Cost-Benefit Analysis Outside of Welfarism

Mark A. Geistfeld

NYU School of Law, geistfeld@exchange.law.nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_lewp

Part of the Jurisprudence Commons, Law and Economics Commons, and the Torts Commons

Recommended Citation


This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Law and Economics Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracythompson@nellco.org.
COST-BENEFIT ANALYSIS OUTSIDE OF WELFARISM

Mark A. Geistfeld*

Welfarism is the principle that the goodness of a social state is an increasing function of individual welfare and does not depend on anything else.¹ As Gregory Keating convincingly argues in the lead article for this symposium, welfarism cannot account for important normative differences among different types of welfare losses or costs.² Welfarism entails that all welfare losses and gains—regardless of their source—are to be rendered fungible and then compared within a cost-benefit analysis (CBA) of the welfare changes. According to Keating, liberal egalitarian principles such as equal freedom or self-determination normatively distinguish bodily injuries from harms to liberty and economic interests. Bodily integrity and related forms of security are necessary conditions for the meaningful exercise of liberty, and that normative difference must be fairly accounted for by legal standards that govern significant risks threatening human health and safety. Hence Keating concludes that liberal egalitarian principles rule out CBA for setting such safety standards.³

---

* Sheila Lubetsky Birnbaum Professor of Civil Litigation, New York University School of Law. Copyright 2018 Mark A. Geistfeld. All rights reserved.

¹ Welfarism is a form of consequentialism for which “the goodness of a state of affairs depends ultimately on the set of individual utilities in that state, and—more demandingly—can be seen as an increasing function of that set.” Amartya Sen, Utilitarianism and Welfarism, 76 J. Phil. 463, 464 (1979). A well-known form of welfarism is utilitarianism, although welfarism can take other forms as well. See id. at 471-72. As a form of distributive justice, welfarism is based on a principle of substantive equality. For example, utilitarianism treats all individuals equally in the sense that each unit of utility or welfare for each individual has equal additive weight in the construction of social welfare. See generally Will Kymlicka, Contemporary Political Philosophy: An Introduction (2d ed. 2002) (explaining why utilitarianism and other forms of distributive justice are based on different conceptions of substantive equality).

² Gregory Keating, Principles of Risk Regulation and the Priority of Avoiding Harm, REVUS: JOURNAL FOR CONSTITUTIONAL THEORY AND PHILOSOPHY OF LAW (this issue).

³ Id. at 2 (“Broadly speaking, the conflict is between an economic version of consequentialism and legal norms which express deontological commitments.”).
Having rejected CBA, Keating defends alternative safety standards that normatively prioritize bodily injury over other types of welfare losses. To prioritize one’s interest in bodily integrity over another’s conflicting liberty interest, the law recognizes an individual right to physical security. Keating argues that adequate protection of the right justifies standards such as “safe level” or “feasibility” for regulating significant risks of bodily harm. These standards require safety precautions beyond the allocatively efficient amount identified by CBA, which instead is a proper criterion only “for regulating harm to goods which are fungible and replaceable,” such as property owned by businesses.4

This normative framework, as I’ve repeatedly tried to show elsewhere, persuasively explains the important doctrines and practices of U.S. tort law.5 The liberal egalitarian norms, however, justify a robust role for CBA that is quite different from the practice criticized by Keating. CBA can do more than simply identify allocatively efficient outcomes. But even when applied in this manner, CBA shows why allocatively efficient safety standards fairly govern significant risks of physical harm in important classes of cases, contrary to Keating’s reasoning. Although CBA occupies a central place within the field of modern welfare economics, it is not inextricably tied to welfarism as a principle of substantive equality. Keating is mistaken to claim otherwise, and that mistake underlies most of our important differences.6

4 Id. at 12.
5 This project began with Mark Geistfeld, Reconciling Cost-Benefit Analysis With the Principle that Safety Matters More Than Money, 76 N.Y.U. L. Rev. 114 (2001) (showing why cost-benefit methodology can be rendered compatible with a principle that prioritizes security over liberty while providing the much needed tools for turning this principle into an operational decision rule). Like Keating’s approach, my analysis also recognizes that the fair protection of the individual right to physical security must account for the normative fact that physical harms are irreparable injuries that cannot be fully repaired by the compensatory damages remedy. The resultant formulation of the tort right and correlative duty can explain the important doctrines and practices of tort law. See Mark A. Geistfeld, Tort Law: The Essentials (2008).
6 Cf. Keating, supra note 2, at 2 (“Cost-benefit analysis has its home in a framework which supposes that welfare is the ultimate or master value and that promoting welfare is the proper end of legal and political institutions.”).
I. COST-BENEFIT ANALYSIS, LEGAL ENTITLEMENTS, AND SUBSTANTIVE EQUALITY

