

JURIES, SOCIAL NORMS, AND CIVIL JUSTICE

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ABSTRACT

At the root of many contemporary debates and landmark cases in the civil justice system are underlying questions about the role of the civil jury. In prior work, I examined the justifications for the civil jury as a political institution, and found them wanting in our contemporary legal system.

This Article looks closely and critically at the justification for the civil jury as an adjudicative institution and questions the conventional wisdom behind it. The focus is on tort law because the jury has more power to decide questions of law in tort than any other area of law. The Article makes three original contributions.

First, I undermine the claim that the breach question in negligence is inevitably one for the jury by revisiting a famous debate between Cardozo and Holmes about the possibility of judge-made rules around breach in tort. Second, I draw on social and cognitive psychology to question the conventional wisdom that juries applying general standards are ideally suited to identify and apply social norms. And third, I sketch a middle-ground approach on breach, which involves presumptive rules that defer to indicia of social norms such as statutes and regulations, custom, and the market.

In making the argument, this Article begins to point the way towards a tort system that recognizes the value of recourse but better serves rule-of-law values.

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Now I submit that the jury is the worst possible enemy of this ideal of the “supremacy of law.” For ‘jury-made law’ is, par excellence, capricious and arbitrary, yielding the maximum in the way of lack of uniformity, of unknowability. It is acknowledged that jurors are government officials. Yet little, practically, is done to ensure that these officials, jurymen, “act upon principles and not according to arbitrary will,” or to put effective restraints upon their worst prejudices.

—Jerome Frank, *Courts on Trial* 132 (1949).

INTRODUCTION

In 2013, the Supreme Court decided a case out of New Hampshire, where Karen Bartlett sued a generic drug company for failing to warn of possible side effects of an anti-inflammatory drug.¹ The specific doctrinal issue—federal preemption of state tort law—has appeared regularly on the Court’s docket over the past decade, while the broader undercurrent of the case has been even more salient: profound discomfort with the power of the civil jury.

When *The New York Times* reported on the certiorari grant, it quoted from the government’s brief, submitted in support of the defendant drugmaker: “Tort judgments second-guessing FDA’s expert drug safety determination would undermine the federal regime to the extent that they forbade or significantly restricted the marketing of an FDA-approved drug.”² Though the government’s brief is somewhat oblique in the target of its attack, it is clear enough who is doing the undermining through “ad-hoc reconsiderations” of FDA judgments “on a State-by-State and lawsuit-by-lawsuit basis.”³ It is the civil jury—or, even worse, many of them.

1. *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2470 (2013). Bartlett lost the case, with the Supreme Court holding that such claims against generic drug manufacturers were preempted under federal law. *Id.* at 2473.

2. Katie Thomas, *A Liability Challenge*, N.Y. TIMES, Mar. 5, 2013, at B1 (internal quotation marks omitted) (citing Brief for United States as Amicus Curiae Supporting Petitioner at 13, *Mutual Pharm. Co.*, 133 S. Ct. 2466 (No. 12-142)).

3. Brief for United States, *supra* note 2, at 13.

In the past decade, a steady flow of cases on the Supreme Court's docket arrived on the strength of this theme: suspicion of the power of the civil jury. The issues ranged from whether the jury should be authorized to issue massive punitive damages awards or punish speech it deemed "outrageous," to whether they could tell pharmaceutical companies what they should have been warning consumers or determine that a Fortune 500 company's hiring practices were improper.⁴ But the anxiety from the certiorari-seekers had a clear direction: a handful of laypeople had an awful lot of power, and elites were concerned about how it was being exercised.

All these cases were lawsuits where individuals were complaining that they were wronged by other private parties. In other words, these were tort cases—the bread-and-butter of our civil justice system.⁵ The jury's centrality in such cases should be no surprise, as it is here that juries are given more power to decide normative issues than perhaps any other area of the law.⁶ In being able to decide what is "reasonable," juries are able to put the imprimatur of the state on what they deem wrong.

Therein lies the rub. Juries are thought to be better than generalist judges or experts in deciding such cases for two main reasons: first, that these questions of reasonableness are inevitably fact-intensive, and juries are the finders of facts; and second, that the legal questions ought to be decided with reference to social norms, and juries are ideally suited to identifying and applying such norms. Indeed, one might think of jurors as experts in social norms.⁷ But it is these very reasons that give the jury such significant power in tort cases.

The Supreme Court has been sympathetic to this concern about jury power, granting certiorari and then issuing decisions questioning the jury's normative power and authority.⁸ At the same time, the leading scholars and lawyers in tort issued a new *Restatement of Torts* in 2010—the first in more

4. See the cases discussed in Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1333–34 (2012).

5. I use the term *tort* here to refer broadly to civil claims not arising out of contract or property rights where one party claims that another has wronged him. This includes traditional common-law torts, statutory torts like employment discrimination or consumer fraud, and constitutional torts against government officials under 42 U.S.C. § 1983 (2006). See DAN B. DOBBS, *THE LAW OF TORTS* 1 (2000) (defining a tort as "conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability").

6. See Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 424 (1999) ("Negligence law is the logical place to start in mapping the role of the jury in deciding normative issues in the common law for it is here that the jury has the most say.").

7. See Solomon, *supra* note 4, at 1336.

8. See *id.* at 1333–34 (discussing these cases).

than forty years—affirming the jury’s central role in tort law.⁹ Indeed, the *Restatement (Third)* stops just short of saying it could be no other way.¹⁰ In support of this claim, the *Restatement (Third)* spends what might appear to be a surprising amount of time discussing dueling opinions from Justices Cardozo and Holmes in the early twentieth century in cases called *Pokora* and *Goodman*.¹¹

This Article attempts to respond to both the Supreme Court and the tort reform that has succeeded there on the one hand and the *Restatement (Third)*’s fatalistic embrace of the jury’s role on the other. There *is* another way between unfettered jury discretion and cutting off redress entirely, and this Article begins to demonstrate it.

In doing so, this Article makes three original contributions to the literature—two negative and one affirmative. Parts II and III develop the two critical (or negative) points, aimed at undermining fundamental assumptions among scholars, lawyers, and judges. Part IV begins the affirmative project of reconceiving the negligence inquiry.

The first critical point is this: the claim that the breach question in negligence is inevitably one for the jury is weaker than the conventional wisdom suggests. Modern-day conventional wisdom, as reflected in the *Restatement (Third)*, can be traced back directly to Cardozo’s perceived victory over Holmes on this debate. Complicating this conventional wisdom requires revisiting the *Pokora/Goodman* episode in some depth, which has not yet been done by scholars, and which I undertake in Part II.

The second critical point is aimed at the idea that juries applying general standards are ideally suited to identify and apply social norms. This idea is made up of several assumptions: (1) that jurors are good at identifying social norms generally, and particularly in judging the kind of “reasonableness” at issue in tort; (2) that a “totality of the circumstances” approach is more likely to get the right result in most cases, as compared with a more rule-like approach that only looks to certain factors; (3) the fact that juries see only one case makes them particularly desirable adjudicators; and (4) that the members of the jury combine to create the “wisdom of crowds”¹² based on their many minds being better than one and their diverse backgrounds and experiences. I challenge each of these assumptions below in Part III.

Part IV begins the affirmative project of constructing a new way of determining breach or wrongfulness. The basic contribution is to outline a

9. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010).

10. See *id.*

11. See *id.*; *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (Cardozo, J.); *Baltimore & O.R. Co. v. Goodman*, 275 U.S. 66 (1927) (Holmes, J.).

12. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2005).

third way between the open-ended standards for the jury from Cardozo and adopted by the *Restatement (Third)*, and Holmes's detailed rules determined by judges over time in classic common-law fashion. This third way involves juries or judges deferring to indicia of social norms such as statutes and regulations, custom, and the market.

For the purposes of this paper, I assume that doing justice between the parties in the lawsuit is at least a significant part of the function or purpose of tort law. I think this is a relatively uncontroversial assumption, whatever else one thinks tort does or should do. Even Kaplow and Shavell, leading proponents of an economic theory of tort law, seem to agree: "Indeed, we do not assert that the law fully reflects the prescriptions of welfare economics, and we argue . . . that the law is influenced by notions of fairness, perhaps including corrective justice."¹³ I also assume that a judgment of tort liability is in part an expression by the state that the defendant has done something wrong to the plaintiff, however we define "wrong."¹⁴

I. THE RULE-OF-LAW PROBLEMS OF THE CIVIL JURY

Before getting into the assumptions embedded in the embrace of the civil jury's normative power, we need to set the stage more fully. To understand how it is that the Supreme Court grew concerned with the power of the civil jury, we need to understand the arguments from the tort reformers who advanced this agenda.

In this Part, I provide a quick snapshot of the just-below-the-surface rule-of-law critique of the civil jury, operating in the shadow of the attack on juries' competence to decide civil cases. The critique was real when progressive judge and noted legal realist Jerome Frank made it eighty years ago,¹⁵ and for defenders of tort law, it is no less worthy of attention simply because the critique comes from tort reformers.

In making their case against the civil justice system, the tort reformers have advanced several narratives, complete with vivid imagery. One is a system-wide image of a system spinning out of control, with costs really expensive and a crippling "tort tax."¹⁶ Imagine the tornado that hit Kansas in *The Wizard of Oz*, with Dorothy's spinning house as a small business owner like 2008 campaign icon Joe the Plumber, or a pharmaceutical

13. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1045 (2001).

14. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 947-53 (2010) (defining negligence as a "legal wrong" and distinguishing it from a "moral wrong").

15. See generally Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931).

16. See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 3-5 (1988).

company executive at his desk, planning investments in research and development—both trying to survive but swept up by tort system forces beyond their control. A flood of statistics with big numbers and anecdotes with implausible facts and results add to the sense of dizziness.¹⁷

Another is the narrative around the immorality of plaintiffs and their lawyers.¹⁸ Here, the lawyer is a wolf or vulture, the account frequently playing on anti-Semitic images of the shyster. The contingency fee practice is the institutional embodiment of this immorality, taking a pound of flesh—or one-third of a pound to be exact—from the victim's wounds. Plaintiffs themselves are soft, weak beggars with no individual responsibility, standing alongside Reagan's black welfare queen with her hand out, helping to constitute a "nation of victims."¹⁹

But the central narrative of tort reform has been an attack on juries, and that is my focus here. This argument has centered on the issue of jury *competence*, and the response by defenders of the civil jury has been powerful. The defenders have shown that judges and juries most often agree, and that juries side with plaintiffs less often than judges do.²⁰ Verdicts generally, and punitive damages awards specifically, are not "out-of-control"—indeed, tort filings are down in the last twenty years.²¹ The defenders have succeeded in responding to rhetoric and anecdotes with real data.

But the attack on juries has another theme, less noticed, but just as important. This critique is based on legitimacy or rule-of-law concerns, and it has not been as explicit in tort reform rhetoric.²²

17. Other images include the narrative of decline, see STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 38–41 (1995), and metaphors of explosion/skyrocketing, *id.* at 47–48.

18. See *id.* at 38.

19. See *id.* at 45. See also generally CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* (1992).

20. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1138 (1992) (“[T]here is a high positive correlation between rates of success in judge trials and rates of success in jury trials. Plaintiffs tend to do well before judges in the same case categories in which they tend to do well before juries.”).

21. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497–501 (2008); *Civil Cases*, BUREAU OF JUSTICE STATISTICS, <http://bjs.gov/index.cfm?ty=tp&tid=45> (last visited May 1, 2014) (containing studies showing the decline of tort cases); *Civil Caseloads*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Civil.aspx> (last visited May 1, 2014) (containing reports showing the decline in civil cases and trends for tort filings).

22. Perhaps the jury is seen as providing democratic legitimacy, and so a legitimacy critique might not resonate. Or perhaps reformers felt they did not even need to make the critique explicitly. A jury second-guessing the FDA? *Res ipsa*. The unfairness speaks for itself.

A. *The Tort Reformers' Rule of Law Critique*

The legitimacy critique plays a major role in two tort reform efforts that have reached the Supreme Court in recent years: punitive damages and preemption.²³ Just as they seek to undermine the *moral* authority of plaintiffs and their lawyers with other rhetoric, in these areas, the tort reformers seek to question the *political* authority or legitimacy of the jury.²⁴ They are also saying, in the punitive damages context, that the jury's decision making does not comply with formal rule of law values.

The problem to which the tort reformers point is this: tort law as a law of private wrongs complies with rule-of-law values only if the difference between right and wrong is reasonably knowable in advance.²⁵ But the fact that the “wrong” is defined on a case-by-case basis by juries, whose decisions do not come with reasons or precedential value, arguably makes this a difficult task.²⁶

There is an extensive literature on the rule of law that I will not review here.²⁷ What I am referring to here are the “formal” rule of law requirements associated primarily with Lon Fuller and Frederic Hayek. As Hayek put it: “Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.”²⁸

23. See Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1758–59 (2012) (discussing the Court's recent grappling with punitive damages and preemption).

24. See DANIELS & MARTIN, *supra* note 17, at 1–4.

25. See Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 317 (2002) (arguing that giving the factfinder such discretion in applying a vague normative standard like negligence raises “serious legality concerns,” though the concerns are more serious in criminal law). For an argument that standards like reasonableness present no more rule-of-law or legality problems than rules, see generally Jeremy Waldron, *Vagueness and the Guidance of Action*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 58 (Andrei Marmor & Scott Soames eds., 2011); Jeremy Waldron, *Thoughtfulness and the Rule of Law*, BRIT. ACAD. REV., July 2011, at 1, 5–6, 8–10 (U.K.).

26. See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976) (“We are rapidly approaching the day when liability will be determined routinely on a case by case, ‘under all the circumstances’ basis, with decision makers (often juries) guided only by the broadest of general principles. When that day arrives, the retreat from the rule of law will be complete, principled decision will have been replaced with decision by whim, and the common law of negligence will have degenerated into an unjustifiably inefficient, thinly disguised lottery.”); Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS 79, 88 (1989) (discussing the rule of law requirement that official action should be guided by rules of conduct).

27. See generally BRIAN TAMANHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004), for a good overview.

28. See F.A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944); see also LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

The role of the civil jury in deciding normative issues in tort, specifically deciding what conduct is reasonable or not reasonable under the rubric of “breach” in negligence (or defect in products liability), presents several problems related to Hayek’s definition of the rule of law. Though these problems have been part of the debate over the civil jury for years, laid out most trenchantly by Jerome Frank²⁹ in the 1930s and 40s, it is worth recounting them very briefly. My focus is not on the ability to plan one’s affairs, but rather on the ability to “foresee with fair certainty how the authority will use its coercive powers in given circumstances.”³⁰

The standard story in the literature about juries is that the glory days were back in the colonies and at the time of the Founding, where nullification was encouraged (in the Revolutionary spirit) and they were asked to decide issues of law as well as fact.³¹ Since then (the story goes), their law-making power has been taken away in the civil and criminal context such that today, the role of the jury is to “apply the law to the facts,” and nothing more.³² The reality, though, is that the jury’s power to decide law-like questions remains strong in certain areas, particularly tort.³³ It is not only that mixed questions of law and fact frequently involve evaluative judgment,³⁴ but also that standards like “reasonableness” are so devoid of content that juries act as “norm creators,” to use Kenneth Abraham’s insightful phrase.³⁵

It is also worth noting how the idea of tort law as a law of private wrongs affects the way we think about these rule of law issues. To say that tort is a law of private wrongs is to describe it as a system where people bring lawsuits to hold others accountable to those who have wronged them,³⁶ and the jury decides whether to attribute responsibility to the

29. See JEROME FRANK, *LAW AND THE MODERN MIND* 170–85 (1930); see also JEROME FRANK, *COURTS ON TRIAL* (1949).

30. HAYEK, *supra* note 28, at 112. I understand that the two things are related.

31. For an example of this, see Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1136–40 (2014). The classic case that put the nail in the coffin is *Sparf v. United States*, 156 U.S. 51, 90–91 (1895).

32. Ferguson, *supra* note 31, at 1107.

33. See Gergen, *supra* note 6, at 424 (“Negligence law is the logical place to start in mapping the role of the jury in deciding normative issues in the common law for it is here that the jury has the most say.”).

34. See, e.g., Dilan A. Esper & Gregory C. Keating, *Abusing “Duty”*, 79 S. CAL. L. REV. 265, 279 (2006) (noting that applying particular facts to a standard of care requires evaluative judgment as well as finding facts).

35. Kenneth S. Abraham, *The Trouble With Negligence*, 54 VAND. L. REV. 1187, 1191–95 (2001); see also Simons, *supra* note 25, at 317 (pointing out that granting the factfinder discretion to apply “a vague normative standard of negligence or reasonableness” has the effect of granting a “largely unreviewable power to create a new legal norm”).

36. See generally, e.g., Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31 (2011); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009).

defendants.³⁷ This view corresponds most strongly with how lawyers and judges talk about tort law.³⁸

Under an account of tort law as a law of private wrongs, the jury's role in determining liability basically boils down to two issues: first, whether the defendant has behaved wrongfully³⁹—that is, below the relevant standard of care (breach); and second, whether the harm suffered by the plaintiff is factually and normatively connected to the defendant's conduct such that the defendant ought to be held responsible (factual and proximate cause). To be sure, this is a simplified view and may not capture the reality of how jurors achieve “total justice,”⁴⁰ but it does capture the basic inquiry of what the jury is supposed to do under standard jury instructions. In this Article, I focus on the first of these inquiries: the breach issue.

The rule of law problems arise from three main features of the civil jury: the lack of reasons given for decisions,⁴¹ the lack of accountability, and the lack of precedential value for outcomes.⁴²

The lack of reasons is familiar: juries are simply asked to return a verdict, negligence or no negligence. They are not asked to say what standard they applied, or how they applied it.⁴³

The lack of accountability is related to the lack of reasons, but magnified by the extreme deference to jury verdicts on questions of mixed law and fact such as “reasonableness” from both the trial and appellate judges.⁴⁴ To be sure, judges have mechanisms for controlling the work of the jury in this domain, including “no-duty” rulings on summary judgment,

37. See PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 126 (1997) (referring to the “powerful role of the jury in tort law”).

38. See Solomon, *supra* note 36, at 1773 (“Most scholars think corrective justice—the leading individual-justice theory—is more consistent than other accounts with the ‘internal point of view’—that of lawyers and judges . . .”).

39. For present purposes, I am treating “wrongfulness” as careless conduct, defined non-rationally. I realize this is a contested definition, but I don't think the debate has much import here. Under my conception, the relationality would come into play in the second inquiry about responsibility.

40. See NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 16–18 (2000) (defining “total justice” as juries being more concerned with “making things come out right than with strictly following the relevant legal rules”).

41. For the importance of reason-giving in promoting non-arbitrariness, see, e.g., Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 996–98 (2007).

42. See JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 1 (2009) (pointing to precedent as a way to “reduce the likelihood that Jane's case, adjudicated in December 2006, will come out very differently from Joe's very similar case adjudicated in January 2007”).

43. See generally, Stack, *supra* note 41, at 996–98; Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2386–90 (1990) (describing the jury's role in applying standards of law, such as negligence, to reach a verdict).

44. See, e.g., Timothy P. O'Neill & Susan L. Brody, *Taking Standards of Appellate Review Seriously: A Proposal to Amend Rule 341*, 83 ILL. B.J. 512, 515 (1995) (“[I]f the decisionmaker was a jury, the standard of review is one of reasonableness, thus granting a jury's finding of fact more deference than that afforded a judge's finding.”).

or JNOV rulings after the verdict.⁴⁵ But such rulings are rare and have their own problems.⁴⁶

And finally, the general verdict, issued without reasons, has of course no precedential value when similar cases arise.⁴⁷

B. Themes of the Critique

For critics, the lack of reasons, accountability, and precedent lead to a few fundamental rule of law concerns: horizontal equity, bias or arbitrariness, and the disappearance of rules.⁴⁸ Though these themes have been clear in the tort reform arguments, they have not been tied together to challenge the very legitimacy of the system itself. Perhaps as a result, these concerns have not been taken seriously enough by defenders of the civil justice system.⁴⁹

1. Horizontal Equity

First, we can have no confidence that *like cases are being treated alike*. A defendant in Courtroom A who behaved the exact same way, leading to the exact same harm, as the defendant in Courtroom B might be held liable

45. See FED. R. CIV. P. 50(b) (allowing judges to enter judgment against the jury's verdict); see also Esper & Keating, *supra* note 34, at 279 (describing courts' use of "no-duty" rulings and arguing that they take cases away from the jury).

46. On problems with "no-duty" rulings, see Esper & Keating, *supra* note 34, at 279 (arguing against courts' use of "no-duty" rulings); on judges' uneasiness with taking cases from the jury, see CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2533 (3d ed. 2002) ("[A]ppellate courts have repeatedly said that it is usually desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.").

47. Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1875 (1966) ("[T]he conclusion of the jury will have no precedential value extending beyond the very case being adjudicated."). Though the same is true when trial judges issue verdicts, their findings of fact and conclusions of law can be more easily examined on appeal, a process which could lead to the development of precedent.

48. See, e.g., WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 169–73 (1991) (lamenting the erosion of rules in the tort system); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (addressing the bias in tort judgments); Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1239–40 (2002) (discussing the inconsistency of tort judgments); Henderson, *supra* note 26, at 468 (explaining how changes to tort law have "eliminated much of the specificity with which negligence principles traditionally have been formulated"); Timothy D. Lytton, Robert L. Rabin & Peter H. Schuck, *Torts as a Litigation Lottery: A Misconceived Metaphor*, 52 B.C. L. REV. 267, 267–68 (2011) (explaining that tort reform proponents have criticized the torts system for producing arbitrary outcomes).

49. See *Debunking the Myths*, AMERICAN ASSOCIATION FOR JUSTICE, <http://www.justice.org/cps/rde/justice/hs.xsl/2011.htm> (last visited May 1, 2014) (arguing that tort reformers have misstated the existence of actual problems in the torts system); *Department of Justice Study Disproves Tort "Reform" Myths*, PUBLIC CITIZEN, http://www.citizen.org/congress/article_redirect.cfm?ID=5671 (last visited May 1, 2014).

for negligence, but a defendant in Courtroom *B* is not. Such a lack of horizontal equity or consistency is a major problem for a system of law,⁵⁰ and it is not always apparent.⁵¹ It was this kind of concern that led to Congress passing the U.S. Sentencing Guidelines for federal judges,⁵² for example, and is a concern in many other diverse areas of law.⁵³ Put differently, the tort system falls far short of an ideal of “outcome equality,” as to either liability or damages.⁵⁴

Consider some possible scenarios. Take a city where a crack in a sidewalk, reported six months earlier, was sufficient to put the city on notice and therefore at fault, when someone tripped and fell. A different plaintiff, same crack, might get a jury saying the city was not at fault.

Or a company like Wal-Mart, whose staffing model for keeping the floors clean and safe may be deemed reasonable by a jury as to one store, where an accident occurred, and unreasonable by a different jury judging an accident in the Wal-Mart store in the next town over. Worse yet, different juries might give different reasonableness answers as to the same store, or one answer for Wal-Mart and another for Target.⁵⁵

Perhaps the clearest example of this is when the same products are deemed defective or not by different juries. Take the frequent litigation around prescription drugs with unfortunate side effects⁵⁶, or when doctors

50. See H.L.A. HART, *THE CONCEPT OF LAW* 160–61, 205 (2d ed.1994) (noting that because law is an attempt to control conduct by general rules, “formal justice”—the principle “summarized in the precept ‘treat like cases alike’”—is integral to law); see also *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008) (“Courts of law are concerned with fairness as consistency . . .”); Eisenberg et al., *supra* note 48, at 1239 (“A system that fails to treat similarly situated parties equally cannot be squared with fundamental notions of fairness and justice.”); Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 *STAN. L. REV.* 1153, 1154 (2002) (defining “coherence in law” as a legal system in which “the similarly situated are treated similarly”). Of course, it is merely one value or metric to assess how well the law is working.

