agree that this represents such a highly idiosyncratic market that any values established lack applicability to the general public.

ages as a mechanism of prohibiting the nonconsensual trafficking in the right to injure is simply a clever metaphor and nothing more.[206]

The other justifications for permitting punitive damages advanced by the economists prove too much. The first is that punitive damages are acceptable when the damages are nonmonetizable. The second is when the damages are concealable.[207] The nonmonetizability claim arises when it is more difficult than usual to assess the economic value of the plaintiff's damages, even though the circumstances are such that the community is prepared to concede that damage has in fact been done. The classic example is the extent of the injury to a plaintiff's reputation in a defamation case.[208] To the extent that "nonmonetizability" provides a justification for punitive damages, the justification depends not only on the difficulty in assessing damages, but also on the belief that attempts to quantify the damages will be on the low side, which provides an inadequate deterrent.

While there is undoubtedly a "monetizability" problem in all personal injury litigation, the problem is certainly no greater in the cases involving noneconomic, self-focused conduct found in the ordinary negligence case than in the economic, self-focused cases, such as the design choice cases. From the standpoint of the law and economics school, punitive damages in products liability cases would be considered either counter-productive,[209]or should be allowed in all personal injury litigation. Furthermore, given the suspicion with which jurors treat those who act with economic motivation, even in the absence of punitive damages, there tends to be a "punitive element" present in awards of compensatory damages in design cases.[210] To the extent that the economists would require a tendency toward underestimating compensatory damages as a condition for punitive damages, it is clear that no such tendency exists.

The concealability argument also fails. If the occurrence of damages is concealable, for example, in theft cases in which the tortfeasor generally is not going to be required to pay for the damages he causes, the economists urge that punitive damages be allowed so that the actual damages paid begin to exceed the actual damage caused in order to persuade the tortfeasor to choose the low transaction-cost market over the

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206. *See supra* notes 144-45 and accompanying text.

207. *See* R. POSNER, *supra* note 4, at 143.

208. *Id.*

209. *See, e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 49 (1982); *see also* Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982).

210. Interestingly, English law expressly allows for the recovery of "aggravated damages" in these circumstances. *See generally* WINFIELD & JOLOWICZ, *supra* note 1, at 616.

high transaction-cost judicial system.[211] However, as in the case of monetizability, there is no reason to believe that damages are any more concealable in the intentional design cases than in any other type of personal injury litigation.

In *Grimshaw*[212] the result could perhaps have been justified by claiming that the figures used were inappropriate. In other words, it could be argued that Ford's cost-benefit analysis was in some sense reprehensible because the values assigned to human life were set too low. There are several problems with this argument. First, the numbers Ford chose, while obviously open to debate, were at least not so low as to be counter-intuitive.[213] More importantly, however, the punitive damages award seems to reflect an abhorrence of the fact that Ford engaged in the cost-benefit analysis at all, not that it was done improperly. The argument is not that Ford was callous in undervaluing human life, but that they were callous in considering its value at all. However, if the Hand formula, or any similar cost-benefit procedure used to determine the existence or nonexistence of negligence or product defect, is to have any meaning at all, such a valuation is not only unavoidable, but is an integral part of the decisionmaking process.[214]

The descriptive failure of economic theory is not limited to punitive damages. The shortcomings of economic theory as a descriptive tool also can be observed in the judicial formulation of rules concerning "nonfeasance immunity." Interestingly, the leading exponents of the law and economics movement recognize that the doctrine of nonfeasance immunity frequently may frustrate the efficiency objective. Unfortunately, they then reject the obvious explanation of the rule in a futile attempt to deny the existence of the "second tendency" in the formulation of tort doctrine.[215] Professor Richard Posner, for example, uses the example of a pedestrian who observes another pedestrian who is about to be hit by a falling flower pot. The first can prevent injury to the second simply by shouting a warning. Under the "nonfeasance immunity" rule, however, there will be no liability for his failure to shout the warning. Under such circumstances:

> The expected accident cost is high, the cost of my taking the precaution that would avert it trivial. Nonetheless I am not liable. The result *seems* inconsistent with the

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211. R. POSNER, *supra* note 4, at 143.

212. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). For a discussion of *Grimshaw*, see *supra* notes 198-202 and accompanying text.

213. The cost-benefit analysis was based on the figures of $200,000 per life and $67,000 per injury. *See* W. KEETON, D. OWEN & J. MONTGOMERY, *supra* note 60, at 490 (reprinting Ford's famous corporate memo).

214. *See supra* note 140 and accompanying text.

215. The two tendencies, noted earlier, are wealth maximization, on the one hand, and suspicion of the economic gain motivation, on the other. *See supra* notes 13-15 and accompanying text.

> economic standard implicit in the Hand formula. Had transaction costs not been prohibitive the endangered pedestrian would surely have paid me enough to overcome my reluctance to utter a warning cry. To make me liable, therefore, would seem to increase value. Nor would there be a difference in principle if the attempt to warn or rescue might endanger the rescuer (and hence expected cost of precautions) is less than the danger to the person in distress (and hence expected accident cost), then the rescue will increase value—at least if the lives of the two parties are equally valuable or the life of the victim more valuable.[216]

The apparent inconsistency between common-law doctrine and the application of wealth maximization principles is rationalized by claiming that altruists would not respond to persons in distress if they knew that they would be subject to liability for not responding because then they would not get the satisfaction of being recognized as altruists.[217] Furthermore, potential rescuers, if subject to liability, might start avoiding places such as beaches, "for fear of being legally compelled" to come to another's rescue when it involves a risk to themselves.[218]

The foregoing theory fails because it attempts to explain the legal rule in terms of the rescuer's motivation rather than in terms of the rulemaker's perception of the rescuer's conduct. In the course of the explanation, therefore, dubious assumptions must be made about why the actor acted and what sort of things people think about before they act. It seems much more plausible to explain the rule of no liability as an after-the-fact reward offered to the rescuer because the rulemakers like what he has done. In short, the "nonfeasance immunity" rule "seems" inconsistent with the "economic standard implicit in the Hand formula" because it is inconsistent with the economic standard.[219]

However, the inability of the economist's model to explain the no liability rule in the rescue cases is arguably very different from the failure of the model to explain the emergence of punitive damages in product liability cases. In the rescue cases, in addition to the preference for the altruist, an independent value is furthered. Personal autonomy is chosen over efficiency, and, on this basis, the legal rule becomes defensible.[220] In the case of punitive damages liability, however, one value is

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216. R. POSNER, *supra* note 4, at 131-32 (emphasis in original).

217. *Id.* at 132.

218. *Id.* at 132-33; *see also* Landes & Posner, *supra* note 77, at 120-24.

219. *See* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 189 (1973) (arguing that absence of liability is inefficient and irreconcilable with economic theory).

220. *See* Linden, *supra* note 53, at 242 (explaining that the rule developed because "tbe judges were dubious about trying to enforce unselfishness because this was too much an infringement of person freedom"); *see also* Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111-13 (1908).

Professor Linden also points out some of the administrative problems in requiring rescue. He notes:

> [I]t is rather difficult to select which one of the many individuals on a crowded beach should bear the responsibility to tbe man who drowns in full view of them all or to the man who starves to death in a metropolis. Moreover, there are difficulties in defining what degree of

not being chosen over another. Rather, the emergence of punitive damages liability reflects a triumph of the social bias against the economically motivated over the establishment of a rational cost allocation procedure.

V. Conclusion

This Article has attempted to articulate several points. The first was to demonstrate that a social bias exists against those whose conduct is perceived to have been motivated by a desire to achieve economic gain, either as an immediate or long range objective. Conversely, the existence of this tendency can be seen as favoritism toward those whose conduct is perceived to be motivated by a desire to confer a benefit on another without any expectation of pecuniary reward.

