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WHO DECIDES? COMMUNITY SAFETY CONVENTIONS AT THE HEART OF TORT LIABILITY*

PATRICK J. KELLEY**

I. INTRODUCTION 316
II. METHODOLOGY FOR A DESCRIPTIVE THEORY OF TORT LIABILITY 319
III. THE PRACTICAL POINT OF TORT LIABILITY 322
  A. *Bedrock Facts and Recurrent Explanations of Purpose* 322
  B. *The Test of Practical Reasonableness* 324
IV. THE FOCAL CASE OF TORT LIABILITY: BATTERY 327
  A. *The Standard of Conduct in Battery Cases* 328
  B. *Nonconsent: An Alternative Theory of Battery* 332
  C. *No Excuses: An Objective Standard of Wrong* 335
  D. *Conclusion* 342
V. THE FOCAL CASE OF TORT LIABILITY: NEGLIGENT INFLICTION OF PERSONAL INJURY 343
  A. *Unreasonable Foreseeable Risk of Harm: Theoretical Origins* 343
    1. Holmes's Theory of Torts 345
    2. Critique of Holmes's Theory 347
    3. Dealing with the Remnants of Holmes's Theory 350
  B. *Early Negligence Law* 351
    1. Development of the Negligence Cause of Action 351
    2. The Ordinary Reasonable Man and the Jury 351
    3. The Duty of Care 353
    4. Conclusion: The Underlying Unity of Battery and Negligence 363
  C. *Other General Concepts in Traditional Negligence Law: Contributory Negligence and Proximate Cause* 365
    1. Contributory Negligence 365
    2. Proximate Cause 371
    3. Conceptual Redundancy in a Convention-based System 377
  D. *Custom, Foreseeability Tests and Judicial Decisionmaking in Modern Negligence Law* 379
    1. The Formal Place of Custom in Modern Negligence Law 379
    2. Foreseeability Tests and Judicial Decisonmaking 382
VI. CONCLUSION 389

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I. INTRODUCTION

Andy Warhol knew that the popular press has the attention span of a child; he predicted that in the future everyone will be world-famous for 15 minutes.[1] Public attention focused on the tort liability system for a bit longer than that back in 1986, when we were caught up in a tort liability insurance "crisis,"[2] but the media's spotlight, and the public's attention, have long since moved on to other concerns. Tort law's brief celebrity, however, revealed our ambivalence about the tort liability system. We just can't seem to make up our minds about it. At the height of the 1986 "crisis," for instance, we couldn't tell whether it was good or bad that injured people now seemed to sue more often than they did before.[3] Those who see the tort system as a way to spread the costs of injuries thought it was good;[4] business leaders and government officials faced with steep increases in insurance premiums thought it was bad.[5] We couldn't even tell whether the tort liability system was efficient. Those who see it as a way to compensate injured victims complained that it is grossly inefficient[6] because only 40% of all the money spent on the system goes to the injured.[7] Others, who see it as a method of settling disputes, refused to accept compensation percentages as the appropriate measure of the system's efficiency.[8] Our deep ambivalence about the tort liability system was reflected in the state legislatures' responses to the 1986 "crisis." The legislatures enacted incoherent compromises, which balanced

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[1] J. BARTLETT FAMILIAR QUOTATIONS 908 (Emily Morison Beck ed. 15th ed. 1980).

[2] For media reports on the "crisis" at the time, *see, e.g.*, Church, *Sorry, Your Policy is Cancelled*, TIME, March 24, 1986, at 16; *Business Struggling to Adapt as Insurance Crisis Spreads*, Wall St. J., Jan. 21, 1986, at 37, col. 1. For analysis of the crisis at the time, see, *e.g.*, Wish, *Review and Preview*, BEST'S REVIEW (Prop. & Cas.) Jan. 1986, at 14 *et. seq.*; REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986) (federal inter-agency task force report) [hereinafter *Report of the Tort Policy Working Group*].

[3] We couldn't even agree on whether injured parties *were* more likely to sue now than before. *Compare* Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) *with* Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479 (1987) (changes in litigation rates differ depending on kind of case). *See generally* Nye & Gifford, *The Myth of the Liability Insurance Claim Explosion: An Empirical Rebuttal*, 41 VAND. L. REV. 909 (1988).

[4] *See* Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987).

[5] *See generally, Report of the Tort Policy Working Group, supra* note 2, at 1-15.

[6] *See, e.g.*, S. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 35-49 (1989).

[7] *See* Kelley & Beyler, *Large Damage Awards and the Insurance Crisis: Causes, Effects, and Cures*, 75 ILL. B.J. 140, 141 (1986). *See also* R. STURGIS, THE COST OF THE U.S. TORT SYSTEM (1985); J. KAKALIK, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (Rand Corp. Publication R-3132, 1984).

[8] *See* Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORN. L. REV. 765 (1987).

watered-down items from the opposing reform agendas,[9] or they formed commissions to study the problem and report back, preferably when hell froze over.[10]

In short, we couldn't agree on whether we had a problem, what it was if we had one, or what we needed to do about it, if we needed to do anything. That's because we don't share a common understanding of the purpose and function of the tort liability system. Instead, we have a number of competing and sometimes inconsistent explanations, which keep us from reaching any common evaluation of the current system. We therefore have no shared basis for deciding whether to reform, revise, or retain any element in that system. Gustave Shubert, former Director of the Rand Corporation's Institute for Civil Justice, summed it up this way: "Underlying all our problems with the civil justice system is our country's inability to decide whether it wants to have a pure compensatory system or a fault-based liability system."[11]

What we need is a uniformly accepted theory that explains the tort liability system in terms of its ultimate social function. The reason we don't have one, I will argue, is that our understanding of the tort liability system has been skewed by an earlier, flawed attempt at descriptive theory. That theory, developed initially by Oliver Wendell Holmes, Jr.,[12] has so conditioned our thinking about tort law that it has worked its way into the language of the law itself. We owe to that theory the view that negligence is conduct that poses an unreasonable foreseeable risk of harm to others. We owe to that theory, too, the view that judges exercise a necessarily legislative function in deciding tort cases because every tort liability rule in fact furthers some social policy. That view of the court's role has, in turn, led to a number of different particular theories, each based on a different judgment about the legislative policy the courts ought to adopt.