51. See Sunstein et al., *supra* note 50, at 1156 (arguing that this issue of coherence does not naturally receive attention from a particular institution, and therefore problems can persist).

52. This was an effort that Stephen Breyer, then an aide to Sen. Kennedy, was heavily involved in. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *HOFSTRA L. REV.* 1, 2–7 (1988).

53. See, e.g., JERRY MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983) 54–61 (explaining how features of the Social Security Act and the way disability benefits are administered make it difficult to achieve consistency and coherence); RAMJI-NOGALES ET AL., *supra* note 42, at 34–35 (highlighting the very different rates of asylum grants in different immigration courts across the country). See also generally Brian Galle, *Tax Fairness*, 65 *WASH. & LEE L. REV.* 1323 (2008).

54. I borrow this phrase from Alexandra Lahav, *The Case for “Trial by Formula”*, 90 *TEX. L. REV.* 571, 593–600 (2012) (explicating this ideal and applying it to mass torts).

55. As Holmes once put it, “[I]t is little better than lawlessness if the same rule is not applied in similar cases thereafter.” Oliver Wendell Holmes, *A Theory of Torts*, 7 *AM. L. REV.* 652, 659 (1873).

56. See, e.g., HUBER, *supra* note 16, at 110–12 (describing the split verdicts in the Bendectin cases in the 1980s, along with apparent inconsistencies involving other products); OLSON, *supra* note 48, at 173–75 (1991) (describing similar inconsistencies as “wildly disparate results from case to case”). To be sure, these authors are strong supporters of limits on tort lawsuits, and these verdicts may not be as inconsistent as they appear.

are held liable for malpractice for performing (or not) high-risk surgeries in a given situation.⁵⁷

To be sure, such rule-of-law problems are often hard to pinpoint or can otherwise be explained away. They are hard to pinpoint because juries are often just asked to rule on liability, and not specifically breach. Even if there is a special verdict that includes the question “was the defendant’s conduct reasonable or negligent?” one could say that reasonableness is “all things considered.” So perhaps one jury chose to give less weight to Wal-Mart’s staffing model, and more to the manager’s general attitude toward safety, for example. Or it can be explained away because there was a causation issue or a plaintiff’s contributing fault that distinguishes one case from another.

The argument against efforts to create more horizontal equity or consistency in tort takes one of two forms: it is impossible or it is undesirable.

The impossibility objection generally rests on the idea that tort cases are too fact-intensive such that it is impossible to reduce them to manageable categories of legally relevant facts in order to classify what are “like cases.”⁵⁸ A related impossibility objection is simply that there is no such thing as “like cases.”⁵⁹ But that begs the question. The question is whether the cases are sufficiently “alike” in a normatively relevant way such that the outcome ought to be the same.⁶⁰

The not-a-problem objection is related to impossibility, but pitched somewhat differently. The argument is that because juries return general verdicts in which they are essentially asked the question “did this defendant wrong this plaintiff?”⁶¹ the lack of consistency on breach decisions is both less widespread and less significant than one might think.⁶²

57. See Carter Phillips & Paul Kalk, *Replacing the Tort System for Medical Malpractice*, 3 STAN. L. & POL’Y REV. 210, 215 (1991) (complaining that jury decisions provide “no guidance to future juries”); see also Kirk B. Johnson, *Beyond Tort Reform*, 257 JAMA 827 (1987) (American Medical Association official claiming that there are “wide, irrational variations” in both liability and damages for similar medical malpractice cases) (quoted in DANIELS & MARTIN, *supra* note 17, at 92–93).

58. See generally Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974).

59. See generally *id.*

60. See Mark Kelman, *Problematic Perhaps, but Not Irrational*, 54 STAN. L. REV. 1273, 1280 (2002) (pointing out that “horizontal equity is at best but one value”).

61. See, e.g., 6 CONN. PRAC., TRIAL PRAC. APPENDIX 5 (2d ed. 2013) (showing sample general verdict forms in Connecticut that ask the jury to decide whether they find in favor of the plaintiff or the defendant); 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 45.01 (6th ed. 2013) (showing sample general verdict forms in Washington that ask the jury to decide whether they find in favor of the plaintiff or the defendant).

62. See Goldberg & Zipursky, *supra* note 14, at 947–53; Catharine Pierce Wells, *A Pragmatic Approach to Improving Tort Law*, 54 VAND. L. REV. 1447, 1463–64 (2001) (noting that while juries produce uncertain outcomes, they might be better fact finders and reduce the emotional nature of the case, restoring order to a chaotic situation).

The reasons (alluded to above) are as follows: first, if Defendant *A* and Defendant *B* have similar conduct, but different liability outcomes, that may be simply because the causal link between one defendant's conduct and the plaintiff's harm was more attenuated than the other, or the plaintiff had a more significant causal role in her own harm in one case than another, or another defendant who acted subsequently and negligently in one case ought to be held responsible. Each of these explanations could account for the different liability outcomes just as well as the jury system.

But at some level, one has to acknowledge that there is a significant risk of inequity, and that there is almost certainly some inequity in the current system.⁶³

2. *Bias or Arbitrariness*

The *bias* argument is this: The deck is stacked. A significant thumb is on the scale in favor of the plaintiffs, who inevitably receive sympathy, empathy, and the money to prove it from their fellow, emotional-not-rational unwashed.⁶⁴ In a more extreme form, it's not just a thumb on the scale or a slight bias—it's simple lawlessness.⁶⁵ Far from applying the legal instructions and weighing the evidence in a neutral way, jurors take the opportunity to do a little redistribution from "deep pockets" to their fellow man.

Relatedly, there is a serious risk of *arbitrariness*, or put differently, an outcome being driven by *impermissible reasons* such as distributive-justice considerations in tort cases.⁶⁶ Indeed, one of the many reasons why we generally require legal decision makers to provide reasons is to maximize the chances that impermissible reasons are not playing a role in the outcome.⁶⁷ African-American plaintiffs currently win less often and get less damages than white plaintiffs.⁶⁸ But under our current system, juries can use impermissible reasons, and no one will ever know.

63. See PHILIP K. HOWARD, *THE LOST ART OF DRAWING THE LINE: HOW FAIRNESS WENT TOO FAR* 31 (2001) (arguing that much of contemporary law is "changeable from jury to jury").

64. See DANIELS & MARTIN, *supra* note 17, at 10–11.

65. See, e.g., RAMJI-NOGALES ET AL., *supra* note 42, at 1 (2009) (stating that the "very essence" of the rule of law is that individual cases are decided "by reference to standardized norms rather than by arbitrary factors").

66. See, for example, Judge Posner's observation that compared to contract law, "[t]ort law does not have these screens against the vagaries of the jury." *All-Tech Telecomm., Inc. v. Amway Corp.*, 174 F.3d 862, 866 (7th Cir. 1999); see also Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337 (2011).

67. See Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 1002 (2008) (noting that by requiring judges to provide reasons for their rulings, in cases of abuse of discretion, "even the winner may realize that the decision was reached incorrectly or, worse yet, illegitimately").

68. See Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91,

Among the many metaphors used by the tort reformers is the notion that the civil justice system is a “lottery.”⁶⁹ A game of chance. Winners and losers are chosen arbitrarily and unpredictably, not based on any notion of merit or justice.⁷⁰ By calling it a “lottery,” the tort reformers imply that it is unworthy of another label: “law.”

Framed this way, and taken together, this set of criticisms goes to the legitimacy of the legal system, or what Lon Fuller called the “inner morality” of law.⁷¹ The arbitrariness violates the basic principle that courts should “treat like cases alike,” which is a tenet of the rule of law.

3. *Disappearance of Rules*

This line of lament from the tort reformers can easily be seen as nostalgia (i.e. “Law was better back in the days when rules were rules, men were men.”) in the absence of a specific normative critique.⁷² To a certain extent, the arguments appear to be about the move in some doctrinal areas towards standards and away from rules, with the familiar arguments (some of which I make below) about the lack of predictability, etc.⁷³

But some of the arguments are more about the erosion of traditional doctrinal boundaries, such as the boundaries for factual causation or recovery for emotional distress.⁷⁴ Again, though, the critics frequently don’t really say what the problem is, except that things are different than they used to be.⁷⁵

There is an argument there about a problem, but it’s more implicit than explicit in the critiques. The argument is that the erosion of doctrinal categories has meant *injustice*, a situation where people are being held responsible for more than they deserve.⁷⁶ It’s an argument about “just desserts,” proportionality, and fairness.⁷⁷

100 tbl. 1 (2012) (indicating a higher success rate among white plaintiffs than African-American plaintiffs).

69. See, e.g., P. S. ATIYAH, *THE DAMAGES LOTTERY* 143 (1997) (referring to the tort system as a “lottery by law”). But see DANIELS & MARTIN, *supra* note 17, at 60–61 (describing and responding to this line of attack).

70. See, e.g., OLSON, *supra* note 48, at 177 (arguing that as the scope of the civil justice system has expanded, the result has been to generate a “randomness of outcome that is forever being compared to a lottery”).

71. FULLER, *supra* note 28, at 42.

72. See, e.g., OLSON, *supra* note 48, at 169 (describing how various “formalist damage limitations” were eroded in the second half of the 20th century).

73. For example, see *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (eliminating different categories for premises liability), which is discussed in Henderson, *supra* note 26, at 512–13.

74. See, e.g., HUBER, *supra* note 16, at 84–132 (describing and lamenting several such changes).

75. *Id.*

76. See generally Eisenberg et al., *supra* note 48; Sunstein et al., *supra* note 50.

77. See *supra* notes 66–70.

One example actually stems from the erosion of one traditional category—contributory negligence—and the (until recently) continued strength of another: joint and several liability.⁷⁸ Under a comparative negligence regime that retains a joint and several liability rule, the tort reformers argue that the rule makes it possible for plaintiffs to go after deep pockets who bear relatively little responsibility for the harm.⁷⁹ In assessing this point, leading torts scholar Robert Rabin acknowledges that the thrust of the tort reformers' argument is one of fairness: "[A] powerful fairness argument can be made for the . . . position: that a defendant's liability ought to correspond roughly to proportionate responsibility for the harm."⁸⁰

This is an argument about proportionality as we think of it in the criminal justice context—people being punished in an amount that is consistent with their just deserts. This is an argument about the fairness or legitimacy of the civil justice system: a justice system where people are made to pay more than their share of moral and legal responsibility dictates is one that must be changed.

C. *Legal Versus Political Legitimacy*

But for defenders of the tort system who believe these rule of law criticisms have some force and would like to address them, there is a fundamental dilemma.

A logical way to address these issues is by shifting decision-making authority from the jury to the judge.⁸¹ That would increase the *legal* legitimacy of civil justice, not because of anything having to do with having a trained dispute-decider, instead of twelve laypeople, deciding the issues—but rather with features associated with the judge as decider: an obligation to give reasons for decisions, a recurring role in deciding such cases, and (combining the previous two), an obligation to treat like cases alike.⁸²

But according to many defenders of the tort system, it is the jury's role in determining normative issues that gives the system *political* or

78. On contributory negligence, see Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 200 (1990) (noting that as of 1990, forty-four states had replaced contributory negligence with comparative negligence).

79. See, e.g., Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1133 (1989) (arguing that joint and several liability burdens those most able to pay by making them disproportionately responsible for jointly-caused harm).

80. See Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 41 (1988).

81. The classic work on the importance of judge-jury questions in negligence law is LEON GREEN, *JUDGE AND JURY* (1939). See also G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 76–78 (1985) (discussing the significance of Green's work).

82. See generally Winston, *supra* note 58.

democratic legitimacy in the first place.⁸³ To the extent that the rule of law/legitimacy challenge has been met by defenders, it is with reference to these virtues of the civil jury as a political institution.

The political legitimacy claim is that the system ought to be considered fair because of (a) the identity and selection of the decision maker, (b) the nature of the process that led to the outcome, and (c) the fact that both are consistent with democratic norms.⁸⁴ The decision maker is a group of citizens chosen at random, and representative of the community.⁸⁵ And the process is a microcosm of deliberative democracy, with twelve people discussing and deciding, each voice counted equally.⁸⁶ So the theory goes at least.

There is also frequently an epistemic component to the political-legitimacy claim. The idea is that the legitimacy of the civil jury is derived in part from the belief that the group decision-making process is likely to get closest to the “right” or “best” answer.⁸⁷ One can even say that when the question is whether conduct is reasonable, there is no correct answer *per se*, and so we put our confidence in fair process, not substance.⁸⁸

But these virtues of the civil jury as a political institution are overstated.⁸⁹ Of greatest relevance here is the historical justification for the

83. See, e.g., Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 90–94 (2000) (discussing the democratic legitimacy of the jury’s lawmaking power).

84. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010) (stating that jury decision is best in negligence cases because a jury can draw from their own knowledge and experiences of societal expectations in the community); Dilan A. Esper & Gregory C. Keating, *Putting “Duty” in its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1279–80 (2008) (discussing the reasonableness of asking a random subset of a community to decide what duties are owed to the people around them as long as the process of selection is fair).

85. See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 381 (1996) (arguing that the jury “draws authority from its claim to articulate the sense of justice shared by a particular community”); Wells, *supra* note 43, at 2411 (justifying the role of the jury in tort cases in part by its “decisional context” that produces “locally objective” judgments).

86. See, e.g., Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 346 (2003) (arguing that “[t]he American jury is the quintessential deliberative democratic body”).

87. The political theorist David Estlund has written about the concept of “epistemic proceduralism” as a justification for democracy more broadly. See DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 98–116 (2007). Indeed, he uses a discussion of the criminal jury to help illustrate his broader theory. See *id.* at 136–44. It is essentially a normative-legitimacy claim: a political system is worthy of being obeyed by the citizens who are subject to it because of the virtue of its process.

88. See Esper & Keating, *supra* note 84, at 1279–80 (arguing that the theory of jury adjudication of negligence cases is that it is “eminently fair to ask a subset of citizens themselves to decide what we may reasonably demand of one another in the way of care,” even if there is no substantively correct answer, and referring to this as “pure procedural justice” (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 74–75 (1971))).

89. See generally Solomon, *supra* note 4 (examining and finding wanting the theory, concepts, and empirical evidence behind the four principal justifications for the civil jury as political institution: (1) acting as a check on government and corporate power; (2) injecting community norms into the legal

civil jury as a way of maintaining local control over community norms,⁹⁰ which I will discuss in more detail below.⁹¹ Indeed, the *Restatement (Third)* invokes this in discussing the benefits of the jury deciding breach, indicating that besides many minds being better than one, a jury decision can “tak[e] advantage of the insight and values of the community.”⁹²

Having reviewed the legitimacy or rule of law problems with the civil jury and its determinations of reasonableness in tort, I turn in this Part to unpacking how we got to our current system of broad standards with juries as decision makers, and whether another way is possible.

II. ARE JURIES AND OPEN-ENDED STANDARDS INEVITABLE IN DETERMINING WRONGS?

The idea that tort law is quintessentially suited for standards, not rules, is well-established and rarely questioned in American legal scholarship.⁹³ In *The Concept of Law*, H.L.A. Hart cites negligence law as the “most famous example” of the use of an open-textured standard (reasonable or due care) in a context where “it is impossible to identify a class of specific actions to be uniformly done or forborne and to make them the subject of a simple rule.”⁹⁴ Richard Posner has said that “[s]tandards that capture lay intuitions about right behavior (for example, the negligence standard) and that therefore are easy to learn may produce greater legal certainty than a network of precise but technical, non-intuitive rules covering the same ground.”⁹⁵

In this Part, I aim to demonstrate that open-textured standards around breach in tort—and their application by juries—are far from inevitable. I show this in two ways: first, by revisiting the conventional wisdom around the Cardozo-Holmes debate in *Pokora*⁹⁶ and *Goodman*⁹⁷ and showing that

system; (3) providing legitimacy for the civil justice system; and (4) fostering political and civic engagement among citizens).

90. See Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 91 (1990) (“In arguing for the right to civil jury trial, [the Antifederalists] said that legal rights should be settled by the jury of the vicinage—a jury which would base its decision on the local knowledge of ordinary people (including information about the parties) rather than on some uniform, homogenous version of the law.”).

91. See *infra* Part IV.

92. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8, Judge and Jury, cmt. b (2010).

93. There have been a few exceptions. See, e.g., RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 91–111 (1998) (explaining four proposed rules for tort that would constitute a “libertarian synthesis”); Henderson, *supra* note 26, at 468.

94. See HART, *supra* note 50, at 132.

95. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 48 (1990).

96. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (Cardozo, J.).

97. *Baltimore & O.R. Co. v. Goodman*, 275 U.S. 66 (1927) (Holmes, J.).

scholars and courts have taken with too much faith Cardozo's lesson about the undesirability of judge-made rules. Second, I point out that there are judge-made rules around "reasonableness" and similar standards in other areas of law that have similar levels of fact-variability across cases.

The rules/standards debate is an old and ongoing one, and I will neither thoroughly canvass the relevant literature nor contribute to it here.⁹⁸ A few summary points from the theoretical and empirical literatures will suffice.

A legal system might adopt rules over standards for one of two primary reasons: to provide better guidance to those whom the legal norm governs and to limit the discretion of the official applying the norm. Most contemporary debate over the civil jury—and the critique of "unpredictability"—focuses on the former rationale.⁹⁹ I assume without argument that social norms (and their rough incorporation into tort law) are sufficient to provide predictability or guidance for primary conduct. I focus wholly on the latter issue here—the importance of limiting discretion.

A. *The Roots of an "Ethics of Particularism"*

Let's start with the *Restatement (Third)*'s embrace of open-textured standards through the invocation of an "ethics of particularism":

Tort law has thus accepted an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation. Tort

98. For some of the classic works in a vast literature, see generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1993); Louis Kaplow, *Rules Versus Standards*, 42 DUKE L.J. 557 (1992); Richard Posner and Isaac Ehrlich, *An Economic Analysis of Legal Rulemaking*, 3 J. LEG. STUD. 257 (1974); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). For works focusing on tort specifically, see Jason Johnston, *Uncertainty, Chaos and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991) (emphasizing the oscillation between rules and standards in tort). See also Henderson, *supra* note 26.

99. See Clermont & Eisenberg, *supra* note 20, at 1149 (describing the perception that civil juries are often biased and incompetent, which affects their fact-finding duties); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 34–35 (1994) (explaining that postmodern thought indicates that juries better serve the community if they are given rules that encourage communication between the judge and jury); Solomon, *supra* note 4, at 1336 (arguing that judges are better equipped than juries as fact finders and challenging the idea that juries are, in fact, better than judges in applying norms).

law's affirmation of this requirement highlights the primary role necessarily fulfilled by the jury.¹⁰⁰

What exactly do the *Restatement* drafters mean by an “ethics of particularism”? At its most basic level, the particularism referred to in the passage above is the use of the “reasonableness” standard as opposed to rules for determining breach in negligence law.¹⁰¹ In this sense, the word “particularism” could simply refer to the key distinction between rules and standards—the level of specificity of the relevant norm.¹⁰² Standards are very general, allowing the decision maker to focus on all the “particular” circumstances of a situation; rules are more limiting, focusing the decision maker on certain factors.

But interestingly, no legal scholars are cited in the *Restatement (Third)*'s discussion of particularism. Instead, the *Restatement* cites to a piece in the philosophy journal *Mind* by moral philosopher Jonathan Dancy.¹⁰³ In doing so, the *Restatement (Third)* is associating itself with an influential branch of contemporary metaethics called “ethical particularism,” for which Dancy is a leading figure.¹⁰⁴

Ethical particularism arose in part as a reaction to the schools of thought within metaethics known as “universalism” or “generalism” that placed significant weight on the use of moral principles in guiding action.¹⁰⁵ For ethical particularists, there are no moral principles worth relying upon. Rather, in deciding how to act in each situation, individuals

100. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010).

101. *See id.*

102. In the legal literature, though, particularism tends to be used in one of a few distinct ways. Perhaps most prominent in contemporary literature, it is used by scholars such as Cass Sunstein and David Strauss to refer to a mode of developing the content of a particular area of law, generally by judges. *See* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 37–39 (2010) (describing how judges use precedent in a common-law system); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 67–69 (1996) (explaining that analogical reasoning in law has four different features, one being a “focus on particulars”). In other words, it is used as a synonym for case-by-case, common-law decision making, as opposed to the form of decision making based on general rules, most often drawn from statute, favored by Justice Scalia.

103. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010).

104. *See, e.g.*, Jonathan Dancy, *Ethical Particularism and Morally Relevant Properties*, 92 *MIND* 530 (1983); R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 *HOFSTRA L. REV.* 195, 198 (2008) (describing Jonathan Dancy as “[t]he leading contemporary moral particularist”).

105. *See, e.g.*, Wright, *supra* note 104, at 195, 199 (“We can roughly define moral principlism, or moral generalism, in opposing terms. Thus moral principlism holds either that specific moral truths have their source in general moral principles, or that reasonable or justified moral decisions and beliefs are based on the acceptance of general moral principles. Moral particularism rejects moral generalism.” (internal quotation marks omitted)).

must take an “all things considered” approach, looking to any factors in the immediate situation that may be relevant.¹⁰⁶

The idea is not that past situations or analogies are out of bounds in moral reasoning, but the fact that a relevant factor has been treated a certain way in the past—say, “breaking a promise is generally wrong”—is irrelevant to the present.¹⁰⁷ Such generalizations should not exist, or if they do, have no force.¹⁰⁸ Principles, like precedent, are not considered “contributory reasons” that count for or against a considered course of action.¹⁰⁹

In defining the key features of particularism for its purposes, the *Restatement* drafters point out two characteristics. The second is straightforward enough and straight from ethical particularism: the “require[ment] that actual moral judgments be based on the circumstances of each individual situation.”¹¹⁰

But the first one is more complex and worth unpacking—it says that particularism “tends to cast doubt on the viability of general rules capable of producing determinate results.”¹¹¹ To a certain extent, this too is straight out of Dancy.¹¹² But it hearkens back as well to the realists’ arguments against legal formalism and its (purported) love of rules and deductive reasoning. It sounds as much like Llewellyn as Dancy.¹¹³

Indeed, the Realists used the word “particularism” in this sense as a reaction to the formal mode of reasoning associated with much of the late nineteenth century and early twentieth century jurisprudence.¹¹⁴ Rather than relying on deduction from rules or principles to reach the right answer, the Realists believed both descriptively and prescriptively that facts were

106. The political scientist James Gibson talks about the difference between universalism, what he calls “the essential ingredient of the rule of law” and particularism, which he calls judgments based on “either expedience or the substitution of some sort of moral judgment for legal rules.” See James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 597 (2007)).

107. See, e.g., Dancy, *supra* note 104, at 544–45 (discussing how past experiences are relevant in moral reasoning but are not the only factor guiding one’s decision for what is right in a subsequent situation).

108. See, e.g., *id.* at 537–42 (using a hypothetical to explain why the generalist theory fails compared to the particularist’s theory); Wright, *supra* note 104, at 198 (“Moral principles, even if they exist, should not guide, inspire, or validate our particular moral judgments.”).

109. JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 15–37 (2004) (advocating ethical particularism by pointing out that moral principles are often unhelpful if they are applied without consideration of the unique circumstances that warrant their application).

110. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010).

111. *Id.*

112. See Dancy, *supra* note 104, at 537–42.

113. See generally KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

114. The legal-realist version of particularism, most associated with Jerome Frank and Karl Llewellyn, is about a way of approaching legal decision making—particularly judging—as well.

important in deciding cases, and to the extent that the use of rule-based categories was necessary, they preferred smaller categories that are more sensitive to the particular context.¹¹⁵ Tort realist Leon Green's casebook, for example, divided the law of negligence into more discrete categories in a way that is reflected in the *Restatement (First)*, but has been little used since.¹¹⁶

To the extent it attempts to harness the realists, though, the *Restatement (Third)* plays off a bit of a caricature and obscures the real choices involved. No one believes that "general rules" can produce "determinate results" in a mechanical way; there will always be an exercise of discretion by whatever decision maker, even with a rule-based approach. Rules do, however, give a certain feature of a situation significant, even controlling, normative weight.