As is now widely recognized, CBA depends on the specification of legal entitlements.\(^7\) A legal entitlement or right determines how the legal system will protect an individual interest. Like any other entitlement, the entitlement protecting the individual interest in physical security can take different forms. Do individuals have a right to be compensated for their physical harms, or must they instead pay to protect themselves from injury? Do other conditions apply, such as a requirement that compensation must always be accompanied by consent? Resolution of these questions depends on how the law has specified entitlements, which in turn determines the costs and benefits of relevance for the associated safety standards.

A safety standard governing risky behavior measures an injury cost at the time of a risky interaction in order to determine the safety benefit of reducing the risk (and eliminating the associated cost of injury). This injury cost can be measured in two different ways, “which correspond to the maximum amount an individual would be willing to pay (WTP) to secure the change [in safety] or the minimum amount she would be willing to accept (WTA) to forgo it.”\(^8\) Whether one who faces a risk of injury must pay for protection or instead be compensated depends on the entitlement.\(^9\)

If the entitlement does not protect the potential victim from injury, then the right-holder is the risky actor. For such an entitlement, the expected injury cost is determined by the maximum amount of money that the potential victim would be willing to pay (WTP) to the risky actor to not exercise the right

---

7 See Mark A. Geistfeld, *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 THEORETICAL INQ. IN LAW 387, 391-99 (2014). Portions of the ensuing discussion are drawn from this article.
9 See, e.g., ROBERT CAMERON MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 30 (1989) (“The choice between the WTP or WTA formulation is a question of property rights: does the agent have the right to sell the good in question or, if he wants to enjoy it, does he have to buy it?”).
and create the associated risk of injury. If the entitlement instead protects one from being injured by another, then the expected cost of injury is determined by the minimum amount of money that the right-holder as potential victim would be willing to accept (WTA) from the risky actor as compensation for facing the risk of injury. The entitlement or right to physical security accordingly relies on the compensatory WTA measure for quantifying injury costs.

A compensatory entitlement prioritizes the right-holder’s security interest by burdening the duty-holder’s subordinate liberty interest with the compensatory obligation, thereby recognizing a normative difference between these two types of interests. The entitlement can further account for this normative difference in other ways, yielding different specifications that can substantially alter the measure of injury cost and the associated safety standard selected by CBA.

To see why, consider a risky interaction between an automobile driver and a pedestrian that would kill the pedestrian in the event of an accident. Suppose the pedestrian benefits from the trip but not from the driver’s presence along the route, eliminating the risky interaction as a source of compensatory benefit for the pedestrian right-holder. Because the two parties have no preexisting relationship, the pedestrian cannot receive the compensatory payment (the WTA measure) from the driver prior to the risky interaction. In the event of a fatal accident, the (deceased) pedestrian would also be unable to receive compensation in the form of a damages remedy derived from the WTA measure. How can the pedestrian receive the compensation to which she is entitled?

Because the safety standard evaluates the expected cost of injury in terms of the right-holder’s WTA measure, the duty-holder’s breach of that safety obligation ordinarily is fairly redressed by a compensatory damages award derived from the WTA measure. See Mark A. Geistfeld, Due Process and the Determination of Pain and Suffering Tort Damages, 55 DePaul L. Rev. 331, 347-57 (2006) (elaborating on this argument and showing how to compute these damages); see also Mark A. Geistfeld, Punitive Damages, Retribution, and Due Process, 81 S. Calif. L. Rev. 263, 275-84 (2008) (explaining why compensatory damages based on the WTA measure are inherently inadequate for cases in which the defendant reprehensibly rejected the duty to exercise reasonable care, justifying the extracompensatory remedy of punitive damages). By
Suppose the entitlement requires full compensation. In the case at hand, the WTA measure has compensatory value for the right-holder—it actually improves her welfare—only insofar as it reduces risk within the safety standard. To protect her welfare—to be fully compensated as per the entitlement—the pedestrian is entitled to set the WTA measure equal to infinity. The measure of infinite injury costs, when plugged into the cost-benefit calculus, requires precautionary behavior that would eliminate the risk altogether (any precautionary cost of a finite amount, such as the cessation of driving, would be less than the safety benefit of eliminating an infinite injury cost). An entitlement requiring actual compensation as defined by the WTA measure, therefore, can yield a cost-justified safety standard that bans risky behavior in order to protect the right-holder from facing a significant risk of uncompensated injury.