Before embarking on a new search for a descriptive theory, we first ought to formulate a search plan, sometimes called, forbiddingly, a "theoretical methodology." Because it holds out the best hope for a realistic descriptive theory, I start with the methodology of John Finnis. He suggests that, in studying social institutions like the tort liability system, we should start with the point of view of one concerned to act within that system, identify the basic purpose or practical point of the institution,

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[9] *See* critiques of the Illinois and Texas statutes in Kelley & Smith, *1986 Illinois Tort Survey*, 11 S.I.U. L.J. 1001, 1001-04 (1987); Sanders & Joyce, *"Off to the Races." The 1980s Tort Crisis and the Law Reform Process*, 27 HOUSTON L. REV. 206, 263-75 (1990). *See generally*, Downhilder, *Tort Wars: Insurers' Push to Limit Civil Damage Awards Begins to Slow*, Wall St. J., August 1, 1986, p. 1, col. 6 and p. 14, cols. 4 & 5.

[10] *See, e.g.*, commissions formed in Minnesota, New York, and Florida.

[11] G. SHUBERT, SOME OBSERVATIONS ON THE NEED FOR TORT REFORM (Rand Corp. Publication P-7189-ICJ 1986).

[12] O.W. HOLMES, JR., THE COMMON LAW (M. Howe ed. 1963) [hereinafter THE COMMON LAW].

test that purpose to see whether it is practically reasonable, and then pick out for detailed analysis the typical or focal case in that system.

On its face, Finnis's proposed methodology does not require historical analysis. But, as we apply this methodology to the current tort liability system, we find that the history of tort liability must be taken into account at every turn. In determining the basic purpose or practical point of the current system from the internal point of view, we find we must consider bedrock, historically persistent facts about the system, as well as recurrent, historically persistent explanations of the purpose of the traditional tort remedy of money damages. In determining the central case of tort liability, historical and structural analyses combine to broaden that central case from intentional battery to include negligent infliction of personal injury as well. Finally, history provides the key to an accurate description of negligence liability because it identifies the theoretical origins of the modern unreasonable foreseeable risk explanation of the negligence standard. Once we have identified the origins of that explanation we can identify the theoretical problem: how to adequately describe a system influenced to some extent by a prior inaccurate theoretical description. Not surprisingly, historical analysis plays a large part in solving that problem, by pointing us toward negligence law prior to the theoretical misdescription in the late nineteenth century. To strip away the misdescription engrafted onto the law by the faulty theory, we look carefully at the basics of negligence law before and after the misdescription. When we do that we see that the misdescription has not changed the basic negligence liability system, which worked both then and now to redress claims of a particular kind of private injustice.

The historical and practical inquiries ultimately combine to provide a unified description of battery and negligence liability. We find that the purpose of negligence law, like that of battery, is to redress a private injustice, defined by reference to the accepted conventions and coordinating norms of the community. Defendant wrongs plaintiff when he harms her by breaching a social coordinating norm, intended to protect people like plaintiff from that kind of harm, which plaintiff relied on in coordinating her conduct with that of defendant. We find that the law adopts a wholly objective, socially-defined standard that seems to reject all proffered excuses.

This unified description of negligence and battery identifies a common structure to the claims of wrong redressible in the two causes of action. First, there must be a social convention or coordinating norm intended to protect people like plaintiff from a particular hazard. Second, plaintiff coordinated her conduct with that of defendant on the assumption that defendant would follow the social convention; plaintiff relied on the norm and expected defendant to follow it. Third, defendant failed to follow that social norm. Fourth, the defendant's breach of the social norm subjected plaintiff to the hazard the norm was intended to protect her from, thereby causing plaintiff harm.

Once we identify the underlying structure of a negligence claim, we can begin to solve the doctrinal puzzles in negligence law. When we see that traditional negligence doctrines such as duty, proximate cause, and

contributory negligence point to one or another of the basic features in the underlying claim of wrong, we can understand why these doctrines are to a remarkable extent redundant. This is because they all refer back to the underlying structure, which precedes and usually controls the development of the general doctrines. Even modern doctrines of foreseeable risk, as practically applied by the courts, refer to some element in this underlying structure of a claim of wrong.

This view of the tort liability system gives us a different picture of the court's role than the picture that modern "social policy" theories paint. Courts do not make legislative judgments about how people ought to behave based on the judges' views of appropriate social policy. Instead, judges refer back to the community's own safety norms—the customs and conventions that people in the community follow in order to safely coordinate their conduct with the conduct of others. The community as a whole, then, and not the court, decides what people ought to do. And, what the community has decided is a question of fact: Has the community as a whole accepted a particular coordinating convention?

II. Methodology for a Descriptive Theory of Tort Liability

Theory makes the world go 'round, for theory explains the purposes of human actions, arrangements, and institutions. Purposes and goals in turn invest human action with meaning. The theory accepted by those acting within an institution will ultimately shape that institution, for men and women crave purpose and its attendant meaning in what they do. Their understanding of the purposes that give meaning to the institutions and practices in which they find themselves will eventually influence their actions as they try to be more effective in achieving those perceived purposes. Fights over theory are therefore fights over the future.

If competing theoretical explanations of a social institution are possible, however, how can there be a single correct descriptive theory? In particular, how can there be a single correct descriptive theory of tort liability? Over the last twenty years we have seen a number of competing descriptive tort theories—systematic attempts to explain, in terms of underlying principles or policies, the set of practices, rules, and procedures comprising the tort liability system. We have seen a tort theory by George Fletcher that followed the philosophy of John Rawls;[13] a tort theory by Ernest Weinrib that followed the philosophy of Immanuel Kant;[14] a positive economic tort theory by Richard Posner;[15] and differently formulated corrective justice tort theories by Richard Epstein[16] and Jules Coleman.[17]

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[13] Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).
[14] Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).
[15] Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981).
[16] Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).
[17] Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982).

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Each theorist claimed that his theory was descriptive. Those conflicting claims fueled the arguments of other scholars, who criticized the search for a unified tort theory on the ground that it is impossible.[18]

Those critics have a point, for at least three strong arguments can be made against the possibility of a unified theory of tort liability. First, Anglo-American tort law comprises a multitude of different and sometimes conflicting rules, judicial decisions, and procedures. These, in turn, are based on a number of different and sometimes conflicting policies. The search for a common ground of all tort liability is therefore doomed to failure because any objective analysis of the "basis" for tort decisions would reveal a number of different and discrete policy judgments by judges, juries, and legislatures.[19] Second, since the "law" of torts in the various Anglo-American jurisdictions includes flatly inconsistent rules and decisions, any purported common ground of tort liability must be defective in either one of two ways. It will either be useless as a guide to decision since it must be capable of supporting two inconsistent opposing decisions; or it will not be the common basis for all tort liability, but only the basis for one of two or more competing normative principles. A theory of the first kind is vacuous. A theory of the second kind is not descriptive but normative, as it simply reflects the theorist's preference for one tort liability system over others.[20] Finally, a theorist searching scientifically for a descriptive theory of torts must start from the assumption that tort law is a coherent field unified by underlying principles or policies. But we have no basis for that assumption. The field in which to search for a common unifying ground may be either broader or narrower than the field of torts. Likely narrower fields would include the old forms of action—conversion, trover, battery, libel, and deceit—as well as the modern subdivisions of tort law—negligence, strict liability, and intentional tort. Likely broader fields would include civil liability in general or all legal liability.[21] The theorist's choice of tort law as the field assumed to be unified by a single common ground thus reflects nothing but the theorist's preference. The resulting theory is necessarily skewed by this pretheoretical, unexplained, and unjustified choice.