And proponents of rules do not argue, either, that the results under such a decision-making scheme are always the most just.¹¹⁷ Rules are by definition generalizations that are both over-inclusive and under-inclusive when applied to certain facts, in light of the justification behind the rule.¹¹⁸ And rules of course have exceptions, though it is an important question as to when they ought to be defeasible. Nonetheless, rules have benefits, not only in predictability, but also in guiding (and monitoring) the exercise of discretion and in choosing the decision maker.¹¹⁹

Finally, the sentence that follows in the *Restatement (Third)* is important as well. After the sentence discussing the embrace of particularism, the next sentence reads: "Tort law's affirmation of this requirement highlights the primary role necessarily fulfilled by the jury."¹²⁰ As a descriptive matter, this is largely right: particularism does highlight the primary role "fulfilled by the jury."¹²¹ But *necessarily* fulfilled? Could judges not be particularists?

115. LLEWELLYN, *supra* note 113, at 510–12 (describing realist analysis as a method that investigates by grouping in small categories the logical consistency and efficacy of various approaches).

116. See LEON GREEN, *THE JUDICIAL PROCESS IN TORT CASES* (2d ed. 1939) (described in Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 *VAND. L. REV.* 339, 364–65 (2007) (describing the book as being divided by the general contexts in which torts occur)).

117. See, e.g., SCHAUER, *supra* note 98, at 98 (stating that injustice can occur when decision makers are given discretion, under a set of guidelines, to determine under what circumstances they should or should not make the rules).

118. See *id.* (pointing out that this quality is "largely ineliminable").

119. See *id.* at 98, 158–62 (arguing that rules ought to be seen "not so much as implements for achieving predictability but as devices for the allocation of power").

120. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010).

121. See Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 *J. TORT L.* 1, 37 (2010) (lamenting that this commitment to a "case-by-case approach" in negligence law gets in the way of any effort to articulate "broad, sensible categories that could generate reliable default rules that could decide the overwhelming number of cases.").

Whatever the *Restatement* drafters may mean, the sentence—saying that tort’s particularistic inquiry is “necessarily fulfilled by the jury”—is likely overstated. Judges are certainly capable of deciding cases in a particularistic manner, as they do in other areas of the law, including some “right at the boundaries of negligence.”¹²²

Moreover, this is about more than simply rules versus standards. After all, the use of a broad “reasonableness” standard for breach is perfectly compatible with the kind of case-by-case mode of *particularistic* decision making—essentially, the common-law method—that scholars like Cass Sunstein and David Strauss favor.¹²³

Looking at the difference between their version of particularism and Dancy’s—and of course the *Restatement (Third)*’s citation to Dancy’s version¹²⁴—helps make clear the full package of institutional features—the rejection of precedent, analogical reasoning, judicial review of breach determinations, and lack of reasons—that contemporary tort law in the U.S., now with the *Restatement (Third)*’s backing, has embraced. None of these is inherent in a particularistic mode of decision making. Indeed, some are explicitly associated with it in the literature.¹²⁵

Embracing this whole package is far from inevitable. My task in this Article is to show that it could be otherwise, even within our current system. To do that, though, we need to return to the roots of the view that it is inevitable.

B. *Holmes Versus Cardozo Revisited*

The role of the jury in deciding normative issues in tort cases, meanwhile, is well-ensconced and rarely questioned in the academic

122. See Gergen, *supra* note 6, at 438 (pointing out that judges “often do make ad hoc decisions regarding culpability or obligation”). It may be that the *Restatement* drafters were agreeing with Henry Terry’s point that questions of negligence are appropriate for the jury because they are questions of fact. “[T]he inference of reasonableness or unreasonableness, of due care or negligence, is in its nature one of fact, the data furnishing the minor premise and the major premise being drawn from common experience [(i.e., the jury’s knowledge of how an ordinary person would act)], whereas in a true inference of law the major premise is a rule of law.” Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 50 (1915).

123. See generally STRAUSS, *supra* note 102; SUNSTEIN, *supra* note 102.

124. I do not mean to make too much of the *Restatement* drafters’ citation decisions in the commentary. I simply think it is a useful way to talk about precisely what a commitment to particularism might or might not entail and what is normatively desirable.

125. See, e.g., Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 646 (1991) (“[M]any existing and justifiable forms of legal decisionmaking are more particularistic than rule-based.”); Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741, 746–48 (1993) (noting the connection between analogical reasoning and its “focus on particulars”); Wright, *supra* note 104, at 199–201 (discussing particularism in connection with analogical reasoning and legal decision making).

literature.¹²⁶ The scholarly consensus traces back to a debate between Holmes and Cardozo through dueling opinions—*Baltimore & Ohio Railroad v. Goodman*¹²⁷ and *Pokora v. Wabash Railway*¹²⁸—in the early part of the twentieth century that is familiar to many law professors and lawyers, in part for its presence in many of the leading torts casebooks.¹²⁹

Cardozo's view in *Pokora* has led directly to the *Restatement (Third)*'s embrace of an "ethics of particularism."¹³⁰ Indeed, in the *Restatement (Third)*, *Pokora* and *Goodman* are discussed, with the conclusion that "*Pokora* is correctly interpreted as rebuking Holmes and his approach in *Goodman* and as favoring instead an individualization of assessments of parties' negligence."¹³¹ One of the principal *Restatement* drafters, Michael Green, has since written more about *Pokora* and *Goodman*, in part to demonstrate for international audiences the way that the power of the civil jury has influenced U.S. tort doctrine in fundamental ways.¹³²

The issue was whether or not it was possible and desirable for judges to make rules around the breach issue over time in the traditional common-law manner.¹³³ Holmes said yes, first in *The Common Law*, then in

126. See Green, *supra* note 66, at 345–48.

127. 275 U.S. 66 (1927) (Holmes, J.).

128. 292 U.S. 98 (1934) (Cardozo, J.).

129. See, e.g., Glen O. Robinson and Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1485 n.11 (1992) (stating that it is "de rigueur" for torts casebooks to include *Goodman* and *Pokora*); see also Robert Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 440, 442 (2011) (describing the current state of tort law as a "mid-point on the rules-standards continuum" where "*Pokora* lives on, but *Goodman* shows signs of continuing vitality"). Antonin Scalia ends his well-known essay, "The Rule of Law as a Law of Rules," by quoting extensively from *Goodman* and *Pokora* as an example of the difficulty of doing precisely what he argues for in the essay: extending rules as much as possible to govern conduct. Scalia, *supra* note 98, at 1187–88. It is not clear whether Scalia means to agree with Cardozo's caution about judges announcing standards of conduct; he seems to more be saying, "See how difficult it is to figure out when a rule can be extended, and when the answer must simply be left to the factfinder."

130. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010) ("Tort law has thus accepted an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation."); see also W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 728 (2008) ("By invoking a default duty of reasonable care, the Third Restatement does, however, take seriously Cardozo's triumph over Holmes in the classic pair of cases *Baltimore & Ohio Railroad v. Goodman* and *Pokora v. Wabash Railway Co.* . . . This 'ethics of particularism' has been generally accepted in American tort law . . ." (footnote omitted)).

131. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 8, Judge and Jury, cmt. c (2010).

132. See Green, *supra* note 66, at 345–48.

133. These are sometimes referred to as rules about duty, including most recently by one of the *Restatement* drafters. See Cardi & Green, *supra* note 130, at 711. But that cannot be right, as these are both contributory negligence cases. And there is never any question about the existence of a duty to take care to prevent harm to oneself. It is a question about the content of that duty, but in this context, such questions are properly considered under the doctrinal heading of "breach."

Goodman.¹³⁴ Cardozo came along seven years later in *Pokora* and said Holmes was wrong.¹³⁵ It has gone unquestioned that Cardozo got the better of the argument and was right.¹³⁶

But this episode has gone largely unexamined by scholars, and its normative implications have gone unchallenged.¹³⁷ In this next Subpart, I re-examine this episode and conclude that the conventional wisdom is wrong: Holmes's argument was much more plausible than scholars assume.¹³⁸ In revisiting this episode, I aim to make the conceptual space for an argument that it is still possible now to have a more rule-like system generally and specifically around the issue of breach.

1. *Social and Legal Backdrop*

The rise of the automobile and the continued importance of the railroads in economic and social life in America were independently two important cultural and social forces in that era. It should be no surprise then that cases involving collisions between cars and trains may involve deeper issues than are apparent from the surface of a judicial opinion. And in the late nineteenth and early twentieth century, railroads were sites of contestation over responsibility, with the rise of personal automobile transportation adding another dimension.¹³⁹

The building of the railroads themselves—and then the upkeep and maintenance of them—had an enormous human cost in worker injuries, many fatal.¹⁴⁰ It was in lawsuits brought by railroad workers and their decedents against the railroads that doctrines like “assumption of risk,” the “fellow-servant rule” and “contributory negligence” were given meaning and contested, as lawyers, judges, and juries struggled to assign moral, social, and financial responsibility for these inevitable byproducts of railroad expansion, itself a linchpin of the emergence of a truly national

134. See *infra* Part II.B.1.

135. See *infra* Part II.B.2.

136. See Green, *supra* note 66, at 347 (“It is common wisdom that the Cardozo view of jury hegemony won out and that the American tort system reflects that view.”).

137. For brief discussions of *Pokora* and *Goodman* in the literature, see *id.* at 345–48 (arguing that since these cases, the tort system has developed other devices for jury control); Michael L. Wells, Scott v. Harris and the Role of the Jury in Constitutional Litigation, 29 REV. LITIG. 66, 110–12 (2009) (recounting the debate, but concluding that any lesson should not be transplanted to constitutional torts).

138. Holmes was not the only one in the early twentieth century who saw negligence law as evolving in this way. Henry Terry, a prominent tort scholar in the early twentieth century, indicated as well that a decision by a judge on negligence would be considered precedential, and that a number of “positive rules of considerable generality” had developed already, citing “stop look and listen” as one of them. See Terry, *supra* note 122, at 50.

139. BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920, at 99–101 (2001).

140. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 223 (3d ed. 2001).

economy in the United States.¹⁴¹ Eventually, dissatisfaction from both sides of these lawsuits led to the Federal Employers' Liability Act (FELA) in 1908 to deal exclusively with railroad injuries and, in the decades thereafter, the passage of state workers' compensation laws nationwide.¹⁴² In the years after the Civil War, the popular press was filled with horrific accounts of train accidents.¹⁴³ And by the 1880s and 1890s, public opinion had turned against the railroads as they literally spread into every corner of American life.¹⁴⁴ Outside the courts, legislatures and regulators sought to assign railroads responsibility for preventing accidents.¹⁴⁵ Legislatures passed laws mandating certain safety devices, and railroad commissions documented the growing human toll, with an accounting for each railroad company.¹⁴⁶ The expansion of railroads was leaving carnage in its wake, and it was the responsibility of railroads to fix the problem.

In the first two decades of the twentieth century, though, the railroad and streetcar companies joined forces with chambers of commerce and other civic groups to shift the terms of responsibility by launching a set of "safety first" campaigns aimed at the public.¹⁴⁷ Mirroring workplace campaigns conducted by railroads to encourage employees to take responsibility for their own safety, these campaigns sought to educate individuals on rules they could follow to avoid accidents when getting off trains, crossing railroad tracks and streetcar paths, and crossing streets with the spread of the automobile.¹⁴⁸ It was at this time that innovations (now taken for granted) appeared like the white safety lines demarcating the "crosswalk" where it was safe to cross the street, or streetcar doors opening only at the designated stop.¹⁴⁹ We now think of "look both ways before

141. See *id.* ("From about 1840 on, one specific machine, the railroad locomotive, generated, on its own steam (so to speak), more tort law than any other in the nineteenth century."); JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 211 (2001) (pointing out that leading tort cases "invariably involved railroad accidents").

142. See FRIEDMAN, *supra* note 140, at 364.

143. WELKE, *supra* note 139, at 140–42; MARK ALDRICH, *DEATH RODE THE RAILS: AMERICAN RAILROAD ACCIDENTS AND SAFETY, 1828–1965*, at 169 (2006).

144. See FRIEDMAN, *supra* note 140, at 356–57 (describing the "rage of the victims" as a "roaring force" by 1890).

145. *Id.* at 357 (explaining that the injuries from railroads, as well as factories and mines, came to be viewed as a "major social problem").

146. WELKE, *supra* note 139, at 10–15; ALDRICH, *supra* note 143, at 168–71.

147. WELKE, *supra* note 139, at 36–37; *Standardize Traffic Signals*, 73 *RAILWAY AGE* 95, 95 (1922) (explaining that the "principal benefit" from the recently launched Careful Crossing campaign would be "derived from educating the public").

148. See ALDRICH, *supra* note 143, at 265 (explaining that the railroads' experience with Safety First in the workplace led them to "try the technique on motorists"); WELKE, *supra* note 141, at 39 (describing these campaigns as reflecting Progressive-era beliefs in the power of education and containing an "implicit message . . . that individuals were responsible in some measure for their own safety").

149. WELKE, *supra* note 139, at 38–39.

crossing the street” as something we were born knowing, but in the early part of the twentieth century, it was a rule of thumb to educate the general public as part of these “safety first” efforts.¹⁵⁰

In the late nineteenth and early twentieth century, railroad crossing accidents were perhaps the most common type of tort claim.¹⁵¹ And at railroad crossings, the railroads had already made efforts—in the face of litigation, public pressure, and regulation—to move from “flagmen” posted at crossings to signal when it was safe to cross to automatic signals and gates.¹⁵² But from the railroads’ perspective, it was time to put some responsibility back where it belonged: on the individual.¹⁵³ They did this in part by working with legislatures in several states to pass “stop laws” requiring automobile drivers to make a full stop before crossing the tracks.¹⁵⁴ It is not clear there was much enforcement or compliance with such laws, a matter of some frustration to the railroads.¹⁵⁵ And they also did it through public education campaigns, no doubt targeted not just at the general public, but also at the elites who wrote laws and adjudicated cases.¹⁵⁶

“Cross Crossings Cautiously” became a centerpiece of this part of the “Careful Crossing” campaign from the American Railway Association,

150. See, e.g., *Safety Section Meeting Draws Record Attendance*, 86 RAILWAY AGE 1045, 1047 (1929) (referring to the goal of the safety movement as “the training of the subconscious mind by continued example so that in the performance of duties the method is unconsciously correct”).

151. See *id.* at 353 (pointing out that personal-injury cases grew as the railroads did, and that “[m]ost cases were crossing accidents”).

152. See *Uniform Crossing Warnings*, 78 RAILWAY AGE 917 (1925).

153. See, e.g., Editorial, *The Growing Menace of the Highway Crossing*, 73 RAILWAY AGE 361, 361 (1922) (arguing that though in the early days of rail travel, “the onus of the grade crossing was placed upon the railroad[s],” the increased risks from automobiles is “a condition for which responsibility must be placed primarily on the users of the highways”).

154. See, *Prevention of Grade Crossing Accidents*, 86 RAILWAY AGE 1535, 1535 (1929).

155. See *Safety Section Meeting Draws Record Attendance*, *supra* note 150, at 1045, 1047 (railway executive calling for impressing upon city and state officers the “need for rigid enforcement of traffic laws”); *Automobiles at Railroad Crossings*, 79 RAILWAY AGE 596 (1925) (asserting that drivers frequently ignore the stop-laws). See also the testimony of a Northwestern Pacific Railway representative at a congressional hearing on railroad safety expressing his company’s view that “the public have long ago come to consider that this rule of the law that they shall stop, look, and listen was made merely for the purpose of using paint on a sign and not for their information or guidance.” *Safety on Railroads: Hearing on Bills Relative to Safety on Railroads, Headlights on Engines Before a Subcomm. Of the H. Comm. on Interstate & Foreign Commerce*, 63rd Cong. 264 (1914) (statement of Mr. Palmer).

156. See ALDRICH, *supra* note 143, at 266 (pointing out that the popular press frequently contained articles with the railroads’ position that careless driving was at the root of crossing accidents); *Safety Section Meets at Buffalo*, 84 RAILWAY AGE 1159, 1159 (1928) (noting that the architect of the Careful Crossing campaign—H. A. Rowe, claim attorney of the Delaware, Lackawanna & Western Railroad—points not only to decreased casualties after six years, but also “an undeniably lessened primary hostility toward the railroads in connection with mishaps at crossings”); see also *Safety Council Holds Annual Meeting in Detroit*, 73 RAILWAY AGE 467, 468 (1922) (noting that Rowe calls for a movement to influence local newspaper writers not to valorize automobile drivers involved in accidents).

begun in 1922.¹⁵⁷ Though “Cross Crossings Cautiously” was the slogan on most posters, it was sometimes paired with the admonition “THINK! DRIVER THINK!”¹⁵⁸ How does one “cross crossings cautiously” exactly? In a publication targeting doctors, one railway representative explained, “The old, familiar slogan ‘Stop, Look and Listen’ is about the best piece of advice that was ever written.”¹⁵⁹ Indeed, before the American Railway Association settled on its alliterative title for the campaign, the proposal was for a nationwide campaign against grade crossing accidents known as the “Stop, Look and Listen” campaign.¹⁶⁰

To spread their message, the railroads handed out hundreds of thousands of brochures and flyers and enlisted the Boy Scouts in their education efforts.¹⁶¹ Some railroads enlisted their own employees, one in a “Safe Drivers’ Club” where they put a tag with the slogan “Cross Crossings Cautiously” on their rear license plate,¹⁶² and another in “Stop-Look-Listen” clubs.¹⁶³ There was also a plan to enlist the “motion picture news weeklies” in the campaign, perhaps by “smash[ing] up an old automobile in a fake crossing accident,”¹⁶⁴ but it is not clear this ever came to fruition.

While the basic message could be construed as friendly and subtle in its attempt to shape conceptions of responsibility, the railroads also did not hesitate to point the finger, frequently calling attention to anecdotes and statistics indicating that a significant share of crossing accidents involved automobile drivers hitting the sides of trains.¹⁶⁵ The railroads pointed to the

157. See Marcus A. Dow, *A Message to Drivers of Automobiles and Other Persons Who Use Highways That Cross Railroads at Grade*, 35 INT’L J. SURGERY 286 (1922) (explaining that a “nationwide campaign is under way” known as the “Careful Crossing Campaign”).

158. See Poster, reprinted in *Cross Crossings Cautiously*, 78 RAILWAY AGE 954, 954 (1925).

159. Dow, *supra* note 157, at 286.

160. See, *Proceedings of the Safety Section*, 1921 AM. RAILWAY ASS’N 71.

161. See *Safety Section Meets at Buffalo*, *supra* note 156, at 1159 (pointing to the American Automobile Association as well as the Boy Scouts as those enlisted in distributing pamphlets); *Safety Section Reports a 19 Percent Reduction of Accidents*, 82 RAILWAY AGE 1339, 1340 (1927) (reporting success at getting crossing safety tips into the Boy Scout handbook); *Safety Council Holds Meeting in Detroit*, *supra* note 156, at 468 (speaker from B&O railroad calls Careful Crossing campaign the “most striking example of successful propaganda launched recently by the railroads”).

162. See *Traffic News*, 78 RAILWAY AGE 1658, 1658 (1925).

163. See *Safety Section Meets at St. Louis*, 80 RAILWAY AGE 1261, 1261 (1926).

164. *Proceedings of the Safety Section*, *supra* note 160, at 72.

165. See ALDRICH, *supra* note 143, at 266; *Increase in Trains Struck by Motorists*, 87 RAILWAY AGE 266, 266 (1929); *The Careless Auto Driver*, 86 RAILWAY AGE 543, 543 (1929) (reprinting excerpts from an article by a Railway manager called “Stop, Look and Listen” and claiming that “accidents at grade crossings are due almost entirely to the carelessness of drivers who should not be permitted to drive automobiles under any conditions”); see also *Safety Council Holds Meeting in Detroit*, *supra* note 156, at 468 (asserting that the nation is realizing it is at the “mercy of ignorant, heedless and criminally reckless drivers”); *The Protection of Railroad Grade Crossings*, 77 RAILWAY AGE 513, 513 (1924) (arguing that it is important for the public to “bear in mind” that the most effective means of accident prevention is “the elimination of the reckless drivers . . . who are responsible for nearly all the accidents”).

“stop laws” they had no doubt helped pass at the state and local level as an expression of public will, one of “aggressive opposition to every sort of chance-taking by the drivers of motor vehicles.”¹⁶⁶ Accidents at grade crossings were indeed a problem, but for the railroads, responsibility needed to be shared among the companies, members of the public, and the state.¹⁶⁷

2. *Holmes’s Opinion in Goodman*

In 1924, Nathan Goodman drove a truck across a railroad track in southern Ohio, did not see a train coming, and was struck and killed.¹⁶⁸ Goodman was apparently in a hurry, and when he approached the railroad track, he slowed down considerably but did not stop before driving onto the track.¹⁶⁹ When his widow sued the B&O railroad for negligence, the railroad asked for a directed verdict based on contributory negligence at trial.¹⁷⁰ The trial judge denied the request, and plaintiff won a verdict from the jury.¹⁷¹

By the time Goodman’s case reached the Supreme Court on appeal in 1927, Oliver Wendell Holmes was eighty-six years old.¹⁷² Henry Ford had introduced the Model T in 1908, and the use of automobiles by a wide swath of the middle class had exploded around 1920.¹⁷³

But it was only two years earlier that Holmes had replaced his horse and buggy.¹⁷⁴ He had not learned to drive at the time the Goodman case

166. *Prevention of Grade Crossing Accidents*, *supra* note 154, at 1535.

167. See ALDRICH, *supra* note 143, at 265–66 (describing the railroad carriers’ goals with the Careful Crossing campaign as including shaping perceptions of crossing accidents so that public funding would seem appropriate); *The Problem of Automatic Highway Crossing Protection*, 87 RAILWAY AGE 1315, 1315 (1929) (arguing that “[i]t is principally the duty of public authorities to reduce hazards at railway and highway crossings” because it is an increase in motor vehicles and highways that is causing increased accidents); *Gray Charges Executives with Safety Duties*, 77 RAILWAY AGE 27, 28 (referring to a “joint responsibility between the railroads and the public at large”); *Safety Regulations at Railroad Grade Crossings*, 76 RAILWAY AGE 462, 462 (railway executive stresses the “joint responsibility of the railroads, the state and municipal governments”).

168. *Baltimore & O.R. Co. v. Goodman*, 275 U.S. 66, 69 (1927) (Holmes, J.).

169. *Id.*

170. *Id.*

171. *Id.*

172. See John Fox, *Biographies of the Robes: Oliver Wendell Holmes*, PBS (Dec. 2006), http://www.pbs.org/wnet/supremecourt/capitalism/robes_holmes.html (documenting Holmes’s birthday as March 6, 1841, thus making him 86 years old in 1927).

173. See *The Automobile Industry, 1920–1929*, THE HISTORY OF AMERICAN TECHNOLOGY, http://web.bryant.edu/~ehu/h364/materials/cars/cars%20_30.htm (last visited May 1, 2014) (indicating that world total production of automobiles in 1920 was 2.4 million, while the United States alone produced 3.7 million automobiles in 1923).

174. See LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 585 (1991) (explaining that Holmes swapped from a horse and buggy to an automobile, “succumb[ing] to the ‘inevitable’”); see also Michael Herz, Essay, “*Do Justice!*”:

was argued, and he never would before his death eight years later at the age of ninety-four.¹⁷⁵

As a result of the transition from the horse-and-buggy era to that of the automobile, the rules surrounding the care to be taken by vehicles crossing railroad tracks were in flux as well.¹⁷⁶ Crossing railroad tracks with a horse was a bit dicey, and the best strategy for safety was unclear.¹⁷⁷ If you could see that no trains were coming, the best thing to do when approaching was to just keep going across the tracks.¹⁷⁸ If you stopped, you might not get the horse to start going and doing what you wanted it to, and by that time, a train could be on the way. So the rule governing contributory negligence in the horse and buggy era was essentially “look and listen.”¹⁷⁹

There was no reason to believe Goodman did not look and listen—it was undisputed that his view was obstructed—but he did not stop before crossing.¹⁸⁰ Holmes’s holding, then, in reversing the verdict for Goodman’s widow, was that Goodman and those like him need to stop. “He knows that he must stop for the train not the train stop for him.”¹⁸¹ And with that sentence, Holmes formulated what would be known as the “stop, look, and listen” rule.