The legal rules that have grown out of this tendency have been classified as immunity rules, standard of care rules, and damages rules, although this classification scheme is admittedly somewhat arbitrary. It also would have been possible, for example, to have classified the rules in terms of the source of the economic gain—whether the gain flows from the plaintiff to the defendant or from some third party to the defendant. As indicated, those legal rules, like the privity requirement, which links the imposition of liability to the existence of an economic exchange, serve to ensure that no burden will be imposed on the individual who does not act for economic gain. A similar relationship can be seen in the charitable immunity rules that excluded those who were not beneficiaries of the altruism, as well as in the "pre-existing physician-patient relationship" requirement of the malpractice legislation, and in some of the other legal rules that have been mentioned.

Second, a pattern has emerged which indicates that this community bias against those motivated by economic gain translates into judicially and legislatively formulated tort doctrine. When courts abandon or repudiate the economic gain motivation distinction in favor of a motivation neutral rule, legislatures often reintroduce the distinction, which realigns tort doctrine with the community's sense of justice.

The illustrations used in this Article were in no sense intended to be an exhaustive discussion of all areas of tort law in which this pattern may be observed. Furthermore, the same social bias has found its way into the doctrinal development of many other areas of the law. A former colleagne teaching shipping law, for example, sees parallels in the

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danger someone is supposed to risk in order to help someone else. Lastly, once someone offers assistance, it is not easy to decide how long he must continue to look after the bleeding stranger or the starving man.

Linden, *supra* note 53, at 242.

rules controlling salvage,[221] while another who teaches criminal law points to the sanction against murder for hire.[222]

A recognition of the role that this bias has played and continues to play in the formulation of legal doctrine fills in some rather significant gaps in attempts to explain the development of the law. It would seem to better explain the development of the law than the alternatives proposed by traditional legal scholarship. The warranty and representation explanation is itself dependent on the economic gain explanation. While a rationality and intentionality theory clearly has much in common with an economic gain explanation, it fails to explain many of the legal rules that can be understood in terms of the perception of the actor's motivation. The waiver and consent explanation is simply logically indefensible.

While the perceived motivation of the defendant can be seen to serve the instrumentalist goals of internalization of costs and loss spreading, because it is frequently appropriate to assign accident costs to the profit seeking activity, the rules do not appear to have been formulated for that reason. Furthermore, inasmuch as it is the perception of the actor's motivation, which dictates the rule, rather than his actual motivation, it is entirely possible that some of the legal rules thus formulated will fail to achieve the desired allocation of losses.

Furthermore, I submit that looking at the economic gain motive of the actor fills in some rather significant gaps in the explanations offered by those legal scholars who view the development of tort law in terms of various political and economic viewpoints. Those legal scholars who see the development of tort law as the judicial formulation of rules to protect and subsidize the industrialists are not incorrect, but their explanation is incomplete. By the same token, the descriptive claim of the legal economists regarding judicial promotion of economic efficiency is also incomplete. While it is clear that some legal doctrine is best explained with reference to one view or the other, the development of the law is influenced by too many value systems and too many inconsistent and contradictory impulses within any one value system to enable us to hope or expect that any unified explanation will be wholly satisfactory.

Society's ambivalence toward those who act for their own pecuniary benefit has resulted in what this Article has described as the two tendencies in the development of tort law. The first tendency is protection of entrepreneurial endeavor and promotion of wealth maximizing

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221. *See, e.g.*, Landes & Posner, *supra* note 77.

222. CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1987) (providing that an intentional murder "carried out for financial gain" is a "special circumstance" that will justify the imposition of the death penalty or life imprisonment without possibility of parole).

activity. This tendency has been recognized by legal scholars on both the right and left, although one praises it and the other condemns it. The second tendency is to formulate rules that treat those who are engaged in such activity more harshly than those whose motivation is perceived to be "noneconomic, second-party focused."

This Article has not attempted to deal with the normative aspects of the second tendency. Some of the legal rules whose existence is best explained by use of this tendency are defensible, while others are not. More importantly, in some cases in which the rule is defensible, the defense must be based on some extraneous considerations or values, while in other cases, the second tendency is itself based on a value system sound enough to provide a satisfactory justification for the rule's existence. A separate consideration of these issues and problems, however, deserves an article of its own.