John Finnis[22] has rediscovered and reinterpreted an older, philosophically coherent method of descriptive social science that avoids the problems raised by critics of modern tort theory. According to Finnis, the

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[18] *See generally* S. SUGARMAN, *supra* note 6, at 3-72 (reviewing various tort theories and their critics).

[19] *See* G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 211-43 (1980). This criticism, of course, depends heavily on the view that all judicial decisions are ultimately justified by their consequences, and hence by a social policy favoring those consequences.

[20] *See* Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201-06 (1981) (definition of "wrongful conduct" triggering application of corrective justice principles depends on definer).

[21] *See* G. GILMORE, THE DEATH OF CONTRACT 87-94 (1974).

[22] J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 3-19 (1980).

descriptive theorist's job is to "describe, analyze and explain" a certain social reality "constituted by human actions, practices, habits, dispositions and by human discourse."[23] These are human institutions and human actions, however, so the theorist cannot take the role of an external observer. The theorist must instead explore this social phenomena from the internal point of view of one who acts within the human institution. Recognizing that all human actions and institutions have purposes, the theorist will search for the practical point of the practices and actions studied. With the practical point in mind, the theorist can then isolate and analyze the focal case—the case that most fully and clearly exemplifies the meaning and the point of the general term used to describe the subject matter. After fully analyzing the focal case, the theorist can extend the study to other, more peripheral cases. By exploring their similarities to and differences from the focal case, the theorist can discover the principle on which the general term is extended from the focal to the peripheral cases.

The judgments made in determining the practical point and the focal case may be contested, even by those accepting the internal point of view. This means that descriptive theorists, in order to justify judgments that must be made as a precondition to any theory, must participate in the critical evaluation of the human institution, practices, or patterns of action they study. Not only must they take the internal point of view of one concerned to act practically in the human institution, they must further take the point of view of a "practically reasonable" person[24] concerned to act within that institution. From this vantage point, a theorist can analyze and clarify the symbols, meanings and explanations already given as part of the social reality to be studied, sifting those that are truly meaningful from those that are inconsistent with social realities or that result from misguided or incomplete attempts at theory.

This methodology avoids the problem we saw with purportedly scientific or empirical methodologies. If the theorist using a "scientific" method starts by assuming that everything included in a field is explainable by a single principle, the pretheoretical choice of the field determines the ultimate theoretical explanation, for the underlying principle must explain all and only the phenomena included in the chosen field. In the process of critical clarification by use of a focal case, on the other hand, the theorist can start with a field to study defined by a symbol important in social reality without thereby stacking the deck. For in starting with a field so defined, the theorist neither assumes that the defining symbol will be theoretically significant nor uses the extent of the field initially chosen as a factor determining the content of the subsequent theoretical explanation. Thus, the descriptive theorist using the focal case methodology can search for a descriptive theory of tort liability without assuming

[23] *Id.* at 3. The following explanation follows chapter I in Finnis's book.

[24] *Id.* at 15. Finnis argues that the understanding of a mature, practically reasonable man (Aristotle's *spoudaios*, Plato's lover of wisdom) provides "a better *empirical* basis for the reflective account of human affairs." *Id.*

that the categorical distinction between tort and contract has any theoretical significance. No step in the development of the theory depends on the choice of tort liability as the initial field of study. This methodology does not rule out, therefore, the possibility that liability for breach of contract may, upon critical analysis, have the same practical point and the same theoretical explanation as liability in tort.

Furthermore, this approach bridges the apparent chasm between normative and descriptive theories. Any descriptive study of the purposes of a social institution is normative to the extent that the theorist participates in the critical evaluation of that institution. But that does not mean that the resulting theory will be idiosyncratic and non-descriptive. Any truly descriptive theory contains an irreducibly normative component because a reasonable person talking about human institutions, practices, and interactions cannot leave out their most important parts, which are human purposes, goals, and judgments of practical reasonableness. Once one includes these, any coherent description must include a critical evaluation. The better the evaluation, the better the description. An analogy proposed by Lon Fuller may be helpful.[25] Any coherent description of a boy trying to open a clam must include several evaluative judgments, including the judgment that he is trying to open a clam, a judgment about whether the method he uses is a good way of opening clams, and a judgment about whether he has succeeded. In describing the boy's conduct, one who is good at opening clams and who has talked to the boy will have a decided advantage, for that skill and that experience make it more likely that one will make correctly the evaluative judgments called for by the descriptive enterprise.

III. THE PRACTICAL POINT OF TORT LIABILITY

The specific search plan we derive from the foregoing general analysis of an adequate descriptive theory tells us that we should first discover the practical point, or purpose, of tort liability. Moreover, that general analysis suggests to us how we should search for that practical point. We should take the internal point of view of one with a view to acting within the tort liability system, employ basic principles of practical reasonableness, focus on the fundamental realities of the system, and take into account recurrent explanations of its purpose by those whose actions and practices constitute it.

A. Bedrock Facts and Recurrent Explanations of Purpose

The first bedrock fact that any tort theory must take into account is the ordinary form of tort liability—a judicial judgment ordering the defendant to pay the plaintiff a specified amount of money, which is called

[25] Fuller, *Human Purpose and Natural Law*, 3 NAT. L. FORUM 68 (1958).

the award of "damages," or "money damages." The amount awarded is determined by measuring the loss or harm to the plaintiff caused by defendant's conduct. The announced aim of the damage award is to "make the plaintiff whole"—to have defendant pay what will restore plaintiff to the position he was in before the tort.