But Holmes unfortunately added one sentence of dictum: “In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.”¹⁸² It was dictum because it was unnecessary to discuss getting out of the car in this case: Goodman did not even stop, and after pointing to the need to stop, Holmes need not have said any more.

Variations of a Thrice-Told Tale, 82 VA. L. REV. 111, 119 n.32 (1996) (stating that literature suggests Holmes began using automobiles “in the early or middle 1920s”).

175. G. EDWARD WHITE, OLIVER WENDELL HOLMES: SAGE OF THE SUPREME COURT 128 (2000).

176. *Duty of Driver Whose View at Railroad Crossing Is Obstructed to Leave Vehicle in Order to Get an Unobstructed View Before Crossing*, 91 A.L.R. 1055 (1934) (discussing early twentieth century cases applying varying standards of care to drivers crossing railroad tracks).

177. *See, e.g.*, *Flannelly v. Del. & Hudson Co.*, 225 U.S. 597, 603 (1912) (“The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing.”); *Schofield v. Chi., M. & St. P. Ry. Co.*, 114 U.S. 615, 618 (1885) (discussing the “duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision”); 65 AM. JUR. 2D *Railroads* § 308 (2011) (“[B]ut if after looking and listening a person neither sees nor hears any indications of a moving train, he or she cannot be charged with negligence in assuming that there is none near enough to make the crossing dangerous.”).

178. *See generally supra* note 177.

179. *Northern Pac. R.R. Co. v. Freeman*, 174 U.S. 379, 382 (1899) (“The duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track, is so elementary . . .”).

180. *Baltimore & O.R. Co. v. Goodman*, 275 U.S. 66, 70 (1927) (Holmes, J.).

181. *Id.* at 69–70.

182. *Id.* at 70.

This line of dictum was no mere impulse. It was Holmes's chance to implement the theory that he had articulated in his classic lectures *The Common Law*.¹⁸³ In discussing the law of negligence, Holmes put forth his view that the general standard of a "prudent man" ought to be given greater specificity over time by judges.¹⁸⁴ For Holmes, as a matter of logic, it could not be that the question of negligence always went to the jury, without further specificity, as judges would essentially be confessing "their inability to state a very large part of the law" and implying that "nothing could be learned by experience."¹⁸⁵

Through statutes and case law, Holmes argued, there would be greater content composing the "specific acts or omissions" that actors should take in certain circumstances.¹⁸⁶ As judges make such rulings, according to Holmes, "the law is gradually enriching itself from daily life, as it should."¹⁸⁷ For Holmes, the common-law method of accreting precedent was right at home in the negligence standard.¹⁸⁸

At first, according to Holmes, judges would frequently give the question of negligence to the jury, but over time, they would learn from the jury whether certain conduct "usually is or is not blameworthy."¹⁸⁹ After that, having seen enough juries decide enough cases, the judge "ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury."¹⁹⁰ The judge might still seek the jury's opinion in some cases, but that would be less frequent.¹⁹¹

In this context, enshrining "stop, look, and listen" as a legal rule (putting aside Holmes's broader iteration) appears quite sensible. There were ongoing public education campaigns to inculcate it as a social norm, and many legislatures had codified a version of the rule as well. Rather than incurring the costs of continued litigation over the proper standard, and the risk of juries applying a different standard or ignoring the standard altogether, Holmes simply was the agent of importing the evolving social norms into the law, in the great tradition of the common-law judge. And as

183. See OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., 1963).

184. *Id.* at 89.

185. *Id.*

186. *Id.*

187. *Id.* at 96.

188. See *id.* at 95–96 ("When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should.").

189. *Id.* at 98.

190. *Id.* at 99.

191. *Id.*

part of the Progressive-era faith in society's ability to regulate risk, Holmes was merely doing his part.

In 1929, the *Harvard Law Review* published a note entitled "Aftermath of the Supreme Court's Stop, Look, and Listen Rule."¹⁹² It pointed out that many state courts had declined to follow the rule adopted by Holmes in *Goodman*.¹⁹³ Perhaps it was no coincidence that the *Review*'s president at the time was a young man named Henry Hart, who would eventually have a few things to say about the proper relationship between state and federal courts.¹⁹⁴ The note framed *Goodman* as a test for the uniformity benefits of *Swift v. Tyson*.¹⁹⁵ And for the author, the states' lack of enthusiasm for the rule in *Goodman* meant that *Swift*'s promise of uniformity failed the test.¹⁹⁶

3. *Cardozo's Opinion in Pokora*

Seven years after *Goodman*, another contributory negligence case arising out of a man driving across railroad tracks reached the U.S. Supreme Court. Holmes had retired, and Cardozo had taken his place.¹⁹⁷ In general, Cardozo was a great admirer of Holmes,¹⁹⁸ but not (apparently) of his *Goodman* opinion.

John Pokora was an ice dealer, driving across the railroad tracks in Springfield, Illinois on his way to load up his truck with ice.¹⁹⁹ He stopped, he looked, and he listened before beginning to cross, but by the time he reached the main track, he was struck by a passenger train.²⁰⁰ The district court directed a verdict for the railroad, finding contributory negligence, and the Seventh Circuit affirmed based on *Goodman*'s dictum.²⁰¹ In other

192. Note, *Aftermath of the Supreme Court's Stop, Look, and Listen Rule*, 43 HARV. L. REV. 926, 930 (1930) [hereinafter *Aftermath*].

193. *Id.* ("Where the stop, look, and listen rule was law before, it is law still . . . In other jurisdictions, the *Goodman* case has been rejected, either expressly or by implication.") (citations omitted).

194. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003).

195. *Aftermath*, *supra* note 192, at 927.

196. Another complaint about *Goodman*-type rules was the impact it might have on witness behavior in litigation. See, e.g., Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 121 (1924) (noting that one risk of a Holmesian specification of rules is that witnesses are then coached to say they did what the rule tells them to, pointing particularly to plaintiffs in contributory negligence cases as an example of where this happens).

197. See ANDREW L. KAUFMAN, CARDOZO 465–67 (1998) (describing Cardozo's appointment to the Court following Holmes's retirement).

198. See *id.* at 476 ("Cardozo had an affection for Holmes and recognized that Holmes had been an important influence in his thinking.")

199. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 99 (1934).

200. *Id.* at 100.

201. *Id.* at 99.

words, because the driver did not get out of his truck to look down the tracks before crossing, he was contributorily negligent as a matter of law.

Cardozo's opinion for the Court focused on the dictum in *Goodman* that was the dispositive issue in *Pokora*.²⁰² His opinion said specifically that it was not deciding the issue of any duty to stop and that such an inquiry would lead into the "thickets of conflicting judgments" in the state courts.²⁰³

In turning to the key issue, Cardozo began with a sweeping if somewhat ambiguous statement: "Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life."²⁰⁴ It is not clear whether Cardozo meant that social norms change more quickly than courts can keep up, or whether he simply meant that standards of conduct track social norms. The latter seems more likely, as evidenced by Cardozo's next sentence: "To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us."²⁰⁵ Cardozo then proceeded to explain why such a duty is impractical and even dangerous.²⁰⁶

He then made another broad statement: "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged."²⁰⁷ Turning to the aftermath of *Goodman*, he referred to the opinion as being a "source of confusion in the federal courts to the extent that it imposes a standard for application by the judge," and indicated that in the state courts it has only "wavering support."²⁰⁸ He then concluded, saying of *Goodman*, we "limit it accordingly," and reversed the judgment for the railroad in *Pokora's* case.²⁰⁹

The conventional view is that Cardozo clearly won the broader argument: it is both impossible and unwise to formulate rules around reasonableness in torts. Scholars have universally sided with Cardozo's "need for caution in framing standards of behavior that amount to rules of law,"²¹⁰ and courts have followed.²¹¹

202. See *id.* at 102–06.

203. *Id.* at 102–03.

204. *Id.* at 104.

205. *Id.*

206. *Id.*

207. *Id.* at 105.

208. *Id.* at 106.

209. *Id.*

210. *Id.* at 105.

211. See Wells, *supra* note 137, at 112 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL. & EMOTIONAL HARM § 8 cmt. c (2010)) ("Echoing Cardozo, the Restatement observes that seemingly similar cases may present 'many variables that can best be considered on a case-by-case

Indeed, a leading scholar to write on the issue of jury power in deciding normative issues in the common law, Mark Gergen, cited *Pokora* (and only *Pokora*) for the proposition that “when judges have tried to formulate rules to define the standard of conduct in a given situation, the usual complaint is that the rules do not work, and not that the very enterprise of formulating a rule intrudes upon the role of the jury as moral arbiter.”²¹² Indeed, the *Restatement (Third)* points out that few jurisdictions today follow the stop, look, and listen rule.²¹³ But this may be no more than a path-dependent result of the embrace by scholars and courts of Cardozo’s rebuke of Holmes.

4. *Alternative Explanations for Pokora*

Looking back on the dueling opinions, there is reason to believe that the result in *Pokora* was driven by something other than Cardozo’s apparent disagreement with Holmes’s drive for judge-made rules.

First, Cardozo often found conduct to be reasonable (or unreasonable) as a matter of law.²¹⁴ The famous torts case *Adams v. Bullock* is one example of his overturning a jury verdict,²¹⁵ and *Palsgraf* is another.²¹⁶ It may be that the facts of the particular *Pokora* case offended Cardozo’s sense of justice: the truck driver was hit by a train that had failed to blow

basis.”); see also *id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 8 cmt. c (“[B]y and large, . . . American courts have decided that the advantages of allowing courts to decide the negligence issue in cases [where reasonable persons may reach diverse outcomes] do not justify removing the issue from the jury.”)).

212. Gergen, *supra* note 6, at 438.

213. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 8 cmt. c (2010) (“In the modern era, it is rarely even claimed that a motorist is contributorily negligent for not getting out of his or her car. As for the motorist’s failure to stop, courts generally regard this as merely raising an issue for the jury’s consideration.”).

214. See KAUFMAN, *supra* note 197, at 255–56 (1998) (pointing out that though Cardozo was “assiduous in protecting the role of the jury,” he nonetheless frequently took issues away from the jury that he thought clear); John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U.L. REV. 1324, 1367 (1990).

215. *Adams v. Bullock*, 125 N.E. 93 (N.Y. 1919). For criticism of this opinion, see Stephen Sugarman, *Why No Duty?*, 61 DEPAUL L. REV. 669, 690–91 (2011) (criticizing Cardozo for framing his ruling as “no duty” when it is better understood as “no breach”). For an interesting account of the case, see Elizabeth Smallwood, *A First-Year Tort Law Institution: Adams v. Bullock* (2004) (unpublished student paper), available at <http://www.law.berkeley.edu/sugarman/adamsfinal-1.doc>.

216. 248 N.Y. 339 (1928). Cardozo was also not shy about applying the “assumption of risk” doctrine to deny recovery to injured plaintiffs. See, e.g., *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483 (1929) (overturning a jury verdict in favor of a person who had been injured on a Coney Island ride called The Flopper on the ground that “the timorous may stay at home”); *Dougherty v. Pratt Inst.*, 244 N.Y. 111 (1926) (reversing a verdict for the estate of a window-washer killed when he fell off the ledge of a school building). In discussing these cases, Andrew Kaufman refers to Cardozo’s apparent lack of sympathy for “injured people who had been aware of possible danger.” See KAUFMAN, *supra* note 197, at 259.

its horn, even though it was required by statute to do so.²¹⁷ Yet the driver recovered nothing at all because of all-or-nothing contributory negligence and *Goodman*'s dictum.

Moreover, there are several reasons that may do more to explain Cardozo's opinion than his proffered justification—specifically, that (1) “stop, look, listen and get out if you have to” was a bad rule; (2) the consensus had grown against the harshness of the contributory negligence rule, driven in part by a reaction to the railroads' attempt to place responsibility on victims; (3) judges were increasingly dissatisfied with the federal common-lawmaking authorized in *Swift v. Tyson*, and practiced by Holmes in *Goodman*; and (4) differences in personal and professional background led Cardozo to be more attentive to facts and more sympathetic to the injured.

a. A Bad Rule

In overturning the dictum from *Goodman*, Cardozo relied in part on the fact that many state courts were not applying the rule in *Goodman*. It is not totally clear what inference to draw from this, though. It may in part be an issue about *Swift v. Tyson* and the relationship between federal and state courts on issues of federal common law. In other words, if Holmes had been deciding something that was clearly an issue of federal law, then presumably courts would have gone ahead and applied the rule, even if it led to what they considered unjust results.

The explanation may even be simpler, though: courts were not applying the rule because it was such a bad rule. It was a bad rule in that it was far from social norms, as Cardozo pointed out.²¹⁸ It is not clear that there was much of a safety gain, if any. And it was significantly over-inclusive as a guide as to which plaintiffs performed below the “reasonable person” standard when crossing railroad tracks. Rules by definition are over-inclusive and under-inclusive, but the fit here was so bad that courts simply refused to use it. Again, had Holmes simply omitted that one sentence of dictum, it might well have been a much different story. Many jurisdictions at the time did follow the “stop, look, and listen” rule, and a handful still do today.

Seen in this light, *Goodman* was unpopular in the state courts in the way that many U.S. Supreme Court decisions with ill-considered dictum

217. 292 U.S. 98 (1934).

218. See *Pokora*, 292 U.S. at 104 (1934) (“To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us.”). Andrew Kaufman observes that since Cardozo himself had “elevated standards of conduct into rules of law” in prior opinions, he must have believed that this particular rule was “overtaken by the facts of daily life.” KAUFMAN, *supra* note 197, at 263.

are. But that does not mean that common lawmaking around breach was impossible. Indeed, it is quite plausible that even Cardozo did not mean to go this far, as a Duke law student named Richard M. Nixon pointed out.²¹⁹

b. Dissatisfaction with Contributory Negligence

It was through litigation over railroad crossing accidents—cases like *Pokora* and *Goodman*—that the use of the doctrine of contributory negligence had grown substantially, as railroad lawyers sought to use the carelessness of the plaintiff to assign responsibility to the plaintiff for her own injuries.²²⁰ According to one scholar, the contributory negligence issue “tended to overshadow all other contentions” and became the “central theme of dispute” when such cases were appealed.²²¹ The beauty of the contributory negligence doctrine, from the railroad lawyers’ perspectives, is that it was considered an issue of law decided by the judge and frequently used to take cases away from the jury, who were thought to be overly sympathetic to the victim and hostile to the corporate railroad.²²²

By 1934, though, there was great dissatisfaction with the harsh contributory negligence rule, where any amount of negligence barred recovery by the plaintiff.²²³ Some jurisdictions had already moved to a comparative negligence regime, but most had not.²²⁴ And the fact that railroads were often the ones who escaped liability was a particular concern, as evidenced by the fact that some of the statutes moving to comparative negligence initially applied only to suits against railroads.²²⁵

The “stop, look, listen” rule was very much at the center of the struggle over who ought to bear the burden of injuries: individuals or railroads. When *Goodman* came down, the coverage in the popular press reflected the

219. See Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 479 (1936) (arguing that *Pokora* did not “advocate the abandonment of all fixed standards in such cases; its only quarrel was with the standard which had been laid down.”). Nixon was one of the only commentators to point this out.

220. See Wex Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 160 (1946).

221. *Id.* at 151.

222. See *id.* at 169 (describing the doctrine as an “ingenious device which gave the court almost complete freedom to accept or reject jury participation at its pleasure”); FRIEDMAN, *supra* note 140, at 352–53 (describing the doctrine as “harsh” but an “extraordinarily useful” tool for judges keeping tort claims away from the jury).

223. See WHITE, *supra* note 81, at 165–66.

224. See Christopher Curran, *The Spread of the Comparative Negligence Rule in the United States*, 12 INT’L REV. OF L. & ECON. 317, 319–20 tbl. 1 (1992) (listing the adoption of comparative negligence rules by state and the year in which they adopted the rule).

225. See WELKE, *supra* note 139, at 36–39 (describing the “safety-first campaigns” waged by railroads along with local chambers of commerce and other civic entities as containing an implicit message that “individuals were responsible in some measure for their own safety” but “offered ‘rules’ for all to follow” in situations like approaching railroad crossings).

idea that this was a battle over responsibility. “Motorists Are Held Responsible for Safety at Grade Crossings in Supreme Court Ruling” read *The New York Times* headline, and the story made clear the upshot: that Goodman’s failure to stop and get a clear look at the tracks “put the entire responsibility for the accident upon him.”²²⁶ The railroads of course celebrated the victory. *Railway Age* heralded the decision as vindication for the contention “long maintained by the railroads that when crossing tracks one must exercise care in so doing and that he crosses ‘at his own risk.’”²²⁷ In contrast, representatives of the auto companies criticized the decision, asserting that “motorists throughout the country are voicing their disapproval” with the decision.²²⁸ “Assails Rule Blaming Autos in Rail Crashes” read *The New York Times* headline of the story covering this critique.²²⁹

By 1934, when Cardozo decided *Pokora*, highway engineers had begun to challenge the idea that driver carelessness was a key factor in explaining grade-crossing collisions.²³⁰ And there had of course been profound changes in the political and economic climate as well.

In 1927, when *Goodman* was decided, Calvin Coolidge was president, and the unemployment rate was 4.1%.²³¹ By 1934 and *Pokora*, Franklin Delano Roosevelt was president, the nation was in the throes of the Great Depression, and unemployment was 21.7%.²³² In the aftermath of the stock market crash of 1929, public opinion towards big business—including the opinion of elites—was distinctly unfavorable.²³³ In this context, it is understandable that a moderately progressive judge like Cardozo would resist the railroads’ continued attempt to take personal-injury cases away from juries and avoid responsibility for harm.

c. *The Road to Erie*

By 1934, there was also widespread dissatisfaction among judges with another area of legal doctrine—the federal common-lawmaking authorized

226. *Motorists Are Held Responsible for Safety at Grade Crossings in Supreme Court Ruling*, N.Y. TIMES, Nov. 1, 1927, at 1.

227. *Supreme Court Fixes Grade Crossing Responsibility*, 83 RAILWAY AGE 872, 872 (1927).

228. *Assails Rule Blaming Autos in Rail Crashes*, N.Y. TIMES, Feb. 25, 1928, at 8.

229. *See id.*

230. *See* ALDRICH, *supra* note 143, at 266.

231. Stanley Lebergott, *Annual Estimates of Unemployment in the United States, 1900–1950*, in THE MEASURE AND BEHAVIOR OF UNEMPLOYMENT 213, 215 (Nat’l Bureau of Econ. Research ed., 1957).

232. *Id.*

233. Carol B. Swanson, *Antitrust Excitement in the New Millennium: Microsoft, Mergers, and More*, 54 OKLA. L. REV. 285, 292 (2001).

in *Swift v. Tyson*, and practiced by Holmes in *Goodman*.²³⁴ Indeed, it was the same year *Pokora* was decided—1934—that another individual was injured by a passing train in a case that would soon reach the U.S. Supreme Court: the case of an unemployed worker in Pennsylvania named Harry Tompkins, who lost his right arm when he was struck by an object protruding from a train owned and operated by the Erie Railroad Company.²³⁵ *Erie v. Tompkins*, of course, would ultimately overturn *Swift*.

Besides the questions about the authority of federal judges to make common law on state-law issues, the use of federal diversity jurisdiction generally was under fire as critics charged that big business was removing many cases to federal courts to receive favorable treatment.²³⁶ Business interests were also supporters of the “uniformity” goals of *Swift v. Tyson*, which called for federalizing products liability and Supreme Court intervention in state punitive damages law and other areas.²³⁷

It is certainly plausible, then, that when talking about problems with judge-made law, Cardozo was talking as much about *Swift v. Tyson* as *Baltimore & Ohio R.R. v. Goodman*. Indeed, when *Pokora* was argued, Cardozo had just written two opinions narrowing the reach of *Swift v. Tyson*.²³⁸

Ironically, Holmes, author of federal common-law rules in *Goodman*, was perhaps the leading critic of *Swift v. Tyson*.²³⁹ Holmes, though, was not known for his consistency, and perhaps he could not resist the opportunity to try to implement his idea of judge-made rules around breach as he had laid out in *The Common Law*.²⁴⁰ His respect for Holmes notwithstanding,²⁴¹ Cardozo likely noticed the significant tension between Holmes’s

234. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–77 (1938) (discussing issues that had arisen under the *Swift v. Tyson* rule).

235. See TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT & ERIE* CASES IN AMERICAN FEDERALISM 133 (describing the memo from Justice Brandeis’s clerk in the *Erie* case that concluded that despite plaintiff winning at trial under federal common law, if the case went back and was tried under Pennsylvania law, plaintiff Tompkins would “unquestionably” be found “guilty of contributory negligence”).

236. See EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 61–96 (1992) (describing the development of federal common law after *Swift v. Tyson* as increasingly “more favorable to corporate business,” in a way that was different from state law, beginning in the 1880s and culminating in the years around the turn of the century).

237. *Id.*

238. See *id.* at 213–14.

239. See FREYER, *supra* note 235, at 101–08 (outlining Holmes’s opposition to *Swift* in a series of Supreme Court dissents).

240. See HOLMES, *supra* note 183, at 123–25.

241. See Benjamin J Cardozo, *Introduction to MR. JUSTICE HOLMES* 5 (Frankfurter ed. 1931) (referring to him as “the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages”).

disapproval of *Swift v. Tyson* and its support for federal common law, and Holmes's lack of hesitation in fashioning federal common law himself.²⁴²

d. Possible Differences in Background and Style of Judging

To a certain extent, though, this all requires one to ask the question: if all these other factors were what was really going on, why would Cardozo write an opinion criticizing judge-made rules? It may not have been the idea of judge-made rules per se that bothered Cardozo; after all, he was certainly a judge who knew how to use his power under the common law when he wanted to.²⁴³ Rather, it was the dicta that got under his skin—saying more than was necessary in order to try to anticipate future cases.²⁴⁴ One can still have rules developed incrementally by judges over time and develop each step in a minimalist fashion.

There may also have been differences in background that help explain the result. The son of a well-known writer, public intellectual, and professor at Harvard Medical School,²⁴⁵ Holmes was very much a member of the establishment, a Harvard man. He was politically more conservative than Cardozo - a Republican and a Boston Brahmin.²⁴⁶ His law practice consisted of representing commercial and financial interests, with a particular specialty in admiralty.²⁴⁷ But he never developed much of a passion for the practice of law, devoting substantial amount of time to scholarship even as a practitioner.²⁴⁸ Holmes was interested in categorization and classification, aggregating individual cases into generalizations over time.²⁴⁹ Cardozo started from principles, but dug deep

242. See DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* (1995) (pointing out this tension); WHITE, *supra* note 175, at 388–90 (noting that Holmes “cheerfully went about” making federal common law in cases like *Goodman* while vigorously dissenting in other federal common-law cases and criticizing *Swift v. Tyson* without acknowledging the contradiction).

243. See, e.g., *MacPherson*, 111 N.E. at 1050.

244. See *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104 (“[T]he court . . . [referring to Holmes in *Goodman*] added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy.”).

245. See G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 9–13 (1993).

246. See *id.* at 19–29 (1993) (describing Holmes's Boston Brahmin upbringing); see also *id.* at 307 (describing Holmes as a “Brahmin Republican” like Henry Cabot Lodge and Theodore Roosevelt).

247. See MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS: 1870–1882*, at 107–08 (1963) (describing Holmes's law practice); WHITE, *supra* note 245, at 108–09 (describing Holmes's clients as merchants, fire insurance companies, landowners, banks, and industrial enterprises, as well as ship owners or masters in admiralty cases).