This type of standard, which corresponds to the “safe level” standard defended by Keating, can require more safety than would be allocatively efficient—it prohibits behavior that would subject others to a significant risk of bodily harm, even if doing so would decrease social welfare.11

In order for CBA to select the allocatively efficient safety standard, the WTA measure in these cases must be derived from hypothetical rather than actual compensation. This decision rule, widely known as the Kaldor-Hicks criterion, holds that one state of the world is to be selected over another if those who would gain from the change could compensate the losers for their losses and still be no worse off than in the original state. Any change that satisfies the Kaldor-Hicks criterion will necessarily increase social welfare, even though the compensation is only hypothetical and not actual.

For example, the pedestrian could be hypothetically compensated by the WTA measure prior to the risky interaction with the driver, and the amount of ex ante compensation that (hypothetically) would fully protect the pedestrian’s welfare is not infinite. When plugged into CBA, this finite measure of injury costs will set the safety standard at the allocatively efficient amount. By definition, any

---

11 See Keating, supra note 2, at Part I.
precautions above this amount would decrease the driver's welfare by more than it would increase the pedestrian's welfare (via the hypothetical compensation expressed by the WTA measure). The opposite result occurs for any precautions below the efficient amount. As compared to the efficient safety standard, any other standard will not satisfy the Kaldor-Hicks criterion. The hypothetical compensation embodied in that criterion accordingly enables CBA to select the allocatively efficient safety standard in all cases.

What, then, is the appropriate way to measure costs? Actual or hypothetical compensation? The question cannot be answered by CBA; it instead requires resort to a substantive principle of equality.

For any plausible egalitarian principle, a safety standard must equally account for the normatively relevant interests of both the right-holder and the duty-holder. The normatively relevant cost or harm of complying with a duty ordinarily is a burden on the exercise of liberty. Consequently, the fair safety standard must equally account for both the threat to the right-holder's physical security (or injury costs) and the associated burden on the duty-holder's liberty (precautionary costs). The requirement of equal treatment is substantive, not formal.

For example, an allocatively efficient safety standard gives each type of harm equal value (on a dollar-per-dollar basis) within CBA, a weighting that can be justified by welfarism. By contrast, a nonwelfarist egalitarian principle can normatively prioritize one type of harm over the other. A priority of the security interest can justify an entitlement to actual compensation for reasons previously discussed, but the entitlement cannot be so demanding that it necessarily negates the duty-holder’s liberty in violation of the egalitarian principle. This formulation of the entitlement accordingly enables the right-holder to select the WTA measure of injury cost that requires the duty-holder to exercise the maximum amount of care consistent with the ability to engage in the risky activity—a feasibility standard of the type defended by Keating. This WTA measure maximally compensates the

---

12 In other words, one’s right to life or physical security must be relative to another’s right to liberty. Cf. Lossee v. Buchanan 51 N.Y. 476, 485 (1873) (“Most of the rights of property, as well as of person, are not absolute but relative.”).
right-holder via its impact on the safety standard, but does so in a manner that permits the duty-holder to engage in the risky activity.  

A similar compensatory formulation of CBA can also justify the precautionary principle for regulating health and safety matters, another standard that can depart from the requirements of allocative efficiency. CBA is not necessarily tied to the social criterion of allocative efficiency or to welfarism more generally.

To be sure, CBA is a form of welfare economics, the normative branch of economics that studies criteria for determining whether alternative states of the world are better or worse than one another. Moreover, economic analysts of the law typically employ CBA within a welfarist framework, which may explain why one can readily find statements to the effect that “normative economics is a welfarist theory.” The

---

13 This formulation of the feasibility standard improves upon the simple version that Keating apparently defends. Contrary to what might otherwise be suggested by his discussion, under some conditions the feasibility standard can require less safety than would be allocatively efficient. See Jonathan S. Masur & Eric A. Posner, Against Feasibility Analysis, 77 U. CHI. L. REV. 657, 687-98 (2010). Under these conditions, the right-holder would not set the WTA compensatory measure so that CBA yields such a feasibility standard. The right-holder would instead set compensation at the amount that justifies the allocatively efficient standard (or some other formulation of a feasibility standard that requires even greater safety if doing so would not negate the duty-holder’s liberty interest in violation of the egalitarian standard).