Judges have repeatedly justified this measure of damages by explaining that it is called for by the purpose of compensatory damages. That purpose, they say, is to redress the wrong defendant has done to the plaintiff. Lord Coke in his commentary on Littleton, said: "Damages—*damna* in common law, hath a special signification for the recompense that is given by the jury to the plaintiff, for the wrong the defendant hath done unto him."[26] Judge Duer of New York, in an 1850 case,[27] stated: "The injured party must be indemnified. He must be placed in the same situation in which he would have been had the wrong not been committed." A late 19th century treatise writer on damages summarized the common judicial and scholarly understanding on the subject in his definition of damages: "Damages are the pecuniary reparation which the law compels a wrong-doer to make to the person injured by his wrong."[28]

The recurrent explanation that the purpose of the ordinary tort remedy is to redress a wrong is consistent with the bedrock terminology of torts as well. "Trespass," the name of the earliest tort form of action at common law, originally meant simply "a wrong."[29] The word "tort" itself originally meant crooked, twisted—wrong.[30] Courts and commentators often use the term "injury" as an element in all torts in the sense of the Latin "*injuria*," which originally meant *wrong* or *wrongful*.[31]

One final bedrock fact about the operation of the tort liability system is consistent with this recurring explanation. Tort actions are brought by one private individual against another private individual for a remedy that transfers money just between them. The government only provides the method of adjudicating the claim and the means of enforcing the remedy. This is a more limited role than the government's role in criminal actions, which are brought by the government and seek fines paid to the government or imprisonment in government-run jails. The more limited governmental involvement in tort cases tends to confirm the private nature of the wrongs redressed by tort actions.

The ordinary tort remedy of compensatory damages, its traditional justification, the terminology and the operation of the tort liability system, then, all suggest that the practical point of tort liability, from the internal point of view, is to redress private wrongs. It remains to be seen

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[26] Co. Litt. 257a, *cited in* I.T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, § 29 at 24 (9th ed. 1912).

[27] Suydam v. Jenkins, 5 Sup. Ct. 614, 3 Sand. 614, 620 (N.Y. Sup. Ct. 1850).

[28] W. HALE, HANDBOOK ON THE LAW OF DAMAGES 1 (2d ed. 1912). *See also* I. T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 29, 30 (9th ed. 1913); I. J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 17 (1883).

[29] S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 285 (2d ed. 1981).

[30] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 2 (4th ed. 1971).

[31] *See generally*, C. LEWIS & C. SHORT, A LATIN DICTIONARY 956 (1966).

whether this hypothesized purpose can pass the test of practical reasonableness, and whether it is still the practical point of tort liability, or merely a historical curio.

B. The Test of Practical Reasonableness

To apply the test of practical reasonableness, one must first ask why the political community[32] would want to provide a mechanism for redressing private wrongs, which seem to concern only two private individuals within the community. To answer that question, one must discover the practical point of the political community itself. John Finnis has argued that the purpose of a political community is to achieve the "common good", understood as "a set of material and other conditions [including forms of collaboration and coordination] which enables the members of a community to attain for themselves reasonable objectives . . . ."[33] If we accept that as the goal of a political community, we can see the tort liability system as one of those conditions that comprise or promote the common good. The following analysis of the relationship between tort liability and the common good tends to bear this out.

In any community, individuals coordinate their activities with the activities of others according to established patterns of behavior. These patterns of coordination enable members of the community to pursue their goals without interference by other members pursuing theirs. The coordinating behavior may be positive (action) or negative (refraining from action). For example, we drive on the right-hand side of the street, and we refrain from hunting animals in town with rifles. These patterns may have developed through governmental edict, custom, or moral teaching. Once a pattern of coordination is accepted, members of the community rely on it in determining their own conduct, and they expect other members of the community with whom they come in contact to follow the pattern as well.

If Alice coordinates her activities with Joe in accordance with these expectations, and Joe acts contrary to those expectations in a way that injures Alice, Alice feels wronged. Joe drives on the left-hand side of the street, for example, and crashes into Alice. Joe hunts squirrels in town with a high-powered rifle, for another example, and accidentally shoots Alice. Why does Alice feel wronged? At the most basic level, the answer is simple. Alice acted as she did in the expectation that Joe and others like him would follow the accepted pattern. She acted according to patterns of conduct that would coordinate with his if he acted in accordance with that expectation. At a deeper level, we can say that Alice feels wronged because Joe has not respected her claim that in his decision-making and activity he should give due consideration to her interest in

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[32] The political community is organized as a government to take action on behalf of the community.

[33] J. FINNIS, *supra* note 22, at 155.

the pursuit of her own concerns. He has failed to recognize her standing claim to respect for her personal worth and dignity. One has dignity not as an abstract, universal human being but as a particular person with a unique identity, formed in part by historical and social conditions. So respecting Alice's dignity means respecting the choices and commitments, the dispositions and concessions, which she makes in accordance with her expectations about the conduct of others in light of their community's accepted patterns of coordination. Joe's subsequent refusal to pay for the harm he has wrongfully caused may constitute an additional affront to Alice's dignity, for Alice may reasonably expect others to attempt to make up for the wrongs they do.

When Alice brings to court her claim that Joe wronged her, then, we can see that the claim contains both intensely personal and broadly social components. It is personal because Alice claims Joe wronged *her* by failing to respect her standing claim to respect for *her* personal dignity, in a way that resulted in serious personal harm to *her*. It is broadly social because the way Joe injured Alice was by ignoring a *social rule* she had relied on in coordinating her conduct with others in the *community*. In light of the personal and social components in a plaintiff's claim to have been wronged, we can see a number of reasons why a community would provide a mechanism for adjudicating and redressing claims of private injustice.

First, if we look on the judicial judgment as a response to Alice's claim of a personal wrong, we can see that the judicial judgment that Joe wronged Alice and must now redress the wrong vindicates Alice's claim to respect for her personal dignity. It reaffirms her worth as a respected member of the community. Moreover, that judgment provides Alice with a good that she could not obtain on her own—"justice"—in the form of a court order, backed by the power of the state, requiring Joe to act justly toward her now by restoring what he has unfairly deprived her of.[34]

Secondly, if we look at the relationship between the judicial judgment and the social component in Alice's claim, we can see that the community, in redressing the wrong to Alice, also promotes the common good by reaffirming the social convention that Alice relied on. If the formal representative of the political community refused to redress this claimed wrong, Alice and others in the community might place less reliance on this pattern of coordination in the future, thereby limiting the range of activities that could be effectively coordinated. Alice and others like her might limit their reliance on this pattern of coordination to exchanges with people they know for sure accept this practice. Granting redress reaffirms both the community itself and the community standards shared by Joe and Alice.