248. See DEWOLFE HOWE, *supra* note 247, at 104–06 (citing his exchanges with Sir Henry Maine and Frederick Pollock on “The Theory of Torts” as examples of his “abiding interests” in scholarship and theory, even as he joined a law partnership); WHITE, *supra* note 245, at 112 (describing the amount of time spent on legal scholarship after passing the Massachusetts bar in 1867 and for the next 14 years as “perhaps outdistan[ing] the amount of time he devoted to his law practice”).

249. Robert Gordon locates the roots of this tendency of Holmes in “scientific positivism,” the idea that explanation must come from “observable phenomena,” and Gordon points to the tort law

into the facts, even if his opinions sometimes presented a slanted view of those facts.²⁵⁰

Cardozo was no radical, either, but he was not a blue blood like Holmes. He came from a prominent family on both sides to be sure,²⁵¹ but his father, a judge in New York, had been brought down on allegations of corruption in a scandal surrounding Tammany Hall, disgracing the family.²⁵² Cardozo was a Democrat and as a Jew, inevitably remained something of an outsider, despite his family's deep roots in America.²⁵³ Professionally, he was more of a "lawyer's lawyer,"²⁵⁴ and though he too did his share of commercial litigation,²⁵⁵ it was more for middle-class people and their businesses, rather than the wealthy or large corporations.²⁵⁶ It may have been this difference in personal and professional background that led Cardozo to be somewhat more favorable towards plaintiffs and juries than Holmes.

As to jurisprudential philosophy, it is hard to differentiate Cardozo from Holmes in a significant way generally, or a way that explains *Pokora/Goodman*. His lectures *The Nature of the Judicial Process* merely set forth a set of four factors—philosophy or logic, history, custom or tradition, and sociology (or policy considerations)—that he accorded different weight as he saw fit.²⁵⁷ He certainly had a robust sense of common-law judging that included judges being creative in fashioning rules when they saw fit. Perhaps Cardozo was more skeptical than Holmes of the ability of rules at this level of specificity—"stop, look, listen and get out if necessary"—to do much work in deciding cases going forward.

chapters in *The Common Law*, including Holmes's idea of developing generalizations on negligence over time, as one of his "positivist moments." Robert Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 722–25 (1982). Gordon also suggests that Holmes's support for an external standard in judging conduct also has affinities with (scientific) positivism. *Id.* at 725–26.

250. See KAUFMAN, *supra* note 197, at 263 (observing that Cardozo had "confidence in his ability to discern the essential facts of a controversy" from the trial record); *id.* at 570–71 (arguing that the outcomes in many of Cardozo's best-known opinions were "heavily influenced by his particular vision of the facts").

251. See *id.* at 6–11 (describing the Cardozos and Nathans as part of a "small, closely connected group of older Jewish families, many of whom had achieved economic success" in New York City).

252. See *id.* at 3 (describing this chain of events).

253. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 2 (1990) (noting that Cardozo's law practice appears to have been "confined to the Jewish business and legal community"). But see KAUFMAN, *supra* note 197, at 3 (noting that Cardozo took pride in the fact that his ancestors had arrived in America before the Revolution).

254. See KAUFMAN, *supra* note 197, at 92 (noting that Cardozo had achieved this rare status in just fifteen years of practice); POSNER, *supra* note 253, at 2 (referring to Cardozo as a "highly successful trial lawyer").

255. See KAUFMAN, *supra* note 197, at 93 (describing the bulk of Cardozo's practice as involving contract interpretation and commercial debt collection litigation).

256. See *id.* at 81 (noting that his clients were usually "middle-class business and professional people").

257. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

Although Holmes saw such generalizations as heuristics that aided decision-making, but did not dictate outcomes, Cardozo may not have seen them as an aid at all.

The result in *Pokora* then, if not the precise reasoning, was overdetermined. It is clear that there were many factors besides the impossibility of judge-made rules driving the decision—ill-considered dictum by Holmes in *Goodman*; continued dissatisfaction with the strict contributory negligence rule; distrust of the power of big corporations, particularly railroads, during the Great Depression; and unhappiness with *Swift v. Tyson*. Cardozo’s opinion itself has perhaps been overread. To understand that judge-made rules around breach were quite possible then, *contra* Cardozo, helps clear the way for an affirmative argument that they are possible—in some form—today.

C. Rules Around Reasonableness in Other Areas of the Law

Having explored the *Goodman/Pokora* episode to demonstrate the possibility of judge-made rules around breach, I turn in this Subpart to make the point in a different way. In other areas of law, judges give content to reasonableness either in an incremental, common-law fashion, or through the use of presumptive rules around reasonableness. Specifically, this Subpart looks briefly at per se rules of reasonableness in antitrust and rules around unreasonable searches and seizures in Fourth Amendment law. Moreover, when looking at these areas, the fact-variability across cases in tort—seen as a major impediment to useful rules—appears to be not as big an obstacle as is commonly thought.

1. Fourth Amendment

The Fourth Amendment protects “[t]he right of the people to be secure . . . against unreasonable searches and seizures.”²⁵⁸ The reasonableness of searches and seizures is generally litigated in two contexts: pretrial motions by defendants to suppress evidence in criminal prosecutions and constitutional tort actions brought against law

258. U.S. CONST. amend. IV.

enforcement officers.²⁵⁹ In balancing the interests of individuals who are claiming an invasion of their rights against the need to enforce the law, the Fourth Amendment inquiry looks a lot like common-law negligence claims, with the open-ended standard of “reasonableness” at the center of both.²⁶⁰

Indeed, one might think that the Fourth Amendment context is one in which the jury ought to have considerable power to determine what is reasonable. After all, the justification for the jury in both the civil and criminal context is in large part to act as a bulwark for the people against government power.²⁶¹ So questioning whether law enforcement officers have gone too far in searching individuals or their property would seem to be right in the heartland of what the Founders had in mind for the jury. Nonetheless, the Supreme Court has given more power to judges in deciding these questions, opining in a variety of Fourth Amendment contexts about the need for “bright-line” rules.²⁶² Such rules about reasonableness are common in the Fourth Amendment context, even if they are considered (thanks to Cardozo) impossible in a negligence context.

Are the interactions between police officers and individuals less fact-intensive than car accidents, slip-and-fall cases, or medical malpractice? Not likely. Are police-citizen interactions less variable—that is, the same basic fact patterns repeat themselves over and over—such that it makes sense to rely on generalizations, but not in regular tort cases? I do not think so, either.

At a certain level of generality, it is probably true that most police-citizen interactions fit a limited number of patterns—pulling over a driver, stopping someone who looks suspicious, etc. But no more so than auto accidents: one driver speeds and then cannot stop in time to avoid another, a driver tailgates and then rear-ends another when he or she puts on the brakes, etc. Yet courts rely more on rules in determining Fourth Amendment reasonableness than in determining “reasonable care” or what the “reasonable person” would have done in negligence law.²⁶³

259. The latter are brought pursuant to 42 U.S.C. § 1983. *See generally* SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS (3d ed. 2009) (surveying and analyzing general principles that form the basis for § 1983 claims involving constitutional torts).

260. *See, e.g.,* *Sample v. Bailey*, 409 F.3d 689, 696–97 (6th Cir. 2005) (finding that Fourth Amendment claims are subject to a standard of “reasonableness”).

261. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 83–88 (arguing that in civil and criminal cases, “the jury played a leading role in protecting . . . against governmental overreaching”).

262. *See* Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 290–91 (2010); *see, e.g.,* *New York v. Belton*, 453 U.S. 454, 458 (1981); *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).

263. *See* Wells, *supra* note 137, at 77–80, 105–06 (pointing out that the judge-jury and rules-standards issues are undecided for Fourth Amendment cases generally, but pointing to Justice Scalia’s approach in *Scott v. Harris* as a possible example of a move toward rules).

Fourth Amendment doctrine covers a vast range of government investigative activity, with different kinds of actions governed by different legal “tests.”²⁶⁴ So at the same time that the Supreme Court enunciates the importance of bright-line rules in some Fourth Amendment areas, it underscores the need to proceed on a case-by-case basis governed by a general standard of reasonableness, in others.²⁶⁵

It is important to understand the kind of rules that the Supreme Court uses for Fourth Amendment reasonableness. These are not the kind of fact-specific rules that we associate with Holmes’s position, at least as Cardozo and others interpreted it. Rather, they are “entrenched generalizations,”²⁶⁶ to use Fred Schauer’s term, about particular factors that indicate that the law enforcement activity was presumptively reasonable. Examples include “the stopping of a vehicle where probable cause exists to believe a traffic violation has taken place” and “‘suspicionless’ interviews of travelers at bus terminals.”²⁶⁷

To be sure, these rules of presumptive reasonableness are not always straightforward to apply. For example, if a vehicle is stopped, was there probable cause to believe a traffic violation was taking place? Sometimes this will be a close call. The presumptive nature of these rules means that there will frequently be exceptions, and sometimes so many that the idea of a rule of presumptive reasonableness breaks down.²⁶⁸

A related problem with such rules is the level of generality problem. This comes up frequently in cases alleging “excessive force” by police officers, and more generally when government officials claim “qualified immunity” in a constitutional tort action on the grounds that the right they are accused of violating was not “clearly established.”²⁶⁹ Even if the right is clearly established, as it was in a case called *Tennessee v. Garner*, “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not

264. See Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C.L. REV. 1511 (2010).

265. See Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1429–30 (2003) (citing and comparing *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) and *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997), and pointing out that the court has even inconsistently described its own presumptive approach).

266. See SCHAUER, *supra* note 117, at 47–52 (defining the term to mean a rule that is applied even when the background justification for it is not present in a particular case).

267. Dan M. Kahan, Donald Braman, & David A. Hoffman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888–89 (2009) (citing these and other examples in demonstrating that Fourth Amendment doctrine is “replete with rule-like presumptions of reasonableness for generically defined fact patterns”) (emphasis omitted).

268. See, e.g., Urbonya, *supra* note 265, at 1426–37 (discussing exceptions to the rule that officers acting with probable cause were reasonable and noting confusing standards set forth in some supposedly “bright-line” rules).

269. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

constitutionally unreasonable to prevent escape by using deadly force,"²⁷⁰ there will sometimes be a question as to whether that factor is indeed met. In a recent Supreme Court case on this issue, the Court held in favor of the police officer, arguing that the past precedents were "cast at a high level of generality," and therefore did not provide sufficient notice to the officer in the case at bar.²⁷¹ When the Court said "clearly established," it clarified, it meant in a more "particularized" sense.²⁷²

At the other end of the spectrum, the Supreme Court and other courts have expressed unhappiness with simply applying a general reasonableness standard on a case-by-case basis.²⁷³ The legality of many searches, for example, hinges on the question of whether the individual had a "reasonable expectation of privacy," a standard that has been roundly criticized as unhelpful and unworkable.²⁷⁴ But this is no different than the general inquiry in negligence law about what a "reasonable person" would do or think in a given situation. Perhaps the difference is that judges are more frequently applying the "reasonable expectation of privacy" standard, but it is hard to imagine that the standard gains clarity or precision through being adjudicated by a jury. Its application simply disappears from view.

2. Antitrust

Section 1 of the Sherman Act—the primary antitrust law in the United States—states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."²⁷⁵ Taken literally, the language "[e]very contract . . . in restraint of trade" would make illegal huge portions of our nation's economic activity, and so the Supreme Court has interpreted the language to mean "unreasonable" restraints on trade.²⁷⁶ And to determine whether a particular restraint is unreasonable, courts usually employ a "rule of reason" analysis that

270. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

271. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam).

272. *Id.*, at 198–99. An insightful discussion of this problem and case are in Wells, *supra* note 137, at 96–97.

273. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (cautioning against "standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review"). *But see* *Graham v. Connor*, 490 U.S. 386, 396 (1989) (indicating that "proper application" of the 4th Amendment in excessive-force claims "requires careful attention to the facts and circumstances of each particular case").

274. *See, e.g., Solove, supra* note 264, at 1519.

275. 15 U.S.C. § 1 (2012).

276. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 57–58 (1911) (delimiting the scope of the Sherman Act to those contracts that "unduly diminish[ed] competition" or were "unreasonably restrictive of competitive conditions").

considers all of the circumstances, weighing any anticompetitive effects against legitimate business justifications.²⁷⁷ This reasonableness standard, considering any and all factors, is quite similar to that in negligence law.

Over the years, however, the Supreme Court has deemed certain business practices “per se” unreasonable restraints of trade.²⁷⁸ That is, they have made rules that declare these practices unreasonable without any detailed inquiry into the specific circumstances of the practice being challenged.²⁷⁹ In these cases, the Court has determined that the economic evidence of the anticompetitive effects is so strong and the potential justifications so weak that the Court can be confident that in declaring a particular practice to be per se illegal, the resulting generalization or rule is likely to be fairly accurate.²⁸⁰ That is, there will be relatively few examples of over-inclusiveness, where a particular practice by certain firms would be viewed as reasonable under all the circumstances, but is deemed unreasonable under the general rule.

The Supreme Court currently applies per se rules to horizontal price fixing, refusals to deal, and instances of market allocation such as firms dividing up territories or customers.²⁸¹ There are other practices that the Court used to treat as per se illegal, but which it no longer does because of changed economic circumstances or evidence.²⁸² A recent split in the Supreme Court over one such per se rule is instructive as to the possibility, but also the limits, of such rules that identify certain practices in advance as unreasonable. In 2007, the Court overturned the long-standing per se rule

277. See *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (indicating that the factfinder “weighs all of the circumstances of a case” in determining whether the restraint is unreasonable).

278. See Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 92–98 (describing the practice and its justification).

279. *Id.* There is also an in-between standard, called “quick look” analysis, which asks if work experiences are such that the court can be reasonably confident about the competitive effects without an “all things considered” in-depth inquiry. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109–11 (1984). *But see* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 464 (2000) (criticizing the doctrine as an “artifact of a bygone Populist era”).

280. See Meese, *supra* note 278, at 92–98. The Court has also done the reverse: deemed certain activity per se legal, particularly “unilateral” conduct by a firm, including most intrabrand restraints. See Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C.L. REV. 5, 78–79 (2004) (describing and approving of this state of affairs).

281. See *Leegin Creative Leather Products, Inc. v. Psks, Inc.*, 551 U.S. 877, 886 (2007) (noting per se unreasonableness of horizontal price fixing and agreements to divide markets); *White Motor Co. v. United States*, 372 U.S. 253, 259–60 (1963) (noting per se unreasonableness of group boycotts).

282. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling the prior holding that maximum resale price agreements were per se illegal); *Cont'l T.V.*, 433 U.S. at 36 (1977) (overruling the prior holding that producer-imposed territorial limits were per se illegal).

against resale price maintenance agreements,²⁸³ known as the *Dr. Miles* rule after the 1911 Supreme Court decision of the same name.²⁸⁴

The majority opinion for the Court, written by Justice Kennedy, pointed to the economics literature in arguing that “there is now widespread agreement that resale price maintenance can have procompetitive effects,” and therefore continuing the per se rule would be inappropriate.²⁸⁵ The Court also indicated that the “doctrinal underpinnings” of the *Dr. Miles* rule had been undermined.²⁸⁶ Importantly for our purposes, the majority also indicated that the kind of common-law reasoning envisioned by Justice Holmes could and did still occur under a “rule of reason” analysis.²⁸⁷

In a strongly worded dissent, Justice Breyer pointed out that nothing had changed since *Dr. Miles* was decided, and Congress decided not to overrule it.²⁸⁸ Per se rules have the advantage of providing notice for those who have to comply with the law.²⁸⁹ Knowing in advance that a particular business practice is unreasonable means that a company (properly advised by counsel) is not going to structure its operations and strategy in a way that might be deemed worthy of civil or criminal liability down the road. And per se rules of this kind were justified in part when it was going to be difficult for courts to identify cases in which the practice was reasonable.²⁹⁰ There was no claim, Breyer pointed out, that the rule was “unworkable” in the same way that Cardozo deemed the rule requiring drivers to get out of their vehicles when crossing train tracks.²⁹¹

The *Dr. Miles* rule had “worked” in the sense that courts could apply it and businesses could follow it. A majority of the Court, however, simply decided that it was a rule that led to too many errors in its attempt—like any rule—to guess in advance, without regard to the specific circumstances, whether practices were reasonable restraints in trade.

283. See *Leegin*, 551 U.S. at 877.

284. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). These practices are also referred to as vertical price restraints.

285. See *Leegin*, 551 U.S. at 900.

286. *Id.* (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

287. See *id.* at 899 (“The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach.”).

288. See *id.* at 908 (Breyer, J., dissenting) (“Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule.”).

289. *Id.* at 886 (majority opinion).

290. See *id.* at 917 (arguing that “applying these criteria in court is often easier said than done”).

291. See *id.* at 924 (indicating that the rule “has proved practical over the course of the last century”); see also *Pokora v. Wabash Ry. Co.* 292 U.S. 98, 104–06 (1934).

3. *Implications*

What lessons ought we draw from the Fourth Amendment and Sherman Act contexts? The clearest is that Cardozo's "impossibility" position is wrong. Both these contexts involve determinations of reasonableness. Both involve highly variable and fact-intensive situations. And yet, judges have made and applied rules in a common-law fashion over time.

But the experience of these two areas of doctrine does not signal a clear victory for Holmes, either. In both cases, application of the rules has been difficult and controversial, and the rules have eroded over time. This may simply be an example of what Fred Schauer has termed the inevitable oscillation between rules and standards in law.²⁹² Or it may be that defining "reasonableness" with any level of fact-specificity, in a way that could be applied to future cases, is sometimes not going to be worth doing.

III. THE PROBLEM WITH JURIES, STANDARDS, AND SOCIAL NORMS

Let's take stock. After laying out the rule-of-law problems with our civil justice system as a law of wrongs in Part I, we explored the *Restatement (Third)*'s invocation of an "ethic of particularism" in Part II and how it is at odds with many features we tend to expect of the common law. We then learned that more rules around reasonableness in tort were indeed *possible* through revisiting the *Pokora/Goodman* episode and looking at other areas of law like antitrust and the Fourth Amendment.

In this Part, we explore why jury discretion in applying reasonableness may not be as *desirable* as we might think. Besides the commitment to particularism, the strongest argument for the civil jury as an *adjudicative* institution is that it is a superior body for identifying and applying social norms. I question that claim in what follows.

Let's start with a few definitional preliminaries, and then identify precisely what it is the jury is doing. Consistent with much of the literature, I define "social norms" as a behavioral regularity with a normative thrust.²⁹³ It is not simply what people happen to do by convention, but there is a sense that this is behavior that *should* be done.²⁹⁴ This is a common

292. See generally SCHAUER, *supra* note 117.

293. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* 5 (2000) (using game theory to define social norms as "behavioral regularities" that people engage in to show they are "desirable partners in cooperative endeavors"); see also STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* 33 (2004) (defining norms such that "the conforming acts must be performed by agents who believe they *ought* to behave in such a manner").

294. See, e.g., Dale T. Miller, *The Norm of Self-Interest*, 54 *AM. PSYCHOL.* 1053, 1056 (1999) (defining social norms as "shared perceptions of appropriate behavior"); see also HETCHER, *supra* note 293.

definition in the social norms literature, but it barely appears in the torts literature, despite the fact that the closely related concepts of both social norms and custom play significant roles in tort scholarship.²⁹⁵

In the Part that follows, I show that the jury's strength in social norms is widely assumed but underexplored, and in fact weaker than conventional wisdom holds. Then in Part IV, I argue that judges or juries could (and should) rely more on external or public indicia of such norms, rather than relying on the jurors' experience and intuitions.²⁹⁶

As I discuss briefly below, my argument is not that judges are better. This issue is more nuanced than simply judge versus jury, or even rules versus standards. My argument is that juries are not the experts on social norms that we think, and therefore (for this and other reasons) we ought to rethink the whole package of how we determine reasonableness—the amount of discretion we give juries, the lack of precedent, and perhaps also the allocation of responsibility between judge and jury.

A. *Are Juries and Standards the Best Way to Apply Social Norms?*

There is significant consensus in the literature—and I agree—that social norms are the right underpinning for tort law's rules of reasonableness, seen (in at least significant part) as a law of private wrongs.²⁹⁷ That is, whoever is the decision-maker, judge or jury, the answer to whether a legal wrong occurred needs to be answered with reference to whether social norms were followed or not. To do otherwise would threaten the moral credibility and legitimacy of the tort system.

But the idea—largely taken for granted in the literature—that the jury is a superior vehicle for identifying and applying such norms is based primarily on the following set of assumptions that I review and critique below:

295. See HETCHER, *supra* note 293; MICHAEL HECHTER & KARL-DIETER OPP, *Introduction to SOCIAL NORMS*, at xii-xiii (Michael Hechter & Karl-Dieter Opp eds., 2001) (discussing the dual conceptions of social norms as behavioral regularities with and without a normative thrust); see also DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 91–92 (2010) (“Customary norms of behavior thus implicate a central puzzle in the law of negligence . . . Is negligence the departure from actual standards of care (what people *really* do in certain situations) or from an idealized vision of conduct (what they *ought* to do)?”).

296. This argument is similar in some respects to that made by Patrick J. Kelley. See Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law* 54 VAND. L. REV. 1039, 1066–69 (2001) [hereinafter Kelly, *Restating Duty*] (advocating the reorienting of negligence law towards breach of existing “community safety conventions” and away from the general reasonable-person standard); Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLE. ST L. REV. 315 (1990) (same).

297. See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 193–94 (2000) (discussing a major school of tort law as viewing tort law as a vehicle for ordinary moral ideas such as fairness and responsibility).

- 1) Lay people do well at identifying and applying social norms, and the social norms typically at issue in our civil justice system are particularly accessible to lay people.
- 2) A “totality of the circumstances” approach is more likely to get the right result in most cases, as compared with a more rule-like approach, which only looks to certain factors.
- 3) Seeing only one case, as a jury does, is also more likely to get it right rather than seeing many cases.
- 4) For this kind of cognitive exercise, the fact that we have “many minds” on the jury increases our confidence that they will properly identify and apply the relevant norms.

In what follows, I explore each of these assumptions.

1. *Are Lay People Experts in Social Norms?*

Standard Assumption #1: Lay people do well at identifying and applying social norms, and the social norms typically at issue in our civil justice system are particularly accessible to lay people.

This is perhaps the most important assumption underpinning the jury’s power to decide normative questions in tort, and so it is worth breaking it down further into three related but distinct components. First, there is the claim that lay people do well in identifying social norms generally. Second, there is the claim that the kind of social norms most often at issue in our civil justice system—what is reasonable in cases where conduct leads to accidental harm—are particularly accessible to lay people. Finally, there is the claim that these social norms ought be defined and applied by individual communities with the jury as the representative. Together these three claims make up the underlying assumption that juries are well-suited to identify and apply social norms in tort law.

a. *Knowledge of Social Norms Generally*

A critical assumption underpinning the normative power of the jury in tort is the belief in jurors’ epistemic superiority when it comes to social norms and the centrality of social norms to determining what conduct is reasonable.²⁹⁸ The premise of jurors’ epistemic superiority is that they can

298. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1493 (1999) (noting that in tort and criminal cases, jurors may be closer to the witnesses and parties in terms of social background and life experience than the judge, and this may put them in a better position to evaluate witness testimony).

identify and apply social norms based on their own experience.²⁹⁹ It is not that they have some kind of epistemic superiority in evaluating evidence; it is that they have a range of experiences to draw upon.³⁰⁰ They can identify social norms because they help constitute and live by them every day.³⁰¹

Research on social norms, though, shows that people are notoriously mistaken about social norms. People commonly overestimate the amount of bad behavior that others engage in, unless the individual is genuinely very “good,” in which case they radically overestimate the degree to which others share their virtue.³⁰² These phenomena are sometimes referred to as the “pluralistic ignorance” and “false consensus” effects, or as Robert Cooter and colleagues put it, the “others are bad” and people are “just like me” biases, respectively.³⁰³

One can also think about how these kinds of biases affect the application of the “reasonable person” standard, as opposed to asking whether one is in compliance with the social norm. In applying the reasonable person standard, juries are encouraged to ask whether the defendant behaved as a reasonable person would in that set of circumstances. Research has shown that most jurors perform this cognitive task by putting themselves in the position of the defendant and asking: “Would I, a reasonable person, have behaved similarly in that situation?”³⁰⁴

But we now know that people generally consider themselves more “reasonable”—that is, more like other people and more often in compliance

299. Henry Terry argued that the issue of negligence turns on what a “standard man,” not “an ideal or perfect man, but an ordinary member of the community,” would have done under the circumstances. Terry, *supra* note 122, at 47. Questions of negligence are left to the jury “because the jury is supposed to consist of standard men, and therefore to know of their own knowledge how such a man would act in a given situation.” *Id.*; see also FRANCESCO PARISI, LIABILITY FOR NEGLIGENCE AND JUDICIAL DISCRETION 226–27 (2d ed. 1992) (suggesting that American courts at the turn of the century tended to define negligence in terms of the care the average person would take).