15 See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

16 EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 12 (2010). Much of the confusion about this matter may stem from the influential presentation of welfare economics by KAPLOW & SHAVELL, supra note 15, at 16 (“The hallmark of welfare economics is that policies are assessed exclusively in terms of their effects on the well-being of individuals. Accordingly, whatever is relevant to individuals’ well-being is relevant under welfare economics, and whatever is unrelated to individuals’ well-being is excluded from consideration under welfare economics.”). Kaplow and Shavell, however, narrowly define welfare economics only in order to contrast welfarism with nonwelfarist (or “fair”) principles, not because it is required by welfare economics. Id. at 25 n.4 (“It is, of course, possible to state a more general notion of social welfare, which can depend on literally anything, and some general formulations presented by economists allow for that possibility. We do not adopt this broader definition of social welfare when discussing welfare economics for the simple reason that our book focuses on the difference between assessment that is limited to effects on
methodology of CBA and welfare economics, however, does not necessarily require utilitarianism or other forms of welfarism. In the late 1930s, prominent economists rejected the utilitarian decision rule embodied in traditional welfare economics in favor of the new welfare economics, which compares alternative economic situations by relying on the Pareto principle. This principle selects one state of the world over another if it actually makes at least one person better off and no one worse off. But most if not all policy changes will have differing distributive impacts, producing winners and losers from the change. Consequently, the new welfare economics recognizes that CBA can defensibly ignore distributive questions only if the government can costly redistribute income or the relevant resource in question via “lump-sum transfers” between households.

In the real world of costly transfers, CBA must account for distributive matters that are not based solely on the equality of wealth or welfare. The equity or fairness of these distributive outcomes does not depend on welfarism, severing individuals’ well-being... and assessment that is not so limited, which largely falls under the rubric of fairness and related terms.”).


19 A lump sum transfer does not distort individual incentives, and so the cost of any other type of transfer largely depends on how it alters incentives. For redistributions that are made for the sole purpose of equalizing wealth, the tax system may be the least costly instrument for attaining the desired distributive outcome, in which case the CBA of safety standards need not account for the associated distributive concerns. See Louis Kaplow & Steven Shavell, Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income, 29 J. LEGAL. STUD. 821 (2000). But see David Blankfein-Tabachnik & Kevin A. Kordana, Kaplow and Shavell and the Priority of Income Taxation and Transfer, 69 HASTINGS L.J. 1 (2017) (demonstrating that redistributions for redressing inequalities of wealth can in some cases be attained at the least cost by (re)assigning property entitlements). However, a nonwelfarist principle of substantive equality does not seek equality exclusively in the domain of wealth or welfare. For distributive matters of this type, the appropriate transfers are effectuated at least cost by protection of the individual rights and enforcement of their correlative duties. See Mark A. Geistfeld, Efficiency, Fairness, and the Economic Analysis of Tort Law, in THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 234, 246-48 (Mark D. White ed. 2009). These distributive components of the entitlements, therefore, must be incorporated into the CBA of the associated safety standards.
any necessary link between welfarism and distributionally sensitive CBA.

II. DISTRIBUTIVE ECONOMIC ANALYSIS

The discussion so far has only explained how safety standards of the type analyzed by Keating—the safe level standard, the feasibility standard, and the allocatively efficient standard—can all be derived within the framework of CBA, contrary to Keating’s claims. His argument goes awry because the methodology is not necessarily tethered to welfarism as he assumes.

To show why CBA depends on a principle of substantive equality, the prior discussion also emphasized how such a principle shapes CBA. The resultant comparative exercise identifies not only the normatively relevant costs and benefits, but also how they are distributed across the right-holders and duty-holders—an approach I have previously called “distributive economic analysis.”

By employing this form of economic analysis within a nonwelfarist normative framework, one can identify distributive concerns that might otherwise be elided by an overly general specification of the fairness problem.