A political community's failure to redress serious private injustice could lead to a serious rupture of the community. Alice might band together

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[34] Under this view, the judicial judgment in a tort action is purely an exercise in corrective or commutative justice. *Cf.* J. FINNIS, *supra* note 22, at 179-80. (Tort action "creates a kind of common subject matter . . . that must be allocated between parties," thus raising questions of distributive justice.).

with others to enforce her claim against Joe for redress of a wrong. Thus, if Alice belonged to the Red group, and Joe to the Green group, she might complain to the Reds of Joe's action. They might then proceed to exact retribution or coerced compensation from Joe or his group. A political community's refusal to recognize and redress claims of private injustice may thus threaten the continued existence of the political community itself.[35]

The purely personal and the broadly social components of Alice's claim of wrong combine to point to additional reasons why the community should provide a method of adjudicating and redressing claims of private injustice. The community may thereby provide a satisfactory resolution to a dispute.[36] It will be satisfactory insofar as the court has considered plaintiff's claim of wrong seriously, as a claim of personal injustice, and has authoritatively determined the merits of that claim on its own terms, as a claim that defendant wronged plaintiff by breaching a social convention that plaintiff rightfully relied on in coordinating her conduct with defendant's. Moreover, in resolving disputes in this way, the courts will be "doing justice." Judicial action on behalf of the community will vindicate those innocent of a wrong and require those guilty of a wrong to act justly to redress it. The community thus both promotes and achieves justice through its judicial institutions. It thereby demonstrates the community's commitment to justice and reaffirms a vision of community in which people treat each other justly.

The hypothesized practical point of tort liability therefore seems to pass the test of practical reasonableness. Two questions immediately arise. First, is this an accurate explanation of the current purpose of tort liability, or is this just an explanation of the purpose of tort liability in days gone by, when the basic forms of liability were settled and the traditional explanations were formulated? Second, can any other purpose or combination of purposes better explain the tort liability system? We will pursue the answers to these questions in the next step in our search for a descriptive theory—analysis of the focal case.

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[35] *See* PLATO, LAWS, Bk. I, Steph. 627-30 (faction as continuing threat to a political community not founded upon principles of friendship and good feeling among its members).

[36] Steven D. Smith, in a tort theory similar to the one formulated here, emphasizes that the primary objective of tort law is to resolve disputes. In resolving disputes according to prevailing social norms and expectation, tort law reinforces the society's normative order. I agree with most of Smith's analysis, and our theories are obviously complementary. On this point, however, Smith seems to have put the cart before the horse. People bring tort disputes to the courts because they know that courts redress private injustices. If the courts did not redress private injustices, people would not bring these claims to them. The primary objective of tort law, then, is to redress private injustices. In pursuing that objective, it will, of course, resolve disputes based on a plaintiff's claim that defendant wronged plaintiff. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987).

IV. The Focal Case of Tort Liability: Battery

In choosing the focal case of tort liability, the theorist should take the internal point of view of a practically reasonable participant in the institution of tort liability, who is informed both by its history and the preceding provisional analysis of its practical point.

What, then, is the focal case of tort liability? The natural answer to that question would be "the intentional tort of battery." This answer seems consistent with the history of the common law. Armed, intentional violence against another's person was one of the earliest actions brought into the King's courts through writs of trespass. The traditional formulaic allegations in trespass of *vi et armis* [with force and arms] and *contra pacem regis* [against the King's peace] point to intentional battery as both archetypal and historically primary.[37] Moreover, most participants in the institutional practices of tort liability would recognize battery as a focal case. Lawyers explaining the meaning of "tort" to laymen often start with battery as their first example. Generations of torts teachers have found the best place to start is with a punch in the nose, and most torts treatise writers start with battery. Further, this answer is consistent with the requirements of practical reasoning. Intentional physical harm is an obvious and significant wrong, which interferes with the victim's ability to pursue many other goods and implicitly denies the victim's claim to dignity and respect as a member of the community. Intentional battery is particularly likely, if unredressed, to lead to anti-communal revenge, feuds and faction. One of the basic conditions for the common good is the continued ability of the community's members to coordinate their activities with the activities of others on the assumption that they will not intentionally hit them.

Battery thus seems to be the prime candidate for the focal case of tort liability. But several nagging considerations combine to suggest that battery is only half the focal case. Under the old common law forms of action, the trespass action, from which the modern tort of intentional battery derived, covered both intended and unintended physical harms.[38] And many unintended physical harms were redressible in the action for trespass on the case.[39] The mid-nineteenth century recategorization of torts into intentional battery and negligence did not change the underlying liability rules, so the law continued to impose tort liability, under certain circumstances, for unintended physical harm to a plaintiff's person.[40] The distinction between intended and negligent infliction of phys-

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[37] S. Milsom, *supra* note 29, at 286-88.

[38] *See* Weaver v. Ward, Hobart 134, 80 Eng. Rep. 284 (1616). *See generally* S. Milsom, *supra* note 29, at 295-300.

[39] *See* The Surgeon's Case, Y.B. Hil. 48 Ed. 3., f.6., pl. 11 (1375), *reprinted in* C. Fifoot, History and Sources of the Common Law: Tort and Contract 82-83 (1949).

[40] *See* Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

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ical harm seems theoretically insignificant, therefore, as it does not determine whether tort liability will be imposed, but only whether one or the other form of action is proper. It may turn out, then, that battery is only half the focal case. What to do? It makes sense to begin provisionally, with an intensive analysis of tort liability for battery, as battery is at least the first half of the focal case of tort liability. We can later move on, if the argument continues to point in that direction, to analyze negligent infliction of personal injury as the second half of the focal case.

In analyzing tort liability for battery, we will focus on two basic questions. First, what do the courts in battery cases use as the standard of conduct? That standard may help illuminate the purpose of the system that imposes liability for its breach. Second, which theory of tort liability in general is more consistent with the practices associated with tort liability for battery, including the prima case, defenses, and procedural rules?

A. *The Standard of Conduct in Battery Cases*

At first glance, the key to the standard of conduct in battery cases seems obvious. It must be the defendant's wrongful intent, for that is what defines the tort and distinguishes battery from negligence. Our analysis of the problems with purportedly scientific methodologies, however, suggests that we risk error if we focus solely on the characteristics defining a field. In doing so, the pretheoretical definition of the field may control, and skew, the ultimate theoretical explanation. The nineteenth-century attempts to explain battery in terms of wrongful intent provide a textbook example of this error.