300. See HOLMES, *supra* note 183, at 98 (arguing that the question of negligence is sometimes given to the jury when the judge feels that he is not “possessed of sufficient practical experience to lay down the rule intelligently”).

301. See Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2182 (1996) (noting that norms ask “what a community does”).

302. See Robert Cooter, Michal Feldman & Yuval Feldman, *The Misperception of Norms: The Psychology of Bias and the Economics of Equilibrium*, 4 REV. L & ECON. 889, 889–90 (2008); see also Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and Alcohol Abuse on Campus: Some Consequences of Misperceiving the Norm*, 64 J. PERSONALITY & SOC. PSYCHOL. 243, 244 (1993) (citing Dale T. Miller & Cathy McFarland, *When Social Comparison Goes Awry: The Case for Pluralistic Ignorance in SOCIAL COMPARISON: CONTEMPORARY THEORY AND RESEARCH* 287–313) (defining pluralistic ignorance as “a psychological state characterized by the belief that one’s private attitudes and judgments are different from those of others, even though one’s public behavior is identical”).

303. See *supra* note 302.

304. See FEIGENSON, *supra* note 40, at 140–44. To be sure, a related problem comes up when judges consider reasonableness. As Justice Alito put it in the Fourth Amendment context, one problem is that “judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person.” *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring).

with the social norm—than they actually are.³⁰⁵ This means that they are more likely to judge litigants as having acted *unreasonably* when in fact they behaved reasonably.

Even absent a claim of epistemic superiority, though, one can simply point to the importance of having the values of the people in the legal process. Private-law scholar Mark Gergen has referred to the allocation of power between judge and jury as being determined by “weighing competing values on a scale.”³⁰⁶ As he puts it:

On one side of this scale are the values of popular judgment. On the other side are the values of satisfying what Lon Fuller described as the demands of the “inner morality of law”—“make the law known, make it coherent and clear, see that your decisions as an official are guided by it, etc.”³⁰⁷

The question, though, is what precisely the “values of popular judgment” get us in this context. Perhaps even if lay people are not great at identifying social norms generally, they are very good at identifying and applying the kind of social norms at issue in tort cases.

b. Expertise in Negligence’s Norms

Let’s consider a few different categories of conduct that frequently arise in tort cases. In the most common kinds of tort cases, the relevant norms are safe driving, upkeep of premises for municipalities and property owners, medical treatment and system decisions and performance, and product design and warning choices. It turns out that jurors’ epistemic competence is likely quite variable in these different kinds of cases.

The major categories of tort cases are auto accidents, premises liability, medical malpractice, and products liability.³⁰⁸ Most jurors don’t know anything about community norms in medical care (medical malpractice),

305. See *supra* notes 298–304 and accompanying text.

306. Gergen, *supra* note 6, at 438.

307. *Id.* (quoting LON L. FULLER, *THE MORALITY OF LAW* 42 (rev. ed. 1969)).

308. At the federal level, the majority of tort cases involve products liability. See BUREAU OF JUSTICE STATISTICS, *FEDERAL TORT TRIALS* (2011), available at <http://bjs.ojp.usdoj.gov/content/glance/tables/tortcldtypetab.cfm>. For a detailed account of all civil claims in Federal District Courts by type, see ADMIN. OFFICE OF THE U.S. COURTS, *2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS*, 141–43 (2010), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusiness.pdfversion.pdf>. For a detailed account of 2005 civil trials by case type at the state level, see BUREAU OF JUSTICE STATISTICS, *SPECIAL REPORT: CIVIL, BENCH, AND JURY TRIALS IN STATE COURTS, 2005*, at 2 (2008), available at <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf>. For a sample of incoming civil claims in state courts, see NAT’L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS*, at 2 (2009), available at <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf>.

designing consumer products and warning about dangers (products liability), or sweeping the floor and shoveling the sidewalk at a business (premises liability).

The major test cases—if you will, where the rubber hits the road—are auto accident cases. This is probably the strongest case for jurors’ epistemic superiority.³⁰⁹ After all, most jurors in most places are drivers. But think about what jurors are actually asked to do: reconstruct what happened, and counterfactually what might have happened had one or more actors behaved differently in some respect. It may well be that an accident reconstruction expert would be better suited than a group of people who drive to decide who was at fault in a particular accident.

Here too, various biases affect jurors’ ability to identify and apply the social norm. On the one hand, driving is one of the leading examples of what I referred to earlier as “pluralistic ignorance.”³¹⁰ Studies show that most people think they are very good or excellent drivers, while thinking that most other people are worse.³¹¹

Moreover, most people are overly inclined to attribute outcomes to individual attributes—“people are bad or careless”—rather than social context or systemic explanations.³¹² These biases indicate that juries will be likely to deem too much conduct unreasonable—more than is warranted, and perhaps for both plaintiffs and defendants.

On the other hand, if individuals are likely to think that the social norm is worse than it actually is (the “others are bad” bias)—say, everyone drives at least 10 mph over the speed limit—then they may be more likely to deem a speeding driver *reasonable*, perhaps falsely concluding that they are complying with the relevant social norm.

Now we also know that judges are human as well, and therefore subject to similar kinds of biases. But the question is whether there are other mechanisms about the way we determine breach in negligence cases—whether judges or juries do the determining—that make accurate assessments of wrongfulness more likely.

309. See Gregory C Keating & Dylan Esper, *Putting “Duty” in its Place*, 41 LOY. L.A. L. REV. 1225, 1280 (2008) (pointing out that judges may be “less well-suited” than twelve ordinary citizens who can pool their experience driving on local roads to determine whether the conduct of drivers was reasonable).

310. See *supra* note 302 and accompanying text.

311. See, e.g., Mark S. Horswill, Andrea E. Waylen & Matthew I. Tofield, *Drivers’ Ratings of Different Components of Their Own Driving Skill: A Greater Illusion of Superiority for Skills that Relate to Accident Involvement*, 34 J. APPLIED SOC. PSYCHOL. 177, 178 (2004) (“[P]eople tended to rate themselves as better than average on 20 (out of 20) separate components of driving skill.”).

312. See *supra* Part III.A.1.a–b.

c. *The Importance of Norms Defined by the Community*

We have been using the term “social norms,” but another term frequently invoked in support of the jury in this context is “community norms.”³¹³ The usage appears to be the same,³¹⁴ but we might also ask: what community are we talking about, and is it important for juries to have the power to define and apply norms for their particular community?³¹⁵

When we are working through the civil jury, the community is in a sense defined backward with reference to the pool from which the jurors were drawn. In the context of state trials, where most civil cases happen, the community is the county.³¹⁶ Most state trial courts are organized by county and draw their jurors from that county.³¹⁷ Descriptively, there are no doubt places in the country where individuals conceive of their county as a meaningful community, but it is unclear how many. Moreover, what people consider their community in the twenty-first century is not only geographic, and perhaps not even primarily so.

There is also the question of how plausible it is to describe counties—even towns, cities, regions, or neighborhoods—as loci for particular and unique norms. The argument has to be that citizens care about retaining community control over the definition of what conduct is reasonable and unreasonable, specifically in the instances in which tort cases most commonly arise: driving, upkeep of premises (slip and fall cases), medical malpractice, and design of consumer products.³¹⁸ It would be surprising if citizens felt this way for any of these categories of cases.

The Supreme Court case with which we began—*Mutual Pharmaceutical v. Bartlett*—is a good place to test this intuition.³¹⁹ Karen Bartlett lives in Plaistow, New Hampshire, a town of 7000 people, located in Rockingham County, a county in southeast New Hampshire and on the border of Massachusetts.³²⁰ Since the case was brought against an out-of-

313. For a review of this, see Solomon, *supra* note 4, at 1378–87.

314. *See id.* at 1380 (“Just as appeals to states’ rights have been largely left behind in favor of appeals to federalism, the language of local self-rule, in this context, has turned into an argument about community norms.”).

315. For a more in-depth discussion, see *id.* at 1376–80.

316. *See id.* at 1376.

317. *See* Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 88 (2004) (comparing federal courts to state courts, which are “organized by county”).

318. *See* STEVEN K. SMITH ET AL., U.S. DEP’T OF JUSTICE, TORT CASES IN LARGE COUNTIES 2 tbl.1 (1995), <http://bjs.gov/content/pub/pdf/TCILC.PDF> (finding that, in the nation’s largest seventy-five counties, auto cases represented 60.1% of tort cases filed in state courts, premises liability cases 17.3%, product liability cases 3.4%, and medical malpractice cases 4.9%).

319. *Mut. Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013).

320. ROCKINGHAM COUNTY, NEW HAMPSHIRE, <http://co.rockingham.nh.us/> (last visited July 12, 2013).

state defendant, for far more than \$75,000, the case was in federal court, and the jurors were drawn from all over the state.³²¹

So the relevant “community” here appears to be the state. And in the design defect claim that ultimately went to trial, the “community norms” that the jury was asked to give content to were the balance of risks and utility that make a particular drug “unreasonably dangerous.” Do those tend to vary between New Hampshire, Massachusetts, and Virginia? Is it important for these norms to be defined by lay people in each of those communities? I’m somewhat skeptical on both counts.

2. *All-Things-Considered Standards Versus Limited-Factor Rules*

Standard Assumption #2: A “totality of the circumstances” approach is more likely to get the right result in most cases, as compared with a more rule-like approach, which only looks to certain factors.

A central assumption of the jury’s discretion in deciding questions of “reasonableness” is that a “totality of the circumstances” approach is more likely to get the right result in most cases, as compared with a more rule-like approach, which looks only to certain factors, or a precedent-based approach.

The usual account of rules versus standards, or formalism versus equity, is that the tradeoff is between greater certainty and predictability for individuals trying to follow the law (the benefit of rules or formalism) on the one hand, and on the other hand, a more just decision in individual cases with standards or an equitable approach. And our approach to the negligence inquiry assumes that the way to get the most equitable result is by consideration of all factors.

If the question, though, is a just result in terms of the accuracy of determining wrongfulness—that is, whether the actor deviated from the relevant social norm—then it is not clear that a standards approach will work better. Moreover, if we look at justice not in the individual case, but across cases, then a rules-based approach likely delivers a more consistent and coherent assessment of wrongfulness as well.

The problem is that our confidence in the “consider all the circumstances” approach is at odds with what we now know about the limitations of human judgment. The “hindsight bias” means that a bad outcome may bias an adjudicator to unreasonableness.³²² An attractive

321. New Hampshire has only one federal district court.

322. See Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 588 (1994) (explaining the hindsight bias phenomenon). Arkes and Schipani also see this issue in the medical malpractice context and suggest

plaintiff increases the chances of the defendant being found unreasonable.³²³ An unusual chain of events increases the chances that a defendant is found careless.³²⁴ Pluralistic ignorance means adjudicators will overestimate their own compliance with social norms compared to others.³²⁵ And research shows that too many factors to consider—or insufficient guidance as to how to prioritize them—may lead to greater confusion and worse decision making.³²⁶

What's the alternative? One possibility is through the use of heuristics that consider only one or a few factors. In his popular book, *Thinking, Fast and Slow*, the Nobel Prize-winning economist Daniel Kahneman summarizes research showing that predictive decision making based on formulas or “simple statistical rules” is more accurate than expert judgments.³²⁷ Some of these studies take place in the medical context, where one would think that allowing expert doctors to consider all the circumstances would yield the best results.³²⁸ But some studies have shown that the use of just one reliable factor—called the “take the best” heuristic—will frequently outperform “all things considered” judgments.³²⁹

bifurcating trials such that a jury decides the breach issue before it hears evidence regarding the extent of the damages. *See id.* at 633.

323. *See* Cookie Stephan & Judy Corder Tully, *Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. SOC. PSYCHOL. 149, 150 (1977) (finding that “physical attractiveness influenced the decision of the simulated jurors”); *see also* Wilbur A. Castellow, Karl L. Wuensch & Charles H. Moore, *Effect of Physical Attractiveness of Plaintiff and Defendant in Sexual Harassment Judgments*, 5 J. SOC. BEHAVIOR & PERSONALITY 547, 557 (1990) (“Guilty verdicts are less likely when the defendant is physically attractive and more likely when the plaintiff is physically attractive.”), available at <http://core.ecu.edu/psyc/wuenschk/Articles/JSB&P1990/JSB&P1990.htm>.

324. *See* J.J. Koehler, *The Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 583 (2003).

325. *See supra* note 302 and accompanying text; *see also* Lars Arberg et. al., *Observed Vehicle Speeds and Drivers' Perceived Speed of Others*, 46 APPLIED PSYCHOL.: AN INT'L REV. 287, 293 (1997) (finding that drivers overestimated other drivers' speed by 8–10 kilometers per hour (5–6 miles per hour)).

326. *See* Hal R. Arkes & Victoria A. Shaffer, *Should We Use Decision Aids or Gut Feelings?*, in *HEURISTICS AND THE LAW* 411, 422–23 (Gerd Gigerenzer & Christoph Engel eds., 2006) (describing a study in which nurses using a simple decision aid outperformed doctors relying on their own judgment in determining the required dosage of anticoagulant). The decision aid, Arkes and Shaffer conclude, allows more accurate processing of numerous variables than expert judgment. Fred Schauer has referred to research showing that unlimited factors make the decision-making process difficult. *See generally* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES, 803–14 (2005).

327. *See* DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 222–33 (2011) (discussing particularly PAUL MEEHL, *CLINICAL V. STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE* (1954)).

328. *Id.* at 222–23; *see also* Arkes & Shaffer, *supra* note 326, at 422–23.

329. *See* Arkes & Shaffer, *supra* note 326, at 412–13 (recounting such studies); *see also id.* at 422–23 (describing a study in which a group of nurses using a decision aid determined the appropriate dosage of an anticoagulant more quickly and with fewer adjustments than a group of doctors). The upshot, the authors note, is that while both groups could easily collect the information used in the decision aid, the decision aid processed the information better than even an expert's gut reaction. Using the “all things considered” approach, jurors also have a tendency to conflate separate elements of a

Such findings led one doctor and leading commentator on medicine to write a “manifesto” in favor of simple checklists to guide medical diagnosis and treatment.³³⁰

Whether one calls these limiting devices “fast and frugal” heuristics, presumptive rules, or rules of thumb,³³¹ they may lead to a more accurate assessment of wrongfulness in a negligence context—whether the ultimate decision maker is a judge or a jury.³³²

To understand how heuristics could help judges deciding reasonableness, let's return to Holmes's project in *The Common Law* and *Goodman*. A judge might, over time, observe that doctors who performed according to the customary standard were generally deemed non-negligent by juries, and (the judge might say to himself) this is how it should be. In a future case, the judge could then deem compliance with custom in a medical malpractice case presumptively reasonable, and either grant a directed verdict for the defendant or instruct the jury accordingly. To be sure, such a ruling would not have precedential value, but it could be taken up by an appellate court and gain precedential status that way. This is not to say that the rule would not have exceptions (or the presumption be rebutted), but such principles would be “guidelines, rules of thumb, instruments of inquiry designed as practical aids to making sound decisions.”³³³

In fact, despite Holmes's well-known slogan “general propositions do not decide concrete cases,” he actually invoked this in his *Lochner* dissent to *qualify* his use of a general proposition, not argue against using

claim. For example, juries often ignore instructions to disregard the extent of the plaintiff's injury when assessing whether a doctor breached his duty of care. *Id.* at 420.

330. See generally ATUL GAWANDE, *THE CHECKLIST MANIFESTO* (2009).

331. See SCHAUER, *supra* note 117, at 108–09 (arguing for the value of rules of thumb).

332. See DOUGLAS A. KYSAR ET AL., *Group Report: What is the Role of Heuristics in Litigation?*, in *HEURISTICS AND THE LAW* 343, 372–73 (Gerd Gigerenzer & Christoph Engel eds., 2006) (arguing that one goal of legal reform might be to structure the legal environment so that the “decision task becomes cognitively simpler”); see also DOUGLAS A. KYSAR ET AL., *Group Report: Are Heuristics a Problem or a Solution?*, in *HEURISTICS AND THE LAW* 103, 132–33 (Gerd Gigerenzer & Christoph Engel eds., 2006) (discussing the 1990 Clean Air Act Amendments and suggesting that the best-available technology rule (i.e. a simple “do the best you can” heuristic) may be superior to an intensive cost–benefit computation). As with legislators attempting an intensive cost–benefit calculation, juries attempting to apply a “totality of the circumstances” approach may face an “information overload,” especially when confronted by unfamiliar and complex legal rules.

333. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 819 (1989) (describing Holmes's view as such, and contrasting it with Langdell's view that such principles decided cases). For a similar, contemporary account, see Elizabeth Anderson, *Moral Heuristics: Rigid Rules or Flexible Inputs in Moral Deliberation?* 28 *BEHAVIORAL & BRAIN SCIENCES* 544, 545 (2005) (drawing on John Dewey's work to argue that moral heuristics “properly function as inputs to moral reflection rather than as fixed, rigid conclusions”) (responding to Cass R. Sunstein, *Moral Heuristics*, 28 *BEHAVIORAL & BRAIN SCIENCES* 531 (2005)).

generalizations altogether.³³⁴ Indeed, as Thomas Grey points out, Holmes indicates in his *Lochner* dissent and elsewhere that a judge who used such a generalization "would be nudged in the direction of the correct decision."³³⁵ Generalizations or principles have an important role to play in judging, even if they cannot deductively decide cases in a Langdellian manner, and that role for Holmes was a heuristic one.³³⁶

In the psychology and behavioral economics literatures, though, the word "heuristics" is generally paired with "biases," and refers to either departures from rational choice theory (in economics) or errors in reasoning or decision making (in psychology). In this context, use of heuristics as an aid to *sound* decision making may seem puzzling. But there is a significant school of thought—the "fast and frugal" school—that holds the use of heuristics can lead to better decision making. The title of one key work from "fast and frugal" scholars is illustrative: *Simple Heuristics That Make Us Smart*.³³⁷ To be sure, the debate about when and whether heuristics lead to better decision making is a complex one, but my claim here is simply that it is quite plausible to believe that the use of social norms as heuristics may be desirable in making negligence determinations.³³⁸ Indeed, evidence of social norms is used in this way to a certain extent now, but my claim in Part IV will be that we give these heuristics presumptive force in determining reasonableness.

3. *One Case at a Time*

Standard Assumption #3: Seeing only one case, as a jury does, is also more likely to get it right rather than seeing many cases.

An argument is frequently made in the literature that juries' "one-shot" nature makes them more desirable adjudicators than judges because they are somehow untainted by experience with past cases, or less invested in or influenced by norms of the legal system.³³⁹ Marc Galanter has argued that

334. See Grey, *supra* note 333, at, 820 (discussing *Lochner v. New York*, 198 U.S. 198 U.S. 45, 76 (1905) (Holmes, J. dissenting)).

335. *Id.*

336. *Id.* at 822.

337. GERD GIGERENZER ET AL., *SIMPLE HEURISTICS THAT MAKE US SMART* (1999).

338. For an illuminating account of the homologies between, on the one hand, Langdellian, Holmesian, and certain Realist models of reasoning and on the other hand, different theories of cognition, see MARK KELMAN, *THE HEURISTICS DEBATE* 202–25 (2011).

339. Similar arguments appear even more frequently in the criminal context. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 913 (2006) (describing the incentives that repeat-player "insiders" possess, which reward cooperation and quick disposition of cases); Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1593 (2011) (comparing one-shot juries to repeat-player prosecution and defense lawyers who may seek to develop a reputation as cooperative).

this quality of juries makes them less susceptible to the influence of the “repeat players”—litigants and lawyers—in the courtroom.³⁴⁰ Considering the “point of view of regulating the litigotiation process,” Galanter points to the advantage of the jury as being “a fresh response less mediated by institutional concerns and more resonant with the emerging moral sense of community.”³⁴¹

Perhaps, then, the *Restatement (Third)* drafters mean to get at something like the following: because of our embrace of ethical particularism, we want the decision maker to work with a clean slate.³⁴² This means that we don’t want the decision maker to be encumbered by any biases that might result from seeing previous cases, and we don’t want the decision maker to be bound—either as a matter of legal precedent, or simply by a norm of consistency—either as to the decisions or the reasons given for decisions in prior cases.³⁴³ The one-shot nature of the jury, then, means that it meets these particularistic criteria.

In other words, it is not necessarily that we place such a high value on the jury’s “popular judgment” or knowledge of community norms, and therefore employ the jury to decide normative issues.³⁴⁴ And the institution of the jury happens to work in a particularistic way because each jury decides only one case.

Rather, the causal chain runs the other way. We want a decision maker who will look at the case with “fresh eyes,” and so we choose the decision maker that, as a matter of tradition and practice, happens not to comply with rule of law desiderata like reason giving, and happens to use community norms in making its decisions.³⁴⁵

These considerations, though, are likely outweighed by the benefits of having seen a number of cases, as judges have.³⁴⁶ Seeing a number of cases

340. Marc Galanter, *The Regulatory Function of the Civil Jury*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 61, 61 (Robert E. Litan ed., 1993).

341. *Id.* at 90.

342. See Posner, *supra* note 298, at 1494 (noting that jurors have a “certain freshness that many judges lack”).

343. See Sunstein et al., *supra* note 50, at 1156 (pointing out that juries typically assess cases in isolation, and lawyers are generally barred from referring to awards in other cases, but criticizing this state of affairs).

344. *But see* Keating, *supra* note 85, at 380 (“Insofar as juries presumably embody the culture and conventions of their communities, they are well suited to selecting contextually salient precautions.”).

345. See, e.g., BELL & O’CONNELL, *supra* note 37, at 128 (presenting the claim from tort law’s adherents that the one-shot jury “focus[es] solely on the people before it,” and is not “contaminated by having looked closely at many other injurious accidents”). *But see* HOLMES, *supra* note 183, at 125–26 (arguing that such considerations “only lead to the conclusion that precedents should be overruled when they become inconsistent with present conditions”).

346. It is not unthinkable that juries could see more than one case at a time. Criminal grand juries do this. See Akhil Reed Amar, *Opening Remarks: The Civil Jury as a Political Institution*, 55 WM. & MARY L. REV. 729 (2014) (suggesting that civil jury scholars learn from other members of the “jury

likely helps with common biases such as the related issues of the “base rate” problem, the failure to understand how often a given phenomenon occurs, and hindsight bias—the tendency to evaluate conduct differently based on the outcome.³⁴⁷ Indeed, studies have shown that the very same people, when asked to evaluate a single case, and then asked to evaluate a series of cases across categories of which the original single case is one, come to very different conclusions about that single case.³⁴⁸ Evaluating the reasonableness or morality of conduct may be more likely to be accurate in its assessment of wrongfulness, if placed in the context of a number of different cases.³⁴⁹

One way to do this is to have an adjudicator (like a judge) who decides lots of cases and can rely on his or her memory and intuitions developed over time about what constitutes reasonable and unreasonable conduct.³⁵⁰ More commonly, the adjudicator might look to past cases that she or other judges in her jurisdiction has decided, using the kind of analogical reasoning familiar from the common law and described above.