Consider the fairness inquiry for tort rules governing the amount of product safety that manufacturers must provide in order to prevent their products from being defective and subject to tort liability. According to Keating, “Fairness is concerned with the distribution of burdens and benefits—with how well each person’s claim is satisfied compared with how well other people’s claims are satisfied.” Based on this principle, Keating concludes that product cases are justifiably governed by the safe level standard, which mandates the amount of safety that would render insignificant the risk of physical harm and does not otherwise “require any inquiry

20 Mark A. Geistfeld, Risk Distribution and the Law of Torts: Carrying Calabresi Further, 77 LAW & CONTEMP. PROBS. 165 (2014). An alternative approach subjects the social welfare function to deontological constraints. See generally Zamir & Medina, supra note 16 (developing this approach). The constraint approach does not account for distributive concerns, id. at 80-81, unlike distributive economic analysis. Both approaches, however, recognize that only certain types of welfare gains or losses are normatively relevant.

21 Keating, supra note 2, at 14 (quotation marks and footnote omitted).
into the costs of risk reduction.” 22 By disregarding cost, however, the safe level standard can violate this principle of fairness for reasons made clear by distributive economic analysis.

Keating’s analysis is based on a misspecification of the distributive problem. In an earlier article, he more fully defines that problem in order to explain why it justifies a rule of strict (or enterprise) manufacturer liability for the physical harms suffered by consumers:

When an enterprise physically harms a random victim in the course of pursuing its own benefit, unless the enterprise repairs the harm it has done, it exploits the victim for its own gain. It enriches itself through impairing the physical integrity or the property of the victim. By requiring reparation, enterprise liability rights the wrong that would otherwise occur, namely, the wrong of making the victim the involuntary instrument of the enterprise’s self-enrichment. In so doing, it also distributes fairly the burdens and benefits of risky activities. Those who reap the benefits also bear the burdens. 23

This reasoning might identify the fair outcome for bodily injuries suffered by those who do not benefit from a business enterprise, but it is not apposite for product cases involving injured consumers. The interaction between a manufacturer and consumer is one of expected mutual advantage, which is normatively different from the noncooperative interactions described by Keating. One important difference between the two types of cases involves the manner in which tort rules distribute the benefits and burdens of the risky activity—the fairness issue addressed by Keating.

In product cases, consumer right-holders fully internalize the costs and benefits of the manufacturer’s tort obligations. For the market equilibrium that obtains under the normatively justified set of entitlements, the manufacturer must charge a price that covers its costs, including those that are imposed as a matter of legal obligation. The consumer as

22 Id. at 5, 9-11.
23 Gregory C. Keating, Products Liability As Enterprise Liability, 10 J. TORT LAW 41, 63 (2017).
right-holder accordingly pays (via higher product prices or decreased product functionality) for the safety investments and injury compensation that tort law requires of the manufacturer as duty-holder. Consequently, the tort rule recognizes that “it is not a factor . . . that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry.”

Tort rules in product cases accordingly pose a distributive problem that is not defined by an interpersonal conflict between the consumer’s interest in physical security and the manufacturer’s economic interest in profits. The problem instead involves an intrapersonal conflict of the consumer’s interests in security and liberty, an issue wholly elided by Keating’s discussion of the fair safety standard.

In comparing his or her own security and liberty interests, the consumer gives no special priority to either one. The consumer prefers to pay for product safety only if the benefit of risk reduction (fully accruing to the consumer) exceeds the cost of the safety investment (also fully borne by the consumer). The efficient liability rule, which maximizes the net benefit that the ordinary consumer expects to derive from product use, is no different from the fair rule that only implicates consumer interests. Contrary to Keating’s claim, the allocatively efficient rule can fairly govern significant risks threatening bodily injury.

To be sure, a liability rule framed entirely in terms of consumer interests will not fully satisfy the preferences of each consumer. Individuals have different preferences for product safety and other aspects of quality, making it infeasible for manufacturers to satisfy completely the preferences of everyone. Manufacturers in mass markets respond to aggregate consumer demand, leading to the question of whether an individual consumer can reasonably expect such a product seller to satisfy her own needs at the expense of other consumers.

Once the inquiry is framed in this manner, it becomes apparent that consumer demand for the product to wholly eliminate significant risks—the safe level standard defended by Keating—does involve a fairness problem, albeit defined by

---

interpersonal conflicts among consumers as right-holders. The fair resolution of this distributive problem is quite different from the one defended by Keating.