As a separate and distinct tort, battery dates back only to about the middle of the nineteenth century.[41] Before then, the old forms of action, trespass and trespass on the case, were the relevant legal categories, and the specially-denominated action of trespass for battery included both intended and unintended direct forcible touchings of the plaintiff.[42] As the old distinctions between trespass and trespass on the case were successively emptied of their legal significance by *Williams v. Holland*,[43] *Brown v. Kendall*,[44] and the pleading reforms in the mid-nineteenth century, the distinction between intent and negligence came to be looked on as significant.[45] Gradually the old common law form of action for trespass

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[41] *See* M. PRICHARD, SCOTT V. SHEPHERD (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE (1976); Prichard, *Trespass, Case, and the Rule in Williams v. Holland*, [1964] CAMB. L.J. 234.

[42] *See, e.g.*, Weaver v. Ward, Hobart 135, 80 Eng. Rep. 284 (K.B. 1161).

[43] 10 Bing. 112, 131 Eng. Rep. 848 (C.P., Tindal, C.J.); 6 C & P. 23, 172 Eng. Rep. 1129 (N.P. 1833).

[44] 60 Mass. (6 Cush.) 292 (1850).

[45] *See* 2 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 85 at 74 (14th ed. 1883) ("And here also the plaintiff must come prepared with evidence to show, either that the intention was unlawful, or that defendant was in fault, for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable."), earlier edition cited in Brown v. Kendall, 60 Mass. (6 Cush.) 292, 295-96 (Shaw, C.J. 1850).

for battery, which could lie for either intended or unintended direct forcible harms to plaintiff, was transformed into the modern intentional tort of battery, and the old form of action for trespass on the case for negligence or default was transformed into the modern tort of negligence.

This recategorization naturally led the first writers of torts treatises in the late-nineteenth century to ask a question that had not received much attention under the old forms of action: when is defendant's intention wrongful or unlawful? These first writers simply adopted the definition of criminal battery in Hawkins' Pleas of the Crown: "Any injury whatsoever, be it never so small, being actually done to the Person of a Man, in an angry or vengeful, or rude, or insolent Manner."[46] The attempt to explain the new intentional tort of battery in terms of its defining characteristic thus tended to equate the tort with the crime of battery, and to equate the wrongful intent in tort with criminal intent. This tendency may have been reinforced by Oliver Wendell Holmes, Jr.'s theory that the purpose of tort liability was the same as the purpose of criminal liability—to deter dangerous behavior.[47]

The best of these treatise writers, Thomas Cooley[48] and Frederick Pollock,[49] were not content with a simple reference to Hawkins. Instead, they dredged through the common-law precedents to answer this new question, and elevated *Cole v. Turner*[50] to the status of a leading case. This previously unheralded and seemingly unimportant *nisi prius* case of trespass for assault and battery was decided by Chief Justice Holt in 1706. The cryptic report of the case in Lord Holt's Reports takes up only 11 lines in the English Reprints, and the facts of the case itself are never clearly stated. *Cole v. Turner* has been considered the leading case on the standard of wrongfulness in battery cases from the late 19th century to the present day, however, so a careful analysis of the case is called for. The brief report states that, at Nisi Prius in a case of trespass for assault and battery, Chief Justice Holt declared: "1. That the least touching of another in anger is a battery. 2. If two or more meet in a narrow passage, and without any violence or design to do harm, the one touches the other gently, it is no battery. 3. If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery; or any struggle about the passage, to that degree as may do hurt, is a battery."[51] Chief Justice Holt arrested judgment for plaintiff after a plaintiff's verdict. Comparing that resolution of the case to the three points in his declaration, it seems that he was persuaded that defendant, meeting plaintiff and his wife in a narrow passage, touched them gently. The

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[46] 1 W. HAWKINS, PLEAS OF THE CROWN ch. 62, § 2 (1716).

[47] THE COMMON LAW, *supra* note 12, at 34-129.

[48] T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 186-87 (star-paginated to the 1st ed., 162) (2d ed. 1888).

[49] F. POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 182-85 (1887).

[50] 6 Mod. 149, 87 Eng. Rep. 907 (N.P. 1704).

[51] *Id.*

upshot of the case, then, seems to be that common, everyday touchings of others in passing are not trespasses. Only if the defendant angrily, or in a rude, inordinate manner, or with a violent struggle, forces his passage will there be a trespass. The standard of wrongfulness, then, seems to be just deviation from the ordinary conduct expected in the community.

Since the late-nineteenth century treatise writers were looking for cases to give content to the new wrongful intent categorization, however, they used *Cole* as an illustration of the standard for determining wrongful intent. They therefore emphasized the first ("anger") and the third ("use violence .... in rude, inordinate manner") parts of Holt's opinion and interpreted those as the criteria for determining wrongful *intent*. Pollock, the most perceptive, accepted this wrongful intent analysis, but went on to tie the standard of wrongful intent to common usage: "Hostile or unlawful intention is necessary to constitute an indictable assault; and such touching, pushing, or the like as belongs to the ordinary conduct of life, and is free from the use of unnecessary force, is neither an offence nor wrong."[52] Notwithstanding Pollock's careful qualification, the treatise writers' misleading formal statement of the standard in terms of unlawful intent could have diverted the courts from the underlying standard of common usage. The leading battery decisions in the 1890s and early 1900s, however, all firmly rejected that temptation and equated the unlawful intent standard with deviation from ordinary, expected behavior.

In the 1891 case of *Vosburg v. Putney*,[53] the Wisconsin Supreme Court dealt with the unintended results of some classroom horseplay in a high school in Waukesha, Wisconsin. George Putney, a 12-year old student, kicked 14-year old Andrew Vosburg in the shin. The touch was so slight that Vosburg did not even feel it at first. Miss Moore, the hapless teacher, later testified that she saw the whole thing: George stood in the aisle by his seat and kicked at Andrew across the aisle. After the kick, a bone in Vosburg's lower leg became inflamed; at the time of trial he was lame.[54] Vosburg sued Putney for battery. The jury returned a special verdict with several specific findings of fact, including the fact that defendant Putney did not intend to do plaintiff Vosburg any harm when he kicked him. The trial court entered judgment for plaintiff on this special verdict.[55]

On appeal, defendant argued that the trial court should have entered judgment for defendant because the jury found that defendant intended no harm to plaintiff. Defendant's counsel argued, with an impressive string of citations, that "where there is no evil intent there can be no recovery."[56] The court accepted the prevalent formulation that the defendant's intention must be "unlawful" to support liability in battery, but went on to explore whether defendant's intention in this case was to commit an "unlawful act."[57]

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[52] F. POLLOCK, *supra* note 49, at 185.
[53] 80 Wis. 523, 50 N.W. 403 (1891).
[54] 78 Wis. 84, 85-86, 47 N.W. 99 (1890).
[55] 80 Wis. at 523, 50 N.W. at 403.
[56] *Id.*
[57] *Id.*

> Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful .... Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful.[58]

The court's contrast of the "implied license" of the playground with the "order and decorum" of the schoolroom suggests that the underlying standard for determining wrongfulness is departure from ordinary, expected behavior under the circumstances. The court's application of the "unlawful intent" formulation in this context, then, strongly suggests that "unlawful" is not to be interpreted in the narrow sense of "contrary to positive law," either criminal or tort. Instead, it is to be applied in a much broader sense of unlawful as simply contrary to the accepted community norm for behavior under the circumstances. *Vosburg*, therefore, suggests that the basic standard of behavior in a battery cause of action is the standard of behavior previously adopted, accepted and acted upon by the community in those circumstances.