Take an example of a classic slip-and-fall scenario in a supermarket. There are thousands of such cases every year.³⁵¹ The breach issue in such cases generally focuses on the question of “constructive notice” or whether the store knew or should have known of the hazard (say, a pool of water on the floor), and should have cleaned it up by the time the customer fell.³⁵² The answer turns on an estimate of how long the pool of water was there, and how often the store has employees come around and clean. Is it fact-specific? Sure, but there are not so many relevant facts.

To be sure, the evidence is frequently going to be disputed, but one can imagine either a judge making a finding of fact including the above estimates during a bench trial, or deciding the issue of reasonableness on a

family” and juries do in some other countries as well). The video of the discussion is available online at <http://scholarship.law.wm.edu/videos/57>.

347. *But see* Posner, *supra* note 298, at 1494 (“The judge may be case-hardened and therefore less likely to attend to the particulars of a new case.”).

348. *See* Sunstein et al., *supra* note 50, at 1173–79 (reporting and analyzing experimental evidence supporting this in punitive damage and contingent valuation cases).

349. *See* BELL & O’CONNELL, *supra* note 37, at 134 (noting that the one-shot jury may be overly “dominated by the individual considerations of the individual case”).

350. Something like this appears to be what Joseph Singer means in his discussion of how reasonableness tests “achieve shape and substance through the use of explicit or tacit *exemplars*.” Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1375, 1388 (2013).

351. THOMAS D. SAWAYA, FLORIDA PERSONAL INJURY AND WRONGFUL DEATH ACTIONS, § 10.13, at 601 (2001–2002 ed.) (2001).

352. *See, e.g.*, *Downs v. Choo*, 656 So. 2d 84, 86 (Miss. 1995) (noting that a plaintiff must show that a negligent act of the defendant caused the injury or that the defendant had actual or constructive knowledge of a dangerous condition).

motion for summary judgment by the defendant, assuming the facts as alleged by the plaintiff.³⁵³

So if faced with a new case, the judge or jury could look at the facts and say: is this closer to the cases that were deemed reasonable, or those that were deemed unreasonable? To be sure, one would not want to compare a supermarket to a 7-Eleven, or small mom-and-pop store, but one can also imagine putting all the supermarkets, or even all the big-box retail, in one category for the purpose of such comparisons, and in service of both more accurate and more consistent assessments of wrongfulness.

4. *Many Minds Theory*

Standard Assumption #4: For this kind of cognitive exercise, the fact that we have “many minds” on the jury increases our confidence that they will properly identify and apply the relevant norms.

Another assumption behind our confidence in the jury is that the “many minds” on the jury increases our confidence that the norm will be properly identified and applied.³⁵⁴ This “many minds” theory is in part based on a simple aggregation theory,³⁵⁵ and in part based on the assumption that a diversity of backgrounds will lead to a better decision.³⁵⁶ The problem is principally with the application of the aggregation theory.

In short, the benefits of the jury for this kind of decision making are overstated. First, the benefits of many minds are predicated on aggregating individual views as in a prediction market, with the views arrived at independently.³⁵⁷ This is not so on the jury, where views are discussed before voting. If the twelve views were arrived at independently, then the argument for superiority might have force.³⁵⁸ But through discussion in the

353. These kinds of reasonableness determinations are made by judges frequently in the Fourth Amendment context. See generally Cynthia Lee, *Reasonableness: The Future of Fourth Amendment Reasonableness Analysis*, GEO. WASH. LAW SCH. SCHOLARLY COMMONS (2012), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1804&context=faculty_publications.

354. See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 6 (2009).

355. See BELL & O'CONNELL, *supra* note 37, at 126–27 (outlining the argument that jury decisions are likely to reflect community norms because these decisions are “collective decisions, arrived at by consensus”).

356. See Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 48 (1915) (indicating that juries in negligence cases are “deemed to be acquainted with the teachings of common experience”).

357. See Vermeule, *supra* note 354 at 6 (“[A] crucial engine behind the [Condorcet Jury] Theorem is the independence of the group members’ views or guesses.”).

358. See *id.* at 4–5 (discussing the Condorcet Jury Theorem and the Theorem’s requirement that the “jurors” arrive at their conclusion independently).

jury room, there are various biases and group dynamics that lead to certain views being elevated, independent of their merits.³⁵⁹

Put differently, the empirical evidence on deliberation is decidedly mixed and heavily context-dependent.³⁶⁰ If certain features of deliberative groups are present, then deliberation *can* lead to better decision making. If not, it can make things worse.

An experienced and skilled facilitator, for example, who makes an effort to solicit a range of views during discussion, and helps ensure that no particular view dominates, can help deliberation be a positive force. Such facilitators, for example, play a key role in James Fishkin's well-known *Deliberative Poll*, an attempt to get citizens to deliberate about national political issues.³⁶¹ The reality, though, is that the foreperson is generally someone of higher status, and not shy about putting her views forward, relative to the group.³⁶² This often means that certain views are privileged, and the benefits of deliberation are not realized.³⁶³

In identifying and applying social norms, group deliberation may produce polarization, where the individual median judgment about the relevant social norm moves even further in a particular direction, after being discussed with members of a group.³⁶⁴ For example, extrapolating from existing studies, one could hypothesize that on average, individuals thought before deliberation that most people used cellphones while driving. Studies show they might be more likely to think, post-deliberation, that everyone uses a cell phone while driving.³⁶⁵

359. See CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 81–91 (2006).

360. For a review of this evidence, see Solomon, *supra* note 4, at 1367–70.

361. See CENTER FOR DELIBERATIVE DEMOCRACY, *DELIBERATIVE POLLING: EXECUTIVE SUMMARY*, <http://edd.stanford.edu/polls/docs/summary/> (last visited Mar. 13, 2013).

362. See Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis Of Jury Deliberations*, 45 *LAW & SOC'Y REV.* 667, 671 (2011) (“Jurors who are chosen as forepersons participate more than non-forepersons and are viewed as more influential in deliberations. These jury leaders are disproportionately male and have higher occupational status than non-forepersons.”) (citations omitted).

363. See *id.* (noting that forepersons' views are more influential in jury deliberations); see also Erin York and Benjamin Cornwell, *Social Characteristics and Influence in the Jury Room*, 85 *SOC. FORCES* 455, 469 (2006) (reporting on research that shows a “powerful” effect of social class on influence in the jury room).

364. See David Schkade et al., *The Severity Shift*, 100 *COLUM. L. REV.* 1139, 1139 (2000) (describing juries' tendency to return higher verdicts after deliberation and finding that deliberation exacerbates the problem of erratic awards); see also Cass R. Sunstein, *Damages, Norms, and Punishment*, in *NORMS AND THE LAW* 39 (John N. Drobak ed., 2006) (“[D]ollar awards of groups were systematically higher than the median of individual group members—so much so that in 27 percent of the cases, the dollar verdict was as high as, or higher than, that of the highest individual judgment, pre-deliberation.”); *id.* at 40 (“[I]f a group has a defined median position . . . members will shift toward a more extreme version of what they already think.”).

365. See generally Schkade et al., *supra* note 364, at 1139; Cass R. Sunstein, *The Law of Group Polarization*, 10 *J. POL. PHIL.* 175 (2002), <http://onlinelibrary.wiley.com/doi/10.1111/1467-9760.00148/pdf>.

The reverse is also true. Suppose individuals thought, on average, that few people used cell phones while driving. After deliberation, they might move closer to the position that no one uses a cell phone while driving. Cass Sunstein and colleagues have referred to this as a “severity shift.”³⁶⁶

Besides the argument about many minds being better than one, the argument about the benefit of the jury’s diverse backgrounds is also weak because actual juries are far from diverse.³⁶⁷ In part, this is a product of—in state court at least—the limits of relying on jury pools drawn from a particular county. Counties are increasingly homogeneous, and so the pool starts off without a tremendous amount of diversity to begin with.³⁶⁸

Moreover, who actually serves is fairly limited, not just in terms of racial and ethnic diversity, but occupational diversity and diversity of educational background as well.³⁶⁹ That is to say, the ideal enunciated in Supreme Court opinions and elsewhere of people from “all walks of life” coming together to deliberate is rarely seen in practice.³⁷⁰ Even when occupational diversity exists, the law itself is unclear about how much juries can take advantage of relevant expertise.³⁷¹ For example, nurses sometimes find themselves as jurors in medical malpractice cases. Can they draw upon their expertise to assist jury decision making? It depends on the jurisdiction, and the answer is not always clear.³⁷²

366. See Schkade et al., *supra* note 364.

367. See, e.g., HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 65 (1993) (finding that minorities and individuals of low educational status are underrepresented on juries); Jeffrey Fagan et al., Measuring a Fair Cross-Section of Jury Composition: A Case Study of the Southern District of New York (Mar. 14, 2008) (unpublished manuscript) (finding that African-Americans and Latinos were underrepresented in the jury pool of the Southern District of New York, while whites were overrepresented).

368. See PAUL TAYLOR & RICHARD MORIN, PEW RESEARCH CENTER, AMERICANS SAY THEY LIKE DIVERSE COMMUNITIES; ELECTION, CENSUS TRENDS SUGGEST OTHERWISE 1, 1 (2008), <http://pewsocialtrends.org/files/2010/10/diverse-political-communities.pdf> (“American communities appear to have grown more politically and economically homogenous in recent decades, according to analyses of election returns and U.S. Census data.”).

369. Recently, many states have reduced occupational exemption from jury duty; however, the current state of jury duty is still such that “[c]urrent jury practice renders jury service voluntary through hardship, occupational, and other exemptions.” Richard M. Re, Note, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1602 (2007) (noting that many occupational exemptions still very much exist and pass the “compelling state interests” standard).

370. See BELL & O’CONNELL, *supra* note 37, at 127 (arguing that over time, jury verdicts in tort cases “taken as a whole” likely reflect community sense of justice because ordinary people “drawn from all walks of life” serve on juries); Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 132–34 (arguing for the importance of diversity on juries, while retaining the “impartiality” ideal for overall jury deliberations).

371. See generally Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL’Y REV. 239 (2007) (discussing the law regarding jurors with expertise in an area relevant to the trial).

372. See Shari Diamond et al., *Embedded Experts on Real Juries: A Delicate Balance*, 55 WM. & MARY L. REV. 885 (2014).

In sum, the available research on both the makeup and functioning of actual juries, as well as the benefits of deliberation in a variety of contexts, ought to give us great pause before believing in the “many minds” theory of jury superiority. To be sure, the takeaway from this evidence might be that we ought to work on improving the deliberation of juries, not abandon it. This view is perfectly compatible with my approach.

B. Implications: Are Judges Really Better?

We have now seen that juries may *not* be as good as we thought at identifying and applying social norms. It turns out that (1) lay people are not particularly good at identifying social norms generally, and particularly in judging the kind of “reasonableness” at issue in many tort cases; (2) that a more rule-like approach which only looks to certain factors may be more likely to get the right result than a “totality of the circumstances” approach; (3) the fact that juries see only one case may not be such a good thing; and (4) that the actual operation of juries falls short of the deliberative democracy ideal.³⁷³

But what’s the alternative? The logical one would be judges deciding these issues. Is there any reason to believe they would do better?

I want to remain agnostic for now on the precise allocation of power between judge and jury on these issues. My task here is simply to complicate the story that juries are particularly good at identifying and applying social norms. And the upshot may be that we continue to let juries, not judges, decide, but simply work to increase the chances that juries successfully and consistently identify the proper social norm and apply it.³⁷⁴ One can imagine juries instructed to apply limited-factor rules, instead of the open-ended reasonableness standard, for example.

There are alternatives as well involving a mix of judge and jury. One can envision judges making the ultimate decision on reasonableness with jury involvement as an advisory or special verdict addressed to finding particular facts of relevance. Would this comply with the Seventh Amendment? Probably, though it is not certain.

In determining whether there might be a 7th Amendment problem with judges deciding questions of reasonableness, we look to the Supreme Court's decision in *Markman v. Westview Instruments, Inc.*³⁷⁵ Under *Markman*, the key is whether the jury must decide a particular issue in order to “preserve the substance of the common-law right” as it existed in

373. See *infra* Part III.A.

374. See OLSON, *supra* note 48, at 175 (“A jury system with believably objective rules would be the best of all legal worlds.”).

375. 517 U.S. 370 (1996).

1791.³⁷⁶ Certain issues must be submitted to the jury if they are necessary “to preserve the right to a jury’s resolution of the ultimate dispute.”³⁷⁷ To determine this, the Court looks to history first, and then precedent and functional considerations.³⁷⁸

In this context, it is certainly true that questions of liability were generally decided by the jury at common law in tort suits.³⁷⁹ But that does not answer the precise question of whether all the issues around reasonableness must be submitted. The Court also looks to issues of precedent or process, including whether the issue is one of fact, generally decided by the jury, or law, generally decided by a judge.³⁸⁰

The issue of reasonableness is generally considered a mixed question of law and fact, but it can be broken down further. Arguably, one can break down the issue into roughly two parts: (1) what constitutes reasonable behavior in this context? And (2) did defendant’s conduct meet that standard in this case? Seen this way, the former question is more one of law, and the latter more one of fact. Giving the judge the former question, and the jury the latter, would likely be consistent with the 7th Amendment, as interpreted by the Supreme Court.

Regardless of Seventh Amendment considerations, though, it is worth taking a moment to pause on how judges might fare. Outside the tort context, the picture of a judge as identifying and applying social norms is quite familiar. Cardozo himself was well known to have such a view of judging,³⁸¹ and the model is well-established in areas like constitutional adjudication, for example.³⁸² Even within tort law, judges frequently identify and apply social norms in determining questions of duty, a practice accepted by both duty proponents and skeptics.³⁸³ And judges frequently

376. *Id.*

377. *Id.* at 377; *City of Monterey v. Del Monte Dunes*, 526 U.S. 718 (1999).

378. *Del Monte Dunes*, 526 U.S. at 718.

379. *Id.* at 718–19.

380. *Id.* at 720. *But see* Bernadette Meyler, *Against Common-Law Originalism*, 59 STAN. L. REV. 551, 598 (2006) (pointing out that the Court’s cases in this area don’t actually look at the “common law conception of what constituted fact as opposed to law”); Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L. Q. 687, 750–51 (arguing that the Court has not “enforced the law/fact distinction” from the common law, despite frequent reference to it).

381. *See* CARDOZO, *supra* note 257, at 63 (arguing that judges must draw on community standards in making decisions); *see also* WHITE, *supra* note 81, at 130 (explaining that Cardozo thought it legitimate for judges to decide cases according to their interpretation of “community standards of morality”); John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1329–48 (1990).

382. *See, e.g.*, Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

383. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 402–07 (2005) (articulating this function); Dilan Esper and Gregory Keating, *Abusing Duty*, 79 S. CAL. L. REV. 265, 282 (2006) (describing duty doctrine as giving judges the “decidedly legal task of articulating the law—of stating *general* norms for the guidance of conduct.” (emphasis in

identify and apply commercial norms, often in applying standards like “good faith,” for example.³⁸⁴

In my view, the judge might be as good or better than juries at identifying and applying such norms because the use of heuristics increase the chances that liability determinations will be *accurate*—that is, consistent with whether the underlying conduct was actually wrong, as defined by compliance or noncompliance with social norms of conduct. It may also increase *consistency* across cases.³⁸⁵

Of course, in theory, the jury could both issue precedent and follow heuristics, using analogical reasoning to get to a result in the case at bar. And the jury could provide reasons that would be constraining in future cases. But it seems unrealistic that the jury would be asked to take on this role it has rarely performed before in the U.S., in part because of the practical difficulties in juries agreeing on such reasons. Certainly judges are used to making these sorts of decisions about obligations from duty determinations in tort law and other contexts.

My argument, then, is not necessarily that trained lawyers (judges) are better than lay people in identifying and applying social norms. I am simply looking at the institutional features of the landscape, and reasoning that in judging conduct, our preference might be “all things considered” particularistic moral reasoning, done properly (without consideration of improper factors).³⁸⁶ But the research indicates that this kind of reasoning—focusing specifically, for example, on whether or not a defendant performed according to social norms—is not what juries do when deciding negligence cases.³⁸⁷

The question, then, is whether the second-best answer is the decision maker doing this kind of particularistic reasoning, without much weight given to precedent or informational heuristics (our current model), or whether using analogical reasoning or heuristics on social norms gets closer to the ideal of an accurate and consistent determination of wrongness, defined as a violation of social norms (my proposal).

original). To be sure, judges frequently *say* they are deciding duty questions but actually ruling “no breach.” See Sugarman, *supra* note 215, at 688–90 (highlighting and criticizing this practice).

384. Cardozo himself does this in one of his best-known contracts cases, *Wood v. Duff-Gordon*, 222 N.Y. 88 (1917), discussed at POSNER, *supra* note 253, at 92–96 (characterizing Cardozo’s opinion as admirably making “the law track lay understanding rather than force lay persons to conform their transactions to rigid legal categories”).

385. See OLSON, *supra* note 48 (describing the argument as judges, being repeat players, being able to “bring a second-best sort of uniformity to the output of their courtrooms”). This appears to be one motivating factor behind Holmes’s view of the desirability of judge-made rules for negligence over time. See HOLMES, *supra* note 183, at 126 (arguing that without such rules, the public’s “rights and duties” would be left to the “more or less accidental feelings of a jury”).

386. See Lawrence Alexander & Emily Sherwin, *Judges as Rule Makers*, in COMMON LAW THEORY 27 (Douglas E. Edlin ed., 2007).

387. See FEIGENSON, *supra* note 40, at 16–18 (describing civil juries’ “total justice” approach).

IV. TOWARDS A SOLUTION: RELYING MORE ON EXTERNAL INDICIA OF SOCIAL NORMS

The idea of this Part—and a reshaped negligence law³⁸⁸—is this: what we want in determining negligence is an accurate assessment of wrongfulness. We define wrongfulness by breaches of social norms.³⁸⁹ But as we saw in the last Part, jurors, either individually or as a group, are not always able to identify the relevant social norms and whether or not they were breached, in hindsight.

Therefore, rather than leave this determination to the jury to make in light of all the circumstances, we should provide rules of thumb or presumptions to use in certain circumstances, on the theory that these are likely to be better guides to—or produce more accurate outcomes of—wrongfulness.³⁹⁰

In this way, we can also have confidence that the adjudicators—whether it be judges or jurors—will really be *applying* norms. Otherwise, jurors may actually be acting as “norm creators,” to use Ken Abraham’s term.³⁹¹ To the extent that jurors are norm-appliers, not norm-creators, we can have increased confidence that like cases are treated alike.

But where do we get these norms? How do we *identify*, first of all, and then second of all, *incorporate* existing social norms into the law as presumptions or rules of thumb for juries?³⁹² Moreover, even if we could do such a thing, how do we ensure that they don’t become ossified—that is, take on one of the negative attributes of rules, the fact that they are more difficult to change over time. By comparison, standards like reasonableness can be adapted by the jury and applied to situations as they happen, and as social norms change.

In this Part, I offer three possible sources of such norms—custom, statutes and regulations, and the market. To a certain extent, these sources are already deployed by tort law in determining breach, but the thrust of my argument is that they should be even more prominent in determining breach

388. Full development of this is beyond the scope of this Article.

389. See Kelley, *Restating Duty*, *supra* note 296, at 1051.

390. In certain respects, this approach, using presumptive rules of reasonableness, is akin to the “moral incrementalism” that Richard Epstein describes, creating a “system of presumptions as an organizing principle” for easier cases, and then building on that to reason one’s way through hard cases. See RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM* 84–107, 93 (2003).

391. See Abraham, *supra* note 35.

392. For accounts of how juries inject norms into law in our current system, see Valerie P. Hans, *Juries as Conduits for Culture?*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 80 (David M. Engel & Michael McCann eds., 2009) (exploring the ways in which juries can inject cultural norms and how these mechanisms have changed over time); Joseph Sanders, *A Norms Approach to Jury “Nullification:” Interests, Values, and Scripts*, 30 *LAW & POL’Y* 12 (2008).

than they are right now.³⁹³ In what follows, I explain why and how these can be used as sources of such norms.

A. Custom

First, custom. To a certain extent, as indicated above, custom is the very definition of social norms. To the extent that social norms are defined as regularized forms of behavior (without necessarily a normative thrust), this describes custom precisely.

Custom is simply what certain individuals or entities do, as a descriptive matter, on a regular basis in certain circumstances.³⁹⁴ It can describe everything from the practice of tugboats in equipping their boats with radios, to the practice of cars crossing railroad tracks, or drivers changing lanes.³⁹⁵

Custom is frequently easy to identify, though not always. And certainly there could be, and frequently is, competing evidence on what exactly the custom might be in particular circumstances. Nonetheless, it seems fairly clear that custom, if properly identified, will give you social norms. Indeed, custom is social norms, by definition.

The question remains, though, is custom a good source to use in determining breach? There has been considerable debate over how much weight custom ought to be given in tort law since at least the *T.J. Hooper* case.³⁹⁶ The general rule is that custom is to be given some weight, but not any kind of presumptive or dispositive weight in determining breach.³⁹⁷ This is true whether the plaintiff uses it as a sword to say that the defendant breached the standard of care, or defendant uses it as a shield to say that there was no breach at all.³⁹⁸ The one place where custom is thought to be

393. Kenneth Abraham seems to separate negligence cases into those that are “bounded” by a “pre-existing norm” like custom or statute, and “unbounded” cases. He is far more worried about the latter. See Abraham, *supra* note 35, at 1191. But I’m not sure why. I see no reason to believe that juries actually follow custom or statute in those “bounded” cases, and he does not cite any evidence.

394. See MERRIAM-WEBSTER DICTIONARY, *custom* entry, available at <http://www.merriamwebster.com/dictionary/custom> (defining custom as “a usage or practice common to many or to a particular place or class or habitual with an individual”).

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

396. *Id.*

397. RESTATEMENT (SECOND) OF TORTS § 295A (1965).

398. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 13(a) (2010) (“An actor’s compliance with the custom . . . is evidence that the actor’s conduct is not negligent but does not preclude a finding of negligence”); see also *id.* at § 13(b) (“An actor’s departure from the custom of the community . . . is evidence of the actor’s negligence but does not require a finding of negligence”); see also BEDERMAN, *supra* note 295 at 92–95.

given considerable weight in determining breach is in medical malpractice cases, but even this has been recently called into question by scholars.³⁹⁹

Many scholars and judges have argued against giving custom too much weight, most notably Judge Learned Hand in *T.J. Hooper*.⁴⁰⁰ Hand argued that courts should not defer to entire industries in determining what the law is, or put differently, what duties of care ought to be.⁴⁰¹ But I think Judge Hand is wrong here.

To the extent that we think that tort law is determining wrongfulness, it is unfair to the defendant and out of step with the legal system to declare conduct “wrongful” when it is consistent with social norms or custom. To be sure, it might well be that an entire industry, in order to save money, would not take relatively inexpensive safety measures that could have a beneficial effect.⁴⁰²

But courts, in deciding wrongfulness in tort cases, are not the ones to make the determination that companies ought to behave differently: that is for legislatures or administrative agencies to do. Put differently, Judge Hand’s famous line in *The T.J. Hooper* case that “[c]ourts must in the end say what is required” is one of his less helpful observations.⁴⁰³ Taken on its face, the statement is innocuous enough, and surely true. But it fails to answer the question of who ought to decide, and how to decide, where the line is between reasonable and unreasonable conduct. That question, of course, is necessarily a comparative one, and judges fare considerably worse relative to social norms, legislatures, and agencies.

To be sure, part of my argument here is that juries don’t fare so well, either. But that points to having juries and judges defer to the superior institutional or epistemic participants, not for juries to take on the role themselves. Juries—either as experts in social norms or as a mini-legislature—are drawn from a political entity (the county) that bears no particular relationship either to the scope of the law at issue (generally state law), or a particular community that we might expect to have unique sets of norms.

In my scheme, then, custom would be given presumptive weight. This would apply to custom as both a sword and a shield, and of course it is a

399. See Philip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 909 (2002).

400. *T.J. Hooper*, 60 F.2d at 737.