Perhaps those who demand maximal safety are also the most disadvantaged for distributive purposes, in which case the maximin principle might provide a fair basis for requiring the maximal safety embodied in the safe level standard. But those who are most disadvantaged for distributive purposes may also be less able to afford the consequent increase in product prices. The more plausible reason why a consumer demands maximal safety is that he or she can afford the resultant price increases. Is it fair to satisfy the safety demands of these consumers when doing so comes at the expense of ordinary consumers who are less well off?

Not surprisingly, the tort rule that Keating uses to illustrate the safe level standard—the consumer expectations test—is not formulated in this manner. Instead of relying on the maximal safety demands of particular consumers, the consumer expectations test asks whether the product “is dangerous to an extent beyond that which is contemplated by the ordinary consumer who purchases it.”25 For reasons made clear by distributive economic analysis, the ordinary consumer contemplates danger in terms of efficient safety precautions rather than the safe level standard.26

Efficient precautions are also fair in other important classes of cases, most notably those involving reciprocal risky

26 The consumer expectations test takes two forms. One applies to defects attributable to product malfunctions, and the other to defects attributable to the unreasonably dangerous design or warnings of a product that does not malfunction. See Mark A. Geistfeld, PRODUCT LIABILITY LAW 69–116 (2012); Mark A. Geistfeld, PRINCIPLES OF PRODUCTS LIABILITY 37–60, 91–110 (2d ed. 2011). The first version disregards cost as Keating claims, but this rule of strict liability is limited to only certain types of product performances (malfunctions) and is justified by the manner in which it enforces the efficient safety standard that consumers could not otherwise practically enforce due to difficulties of proof. See Mark A. Geistfeld, A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation, 105 CALIF. L. REV. 1611, 1663-69 (2017). The second version of the consumer expectations test is expressly defined in the efficiency calculus known as the risk-utility test. Id. at 1641-43.
interactions outside of contractual settings. In these cases, the interacting individuals are identical in all normatively relevant respects, including the degree of risk that each imposes on the other and the severity of injury threatened by the risk. Such a case can be represented by an interaction between two automobile drivers in which each is simultaneously a right-holder (who might be injured by the other) and a duty-holder (who might injure the other). Due to the reciprocity of the two risks, there are no relevant differences between the interacting parties. Each automobile driver has the identical right against the other, each owes an identical duty to the other, and each expects to derive a benefit, on balance, by engaging in the social activity of driving.

Under these conditions, neither right-holder prioritizes his or her security interest over the liberty interest of the other. Each one instead reasonably prefers the efficient standard of reasonable care that requires a safety precaution only if the benefit of risk reduction (fully accruing to the individual as reciprocal right-holder) exceeds the burden or cost of the precaution (also fully borne by the individual as reciprocal duty-holder). By minimizing accident costs, the efficient negligence rule maximizes the net benefit that each driver expects to gain by engaging in the activity.

In contrast, efficient precautions are not fair when governing nonreciprocal risky interactions that occur outside of contractual settings, as illustrated by abnormally dangerous activities like blasting. These interactions involve unequal risk impositions that are not adequately offset by any normatively relevant compensatory benefits for the right-holder. The inequity is addressed by a rule of strict liability, but this rule provides compensation only through the monetary damages remedy, which is inadequate in cases of bodily harm (recall the problem of accidental death). To

---


28 See supra notes 9-10 and accompanying text. Although the problem is starkly illustrated by premature death, the compensatory damages remedy is categorically inadequate for bodily injuries and physical harms more generally, all of which are “irreparable injuries” under the common law. See Mark A.
resolve this remaining distributive inequity, tort law supplements strict liability with a negligence rule requiring the duty-holder to take safety precautions beyond the allocatively efficient amount. 29 For this class of cases, Keating’s fairness arguments map into the appropriate distributive problem. But even in these cases, distributive economic analysis complements the fairness inquiry by providing a determinate method for identifying the required standard of safe behavior.30

Despite its apparent logic, the idea that economic analysis is incompatible with or irrelevant to a rights-based principle of fairness is mistaken. A legal system that protects the individual right to physical security can be usefully guided by the methodology of CBA and distributive economic analysis more generally. The governing principle of substantive equality determines the appropriate use of CBA, thereby framing the issues that can be usefully addressed by distributive economic analysis. Welfare does not have to be the master value in order to be relevant. As fully illustrated by the normative framework that Keating otherwise persuasively defends, CBA has an integral role outside of welfarism.


29 Geistfeld, Normative Source, supra note 27, at 1571-82.
30 Id.