The other leading battery case from the 1890s also arose out of high school hi-jinks. In *Markley v. Whitman*,[59] plaintiff and defendant were both students at Buchanan High School in Michigan. As plaintiff was walking home from school one day, he became the victim of a game of "rush." A group of students lined up in single file behind the unsuspecting plaintiff. The student at the end of the line pushed the one in front of him, the push passing on up the line until defendant, last in line in back of plaintiff, "rushed" upon plaintiff, hitting him on the back. Plaintiff was almost thrown to the ground, his neck was nearly fractured, and his voice was reduced to a whisper. Plaintiff sued defendant for assault and battery, obtaining a jury verdict for $2,500.[60] On appeal, defendant argued, among other things, "that there was no unlawful intent to injure the plaintiff," and that since "plaintiff was one of the school fellows, [he] stood in a different position to the defendant than would a stranger."[61] The court in response pointed out that plaintiff was not participating in the game, testified that he had never taken part in it, and was not anticipating that he would be "rushed." Under these circumstances, the court concluded, "it was unlawful to 'rush' the plaintiff," as "plaintiff,

[58] *Id.*
[59] 95 Mich. 236, 54 N.W. 763 (1893).
[60] *Id.* at 236-37, 54 N.W. at 763-64.
[61] *Id.* at 237, 54 N.W. at 764.

while passing along the street, and not engaged in the sport, had the same right to be protected from such an assault as a stranger would have had."[62]

The Michigan court in *Markley* thus reached substantially the same result as the Wisconsin court in *Vosburg*. "Unlawful intent" in the earlier formulation of the battery cause of action was reduced in both cases to the intent to touch plaintiff in a manner beyond the bounds of ordinary social convention. "Unlawful" was not equated with violation of positive criminal prohibition. The courts in these two leading cases instead adopted a test of convention and community expectations to determine wrongfulness. Courts faced with battery issues after *Vosburg* and *Markley* recognized them as controlling.[63] These decisions show that the gist of the tort cause of action for battery is not defendant's wrongful intent. It is, instead, the defendant's breach of the community's accepted standards of conduct. Any intentional touching of another in violation of accepted community standards is a battery, even though defendant's intention was not otherwise hostile, malevolent, or blameworthy. The courts' purpose in imposing liability for breach of that standard cannot be to punish or deter morally blameworthy conduct, since one may intentionally touch another in breach of the standard without an evil or morally blameworthy intent. Instead, the purpose seems to be to redress a wrong, defined as a breach of a community convention adopted to protect others from harmful touchings.

B. Nonconsent: An Alternative Theory of battery

One could, of course, explain the standard in *Cole*, *Vosburg*, and *Markley* in a different way. In *Vosburg* and *Markley* the plaintiffs did not consent to the particular touching; the court in *Markley* even emphasized that fact in its opinion. In *Cole*, one can argue that the court simply assumed plaintiffs consented to the ordinarily acceptable minor jostling on the street. This suggests that the real basis for liability in battery is the plaintiff's nonconsent. As William Prosser said in his influential treatise: "The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff."[64] This interpretation, moreover, seems consistent with the formal place of consent in the law of battery. The law of battery follows the Latin maxim *volenti non fit injuria*: "to one who consents, no wrong is done." The modern law takes the maxim literally. Consent is not an affirmative defense; lack of consent is part of plaintiff's *prima facie* case.[65]

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[62] *Id.* at 238-39, 54 N.W. at 764.
[63] *See, e.g.*, Nicholls v. Colwell, 113 Ill. App. 219 (1903); Martin v. Jansen, 113 Wash. 290, 193 P. 674 (1920).
[64] W. PROSSER, *supra* note 30, at 36.
[65] *See, e.g.*, Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (1950); Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924); Wright v. Starr, 42 Nev. 441, 179 P. 877 (1919); Carpenter, *Intentional Invasion of Interest of Personality*, 13 OR. L. REV. 275 (1934).

An intentional touching to which plaintiff consents is simply not a wrong to the plaintiff, no matter how harmful or otherwise offensive. This is consistent with the older common law. Under the old common law methods of pleading, consent as a defense to trespass was raised by pleading the general issue[66] and thus denying that there was a wrong at all.

In order to test the claim that nonconsent is the gist of the action for battery, we must first examine carefully the *volenti* rule, to understand its function and its limits.

Why do the courts hold that consent to an otherwise wrongful touching eliminates any cause of action for battery? Two related answers can be given. The first answer focuses on the practical point of tort liability; the second answer focuses on the relationship between tort liability and the common good. If the practical point of tort liability is to redress a private wrong in a suit between private individuals, there is no reason to impose liability when defendant has not personally wronged the plaintiff. And when plaintiff freely and knowingly consents to the defendant's intentional invasion of an otherwise protected interest, plaintiff has not been wronged.

The *volenti* rule allows for needed flexibility in the community's patterns of interaction. The community's generally-accepted patterns of behavior positively define the set of acts affecting others that one may appropriately take. Moreover, these community norms prohibit certain acts affecting others. We all know that some ways of interacting with others are not generally accepted or expected. For example, it is ordinarily not acceptable to jump onto someone's back on the street. Within limits set by the community,[67] however, people can opt out of these general social

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[66] W. PROSSER, *supra* note 30, at 36.