401. *Id.* at 740.

402. See *id.* (noting that “a whole calling may have unduly lagged in the adoption of new and available devices”); see also BEDERMAN, *supra* note 295, at 93–94.

403. *T.J. Hooper*, 60 F.2d at 740; BEDERMAN, *supra* note 295, at 93–94.

presumption that could be rebutted by either side.⁴⁰⁴ But the jury ought to give it considerable weight.⁴⁰⁵

Today, the law on custom is generally that like negligence per se, plaintiffs can use evidence that the defendant did not comply with custom to support an inference of breach.⁴⁰⁶ But consistent with the famous *T.J. Hooper* case, evidence of compliance with custom does not receive much weight in defendant's "no breach" argument.⁴⁰⁷ In other words, plaintiffs can use custom as a sword, but courts disfavor it as a shield for defendants.

My approach would change doctrine to make the use of custom more symmetrical for plaintiffs and defendants, thereby increasing deference to social or industry norms. Classic cases like *T.J. Hooper* or *Helling v. Carey*,⁴⁰⁸ where a doctor was held liable for not performing an inexpensive glaucoma test, even though it was custom not to perform such tests on patients the age of the plaintiff, would come out the other way.⁴⁰⁹ If custom is more important, then there might be increased use of experts on what the custom is. Though this might increase litigation costs during discovery, it might lead more cases to settle in instances where the custom is ultimately clear.

This approach is quite open to the objection that this lets industries or professions (like doctors or lawyers) define what is reasonable themselves, as Judge Hand criticized in *T.J. Hooper*.⁴¹⁰ I think this criticism is misplaced. My approach does allow legislatures, administrative agencies, and other regulatory bodies to define norms for industries and professions. If those entities are "captured" by the industries they regulate, then that is a problem that needs to be addressed. Of course, when talking about the professions particularly, self-regulation may be the desired outcome. But if it is not, then perhaps my approach increases the chances that the standard set by legislatures and agencies will be scrutinized, to the extent that lawyers and litigants are frustrated by their operation.

404. See 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2491, at 304–07 (James H. Chadbourne ed., 1981) (explaining that the effect of a presumption is to compel the jury to reach a certain decision "in the absence of evidence to the contrary from the opponent").

405. Sticking to the rule in the face of countervailing factors might seem overly "formalistic," but that is precisely the point: to limit the factors that are taken into account. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

406. See RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 13(a) cmt. b (2010).

407. See Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4 (1992) (questioning this conventional wisdom).

408. *Helling v. Carey*, 519 P.2d 981 (Wash. 1974); *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

409. *Helling*, 519 P.2d 981 (discussed in Keating, *supra* note 85, at 358–60).

410. 60 F.2d at 740.

B. Statutes and Regulations

The next source of social norms would be *legislatures or administrative agencies*. The idea is that we can accept as a rule of thumb that a legislature or agency's guide to conduct is reflective of social norms or expectations on how individuals and other entities ought to behave.

Statutes and regulations, of course, are authoritative in a slightly different way than custom. With custom, by definition, we are talking about regular patterns of behavior—social norms in that sense.⁴¹¹ Statutes or regulations *may* constitute regularized patterns of behavior in a society. But they are social norms in a different way: they are normative or prescriptive, even aspirational.⁴¹² They say not necessarily that this is what people or businesses *do*, they say this is what people or businesses *should* do.⁴¹³

Nonetheless, they can serve the same function as custom in tort. They can be used as heuristics for juries or judges to determine wrongfulness. Juries or judges can point to the statute or regulation, and say, “This constitutes a social norm on how people should behave.” When people fall short of that standard, we can confidently deem their conduct wrongful.⁴¹⁴

Our confidence in these kinds of social norms as heuristics stems in large part from their democratic legitimacy. If the statutes were passed by a duly elected legislature, then we can be reasonably confident that it represents a norm of behavior that is worthy of being followed.⁴¹⁵ Similarly, if an agency promulgates a regulation after deliberation with the requisite experts as well as participation from interested parties, then it can be putatively legitimate and worthy of being followed as well. In this way, statutes and regulations can serve as heuristics from legitimate and competent institutions that produce such norms, rather than individual juries creating such norms on an ad hoc basis.⁴¹⁶

So my argument goes. But are the statutes and regulations really democratically legitimate? Why should we think statutes are accurate

411. See MERRIAM-WEBSTER, *supra* note 394.

412. Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1819 (2009) (discussing negligence per se being derived from normative experience).

413. See Steven A. Hetcher, *The Emergency of Website Privacy Norms*, 7 MICH. TELECOMM. & TECH. L. REV. 97, 131 (2001).

414. See Aaron D. Twerski, *Negligence Per Se and Res Ipsa Loquitur: Kissing Cousins*, 44 WAKE FOREST L. REV. 997, 1002–03 (2009) (indicating that statutes provide “an important datum” for judges to direct verdicts, but only when it is a genuine indicator of reasonable care in the circumstances).

415. But see Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 535 (1999) (“The assertion that legislatures are more democratic than courts willfully ignores everything we know about those institutions.”).

416. See HUBER, *supra* note 16, at 8 (yearning for the days before products liability when we looked to the “political branches of government to make . . . safety choices”).

representations of social norms when state legislatures are heavily influenced by interest groups?⁴¹⁷

Put differently, one objection might be that statutes are a poor proxy for social norms. The reality of lawmaking, one could argue, has more to do with influential interests successfully getting help from legislators than a deliberative body making laws that reflect or advance the public good.⁴¹⁸ So for example, if there is a statute on the books indicating that a particular medical procedure ought to be treated as the appropriate standard of care, we have every reason to suspect that the law was passed to protect doctors and hospitals, as opposed to patients.⁴¹⁹

Another way of stating this is that the approach may lead to underdeterrence of risky activity.⁴²⁰ After all, as Justice Stevens once pointed out, the *Titanic* complied with regulations governing the number of lifeboats to be on board such a ship.⁴²¹

This is an important objection, but I think it ultimately fails for a few reasons. First, if we give statutes more force by strengthening the use of the negligence per se doctrine, for example, this may well lead to laws that better reflect the interests at stake. For example, if plaintiffs' lawyers know that a statute like the medical one described above would have real force in medical malpractice cases, then they might spend more political capital to ensure such regulations account for patient and consumer interests. Second, giving such statutes force in the civil justice system might lead to greater public attention to such laws and possible improvements over time if they lead to unjust outcomes.

Finally, to *not* use these statutes—I would suggest—is to give up on the idea that tort cases are in part meant to demarcate the boundary between

417. See Tory Newmyer, *The Big Political Player You've Never Heard of*, CNN MONEY (Jan. 10, 2011, 5:00 AM), <http://finance.fortune.cnn.com/2011/01/10/the-big-political-player-youve-never-heard-of/> (describing one organization's influence in state legislatures).

418. See Abel, *supra* note 415, at 556 (“The assertion that courts should defer to legislatures in making tort law is fatally flawed In practice . . . the need to raise money for re-election drives legislators into the pockets of special interests.”).

419. Some scholars point to this as a main reason to have the civil justice system in the first place. See, e.g., THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 198 (2001) (“The tort system is the last defense when government standards are weak, outdated, or set by the regulated industry.”); Stephen Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061 (2014) (seeing the civil jury as a backstop in cases of regulatory failure).

420. See CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* 219–20 (2001) (explicating the importance of the civil jury in products liability cases because “regulatory agencies cannot do the job alone”); KOENIG & RUSTAD, *supra* note 419, at 187 (arguing that one of the advantages of tort law over regulation is that the public sets a high standard of care for product safety and development).

421. See *Geier v. American Honda Motor Co.*, 529 U.S. 861, 903 (2000) (Stevens, J., dissenting) (citing Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO WASH. L. REV. 415, 459 (1996) (noting that the *Titanic* “complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about [half] of the people on board”).

right and wrong, reasonable and unreasonable.⁴²² Some might find this view congenial. Indeed, many scholars have described tort law as a form of “localized distributive justice” focused on the question, “As between these parties, who should pay?”⁴²³

Had our system moved towards “no-fault” or strict liability, or if it were to do so, this might be a plausible alternative. But an area of law embedded with normatively-laden concepts like duty, breach, and fault that are reflected in doctrine—and where judgments of liability are perceived culturally as an assignment of blame—is difficult to separate from the idea of responsibility for wrongs.

One might respond that one can still have responsibility for wrongs, but simply have it determined by juries on a case-by-case basis. But the possibility (and likely reality) of different standards being applied in similar cases means giving up then on the idea of the rule of law. To a large extent, of course, this is our current system,⁴²⁴ and the fault is not with lay people as deciders, but with the general verdict and lack of reasons given by juries. But in my view, this feature of our system is one that makes it particularly vulnerable to attack.

Increased deference to statutes and regulations would primarily impact two important tort doctrines: negligence per se and the regulatory-compliance defense.

Right now, in most jurisdictions, plaintiffs can present evidence of a violation of a statute, and the jury can infer from such evidence (though they need not) that the defendant breached, even in the absence of direct or circumstantial evidence of carelessness.⁴²⁵ This is what is referred to as the “negligence per se” doctrine.⁴²⁶

Under my approach, this doctrine would be strengthened in two ways. First, evidence of a statutory violation would lead to a rebuttable presumption of breach, not just a possible inference. Second, defendants would be unable to make two related arguments: (1) that the plaintiff was not within the class of people the statute was designed to protect, and

422. Indeed, one reason why legislatures may specify rules is to limit jury discretion in tort and criminal cases. See Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1512, 1517 (Sanford H. Kadish ed., 1983) (noting that in a criminal context, the legislature sometimes predefines reasonable care in the form of a rule because of the risk that juries will fail to enforce a negligence standard uniformly).

423. See, e.g., Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 *S. CAL. L. REV.* 193 (2000) (arguing in favor of distributive over corrective justice, insofar as justice is the main focus of tort law).

424. See *supra* Part I.B.1.

425. *Res ipsa loquitur* is another example of such a generalization—essentially saying that if certain factors are present, then the jury can infer that the defendant was careless. See Twerski, *supra* note 414, at 1003 (calling *res ipsa* a generalization that negligence is the “best explanation for a given category of events”).

426. See 71 *TEX. JUR.* 3d § 331 (2013).

therefore the statutory violation is not evidence of a breach of a duty towards her; and (2) that the harm suffered by the plaintiff was not within the risks contemplated by the statute, and therefore the defendant's conduct ought not be deemed a "proximate cause" of the plaintiff's harm.⁴²⁷

The justification here is that we are aiming for more accurate determinations of wrongfulness, and if the statute is violated, then we can be confident that the defendant did not live up to his responsibilities to take care to avoid risking harm to others. To be sure, in making this change, we slightly increase the risk of holding defendants responsible for injuries without the requisite normative connection, but defendants could still bring a claim that their statutory violation was not a factual cause of plaintiff's injury, thereby mitigating this risk.

If the strengthening of negligence per se seems quite beneficial to plaintiffs, strengthening the regulatory-compliance defense would help defendants. In some jurisdictions, this defense acts as a converse to negligence per se—whereas evidence of a statutory or regulatory violation is evidence of breach, evidence of compliance with a statute or regulation can be considered evidence of "no breach" or reasonable care.⁴²⁸ In a products liability context, where the defense is frequently invoked,⁴²⁹ one can think of it as evidence from which a jury could infer that the product is not "defective."

Just like negligence per se, my approach points to regulatory compliance creating a rebuttable presumption of "no breach" or "no defect."⁴³⁰ It would still be open to the plaintiff to demonstrate that the defendant had, for example, committed a fraud on the agency in submitting relevant information, and therefore its compliance should not be given much weight. But without such evidence, regulatory compliance would be all but dispositive. Again, rather than having juries decide whether defendants complied with relevant norms, we defer to the existing norm-creators and appliers.⁴³¹

427. The thrust of this is similar to that proposed, though for different reasons, in Ariel Porat, *Expanding Liability for Negligence Per Se*, 44 WAKE FOREST L. REV 979, 981–87 (2009) (arguing that the current approach may provide insufficient incentives for safety from a social welfare perspective).

428. Traditionally, statutes and regulations have not been given such weight for defendants. See DAN B. DOBBS, *THE LAW OF TORTS* 572–74 (2000) (describing the general rule that compliance with statute may be evidence of due care but does not entail that due care has been taken).

429. See generally Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049 (2000) (discussing and critiquing the regulatory compliance defense).

430. I want to remain agnostic at the moment about whether my approach has anything to say about preemption. At a minimum, I think it is a much closer call as to whether deferring to legislatures and agencies means disallowing a tort lawsuit entirely (preemption), as opposed to giving defendants a robust but rebuttable regulatory-compliance defense.

431. See Schauer, *supra* note 405, at 544 (describing as one of formalism's virtues the idea that decision-makers are to sometimes "recognize their lack of jurisdiction and to defer even when they are convinced that their own judgment is best").

C. *The Market*

The final heuristic for social norms is that of *the market*. I offer this one a bit more tentatively than the first two, but think it can be used in the appropriate context. Others have shown the role of the market in the production of social norms.⁴³² I will merely rehearse the story briefly here. The idea is that certain products and services compete on both price and quality, and the competition on quality will yield norms on a variety of metrics.⁴³³ A similar dynamic may also take place in the liability-insurance market, as I explain below.

1. *The Market for Goods and Services*

Take, for example, cars or pharmaceuticals as the products, subject of course to possible products liability claims. Or take services like legal or medical care, subject to possible malpractice claims. The competition in these markets, imperfect though it may be, yields a set of norms on what is considered good or reasonable. Highly performing or safe products will set benchmarks for quality, and what constitutes acceptable medical or legal care emerges as well.

Looking, then, to the market for norms of reasonable care can yield a heuristic for what is reasonable or unreasonable.⁴³⁴ Put differently, behavior that falls below the norms set by the market can safely be deemed wrongful, without an independent “all things considered” assessment by the jury.⁴³⁵

One place where this approach yields clear prescriptions for doctrine is products liability. Generally, jurisdictions are divided in their approaches to design defect between the “consumer expectations” test and a risk-benefit analysis.⁴³⁶ In the early days of products liability, consumer expectations were dominant, following the *Restatement (Second) 402A*’s formulation that the question of defectiveness ought to rest on whether a product is “unreasonably dangerous,” to be defined with reference to what consumers

432. See generally Cristina Bicchieri & Ryan Muldoon, *Social Norms*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (SPRING 2011), <http://plato.stanford.edu/archives/spr2011/entries/social-norms> (describing the theory that the market creates social norms as a solution to collective action problems).

433. *Id.*

434. See HUBER, *supra* note 16, at 8 (decrying the role of the courts in “determining what may be bought and sold” because of product liability litigation).

435. See Schauer, *supra* note 405, at 544 (indicating one aspect of rule-like formalism is allocating power to some decision-makers and away from others).

436. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) (describing briefly four types of jurisdictions as pure risk-utility or consumer expectations jurisdictions or relative mixes thereof).

expect.⁴³⁷ In the 1980s and 90s, though, risk-utility became more widespread, in part due to a sense that consumer expectations was a form of strict liability that may be too easy for plaintiffs to get to the jury.⁴³⁸

This trend was reinforced by the *Restatement (Third) of Products Liability*, whose intellectual architecture was designed—and the *Restatement* itself drafted—by professors James Henderson and Aaron Twerski.⁴³⁹ The *Restatement (Third)* not only strongly endorsed risk-utility—quite like a negligence inquiry—but also proposed that the plaintiff needed to demonstrate that there was a reasonable alternative design that would have been safer in the way plaintiff described in order to recover.⁴⁴⁰ Some courts have adopted the *Restatement (Third)*, but many still follow consumer expectations.⁴⁴¹

Looking to markets as a source of social norms is quite consistent with the *Restatement (Third)* approach. If there is a reasonable alternative design available on the market, then we can be confident that the manufacturer can be held liable for not choosing the safer alternative.⁴⁴² If there is no such alternative design, then the jury ought not tell the manufacturer its product is defective and it should have designed it differently.⁴⁴³ Put differently, if the epistemic question is how can an adjudicator—whether judge or jury—know whether there is an alternative design of a product where the safety benefits would be worth the increased cost, the answer is look to the market. The market is as good a proxy as any to answer this question: though not perfect, we can draw the inference that there is no alternative worth the cost if a company has not managed to bring it to market.

2. *The Liability-Insurance Market*

Another way to harness information from the market is through liability insurance. The idea is this: liability insurers in many domains implement “risk-reduction” or “loss-prevention” efforts for those whom

437. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

438. See David G. Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. 927, 945 (2009) (noting that many courts moved away from the consumer expectations test to risk-utility based on a sense that the former was too “plaintiff-friendly,” though disagreeing with this view).

439. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998); see also Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers’ Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061 (2009) (discussing the RESTATEMENT (THIRD) ten years after its adoption).

440. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. b (1998)

441. The issue in Karen Bartlett’s case now at the Supreme Court is whether the medicine she was given was “unreasonably dangerous,” which is defined in New Hampshire with reference to whether the risks of the drug as designed outweigh its utility. See *Vautour v. Body Masters Sports Indus., Inc.*, 784 A.2d 1178, 1183 (N.H. 2001).

442. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

443. See *id.*

they insure.⁴⁴⁴ These efforts are sometimes a requirement either of coverage in the first place or of getting a certain price.⁴⁴⁵ Though the existing literature is limited, it appears that what insurance companies tell firms to do to prevent accidents arises from the insurance company's own data and experience and industry-specific research.⁴⁴⁶ In theory (and perhaps reality), insurers ought to learn about best practices through this process, and insurers that successfully help their insureds reduce the costs of accidents would be able to succeed in the market by offering coverage at lower rates.

My suggestion is this: as with custom, parties could use evidence that defendants did or did not take advantage of risk-reduction programs offered by their liability insurers to create a presumption about whether they used reasonable care. Rather than have juries decide what the appropriate norm is for loss-prevention in the particular industry, courts would defer to the evidence of the existing social norm, as revealed through liability insurance practices (or perhaps the firm itself for those that self-insure).⁴⁴⁷

Under existing law, evidence about loss-prevention efforts by insurers would be inadmissible under Federal Rule of Evidence 411, which says, "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."⁴⁴⁸ But Rule 411 has been heavily criticized, and this might be one more reason to revisit its foundation.⁴⁴⁹ Moreover, to the extent that the ban on evidence of liability insurance is founded on fear of juror prejudice, it is worth noting that under my proposal, judges would be deciding the issue of breach much more frequently.

444. See Tom Baker & Rick Swedloff, *Regulation Through Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1415 (2013) (explaining that once insurers take financial responsibility for liability, they sometimes attempt to "regulate loss-producing activities").

445. See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 211–12 (2012) (citing examples).

446. See Baker & Swedloff, *supra* note 444, at 1422 (explaining how insurers can use the information gained from doing loss prevention for underwriting and pricing); Ben-Shahar & Logue, *supra* note 445, at 210–13 (categorizing and describing such efforts); Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 1 J. OF TORT LAW 1, 22–24 (2008) (describing how a major retailer, which self-insures and does risk-management in-house, uses the claims management process to generate information about how to minimize the risk of accidents).

447. Cf. Ronen Avraham, *Private Regulation*, 34 HARV. J.L. & PUB. POL'Y. 543, 552 (2011) (proposing an analogous regime for medical malpractice, though the private guidelines would not be produced by insurers).

448. FED. R. EVID. 411.

449. See Alan Calnan, *The Insurance Exclusionary Rule Revisited: Are Reports of its Demise Exaggerated?*, 52 OHIO ST. L.J. 1177, 1178 (1991) (pointing out that "many within the legal community have said that the rule does far more harm than good, and these critics have been vociferous to say the least").

Though it would be unusual to admit evidence of liability-insurer activities, evidence of harm-reduction efforts can support a defense in certain kinds of tort claims. The clearest example comes from sexual harassment law. Under current doctrine, an employer is presumptively held vicariously liable for a “hostile work environment,” but it can rebut that presumption with a showing that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and the plaintiff failed to take advantage of the reporting mechanisms provided by the employer.⁴⁵⁰ Conceptually, this evidence is in the same family as loss-prevention efforts driven by insurers and aimed at bodily injury.

Though considerably more work remains, we have now seen that it is possible to have a set of presumptions around breach in negligence, using indicia of existing social norms as revealed in statutes and regulations, custom, and the market. And recall that the aspiration behind such presumptions is to gain accuracy in determining wrongfulness and normative legitimacy for the results of the civil justice system.

CONCLUSION

The right of individuals to recourse against those who have wronged them is an important aspect of social equality, and it is embedded in our society and culture.⁴⁵¹ But it is under serious attack. The critics have been themselves criticized for skewing the facts and being driven more by ideological and economic interests than genuine concern for the civil justice system.⁴⁵² And in many cases, this criticism is well placed.

But there is a legitimate critique lying beneath the indictment by anecdote. The critique is based on the rule-of-law problems with juries deciding individual cases without giving reasons, and without regard to how similarly situated plaintiffs and defendants have been treated. Defenders of civil justice have resisted acknowledging these horizontal-equity concerns as a real problem,⁴⁵³ despite such concerns being acknowledged as real in many other areas of the law.⁴⁵⁴ The conceptual obstacle, as I have tried to demonstrate in this Article, is with the twin assumptions that (1) these questions of reasonableness are inevitably fact-

450. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

451. *See* Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243 (2011).

452. *See supra* Part I.

453. *See, e.g.*, Seana Valentine Shiffrin, Essay, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1242–45 (2010) (arguing that horizontal inequity is only a serious problem when done for deliberate or bad reasons).

454. *See* Eisenberg, Rachlinski & Wells, *supra* note 50.

intensive and impossible to generalize about and (2) that juries are ideally suited to identifying and applying the relevant social norms.

Which brings us back to the recent case decided by the Supreme Court, the one with which we began: Karen Bartlett's lawsuit against the generic drug company Mutual Pharmaceutical for selling her medicine that literally made her skin fall off and then left her blind.⁴⁵⁵ Under my approach, Bartlett would have been able to bring such a lawsuit, arguing that the drug was "unreasonably dangerous" such that it should not have even been on the market, or should have had stronger warnings about side effects.

But the drug company would have had a strong regulatory-compliance defense. In plain terms, the FDA said it was okay: therefore no liability. And such a defense should have been successful on a motion for summary judgment, after sufficient discovery to allow Bartlett's lawyer to try to uncover whether there was fraud committed on the FDA where the company knew about greater risks of side effects than it let on. At a minimum, if the evidence was ambiguous about what the company told the FDA and whether it was sufficient, the jury ought to have been instructed to defer to the FDA in the absence of compelling reasons not to.

Such an approach would preserve the right to recourse in cases just like this one, where individuals are at the mercy of (but also benefit from) the products developed by people they don't know, can't talk to, and have no particular reason to trust. But it would also allow companies and other defendants to know that the FDA decides norms of right and wrong, reasonable and unreasonable, about whether medicine is safe enough to be on the market and what level of side effects require what kind of warning. These safety judgments are decided by a national regulatory agency for a product sold nationally, and the norms should not change from a regulatory to a litigation context. That is important not just for innovation and predictability, but also as a matter of fairness.⁴⁵⁶ This approach better meets the demands of the rule of law.

Our mistake has been to assume that the jury was the repository of social norms and that there was no other way but Cardozo's: give juries full discretion to decide these cases as they saw fit.⁴⁵⁷ The alternative, though, is not simply one of highly fact-specific rules to cover every possible situation, as many interpreted Holmes to be arguing. It is to recognize that rules are generalizations, and these generalizations about norms can and should come from places other than individual juries. This Article has tried

455. Thomas, *supra* note 2.

456. See PHILLIP K. HOWARD, THE LOST ART OF DRAWING THE LINE: HOW FAIRNESS WENT TOO FAR 58 (2001) (pointing out that in some products liability claims, "letting the jury decide means that one person's claim will dictate national policy").

457. See *supra* Part II.B.2.

to sketch a third way forward, one that recognizes the value of recourse but helps restore rule-of-law values to civil justice.