[67] *See, e.g.*, criminal statutes prohibiting suicide and prohibiting aiding and abetting suicide. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 568-71 (1972). The question of tort liability for harm arising out of positively-proscribed consensual relations is not directly related to the thesis of this paper, and is therefore not discussed here. Anticipating the results of the analysis of *volenti non fit injuria* in this section and the analysis of negligence *per se* in a following section, however, one might suggest two general approaches to these issues. First, insofar as a plaintiff who in fact consented brings a tort cause of action, such as battery, in which consent eliminates the claimed wrong, the fact that the consent was to an act positively proscribed by the criminal law ought to make no difference. The contrary majority rule as to battery actions arising out of mutual combat in anger can be traced to the late nineteenth century equation of the standards of liability in criminal battery with the standards of liability in tort battery. *See* McNeil v. Mullin, 70 Kan. 634, 79 P. 168 (1905). Second, if plaintiff was wronged in such a case, it was by defendant's breach of the statute prohibiting certain consensual conduct. To determine whether the breach of the criminal statute was also a private wrong to plaintiff, one ought to look at the purpose of the statute, using the basic negligence *per se* analysis: was the statute intended to protect people in plaintiff's class from this hazard. The RESTATEMENT (SECOND) OF TORTS § 892C (1979) adopts a similar approach. *See also* Hudson v. Craft, 33 Cal. 2d 654, 204 P.2d 1 (1949), in which a boxer sued a fight promoter for harm resulting from a professional boxing match in violation of the state's safety regulations. The cause of action was arguably not for battery but for breach of those regulations. The court in *Hudson* analogized to the negligence *per se* doctrine. *Id.* at 660, 204 P.2d at 4.

constraints and individually tailor their particular interactions by mutual consent. For example, two old friends may consent to roughhouse play on the street. The community benefits by this. People are not limited to pre-approved forms of interaction; avenues for experimentation and change are opened up; and the common good is promoted because members of the community are free to adopt specially-tailored patterns of interaction to achieve their perceived goods.

Practices and conventions will grow up around certain recurring kinds of consensual arrangements. A pattern of manifesting consent to certain touchings in a particular way under certain circumstances may be established. The *O'Brien v. Cunard Steamship Company*[68] case provides an instructive example. Plaintiff, an immigrant, was lined up on defendant's steamship to be examined by a physician and vaccinated if found to be without a vaccination mark. She claimed to have been vaccinated, but when the physician could find no sign of it, she held her arm out, without objecting, and he vaccinated her.[69] What should the courts do in a case like *O'Brien* when plaintiff's conduct manifests consent, according to the community's conventions, but plaintiff later claims she did not in fact consent to the contact? The courts uniformly refuse to give plaintiff relief in such situations, holding that defendant is protected from liability regardless of whether plaintiff actually consented[70] when plaintiff's conduct would have led a reasonable person in defendant's position to conclude that plaintiff consented to the contact. One can detect traces of the pervasive estoppel principle in this doctrine of apparent consent, but the basic principle at work seems to be the community convention standard of wrongfulness. Once a pattern has been established in which doing X is taken to manifest consent to another's doing Y, a plaintiff who does X can expect defendant to do Y on the assumption that plaintiff in fact consents to Y. Since defendant has acted consistent with the social convention, plaintiff cannot claim that his legitimate expectations have been dashed. Therefore, plaintiff has not been wronged, even though plaintiff did not in fact consent. On the level of the common good, as well, this result seems justified. If the courts imposed liability on defendants who acted in reliance on a consent-manifesting convention, based on a judicial finding that the plaintiff did not in fact consent, the ability of community members to coordinate their activity based on that consent-manifesting convention would be impaired.

The doctrine that apparent consent precludes recovery thus stands in the way of any description that would see plaintiff's nonconsent as the underlying basis for battery liability. The apparent consent rules clearly reject nonconsent as the touchstone of liability. Those rules suggest, instead, that the touchstone is the reasonable expectations of the plaintiff as conditioned by the community's established conventions. Only by falsely equating apparent consent with actual consent can one say that nonconsent is the "gist of the battery cause of action."

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[68] 154 Mass. 272, 28 N.E. 266 (1891).

[69] *Id.* at 274, 28 N.E. at 266.

[70] *See* RESTATEMENT (SECOND) OF TORTS § 50 (1965); O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891). *See also* W. PROSSER, *supra* note 30, at 101-02.

On its face, the apparent consent rule seems to support a third theory—that battery liability is imposed because of defendant's personal moral blameworthiness. Liability is not imposed in apparent consent cases, one could argue, because a defendant reasonably relying on plaintiff's apparent consent is morally blameless. This explanation, however, does not hold for the next closest case, that of a defendant who makes a reasonable mistake about plaintiff's identity. The law treats these cases differently than the apparent consent cases, even though the defendants in both cases are equally morally blameless.[71] For example, if Joe reasonably mistakes a stranger, Adam, for his rough-housing buddy Jerry, and jumps on his back from behind, Joe would be liable for a battery even though he reasonably believed the person he jumped on consented to the touching. The courts distinguish between the apparent consent doctrine, which they accept, and the defense of defendant's reasonable belief in plaintiff's actual consent, which they reject. The apparent consent doctrine applies only when plaintiff's conduct, in light of the community's accepted patterns of manifesting consent, would have led a reasonable person in defendant's position to believe plaintiff consented. Reasonable mistakes not occasioned by the plaintiff's conduct do not excuse defendant's otherwise-wrongful action.

C. No Excuses: An Objective Standard of Wrong

The subtle distinction the courts draw between apparent consent and other reasonable mistakes about consent seems to reflect the distinction between justification and excuse. Defendant's conduct in an apparent consent case seems to be fully justified, while another defendant's reasonable mistake about plaintiff's consent, not based on the plaintiff's apparent consent, only counts as an excuse. The law of battery accepts the justification and rejects the excuse. This correlation raises a further, more general question: does the law of battery recognize any excuses?

A brief look at certain basic concepts may be helpful in exploring this question. When we accuse others of moral wrongdoing, they may defend either by way of justification or by way of excuse. If they succeed in justifying their conduct, they will have shown that it was not the wrong thing to do at all, that it was justified under the circumstances. Whether something counts as a justification, therefore, depends on the applicable standard of proper conduct. If they succeed in excusing their conduct, on the other hand, they will have conceded that the conduct itself was wrong, but will have shown that they were not fully responsible for the conduct, and hence not morally blameworthy. Facts used as excuses may thus go to the voluntariness of the actor's conduct, as in duress; to the actor's capacity to recognize the right thing to do or the capacity to do it, as in insanity, infancy, intoxication, or provocation; to the actor's ignorance of critical facts, as in mistake; or to the actor's lack of evil "intent," as in accident, lack of intent, or benevolent motives.

[71] W. PROSSER, *supra* note 30, § 17 at 99.

Although some excuses are accepted in the criminal law,[72] none except accident are acceptable defenses to the tort of battery, and even then lack of intent does not preclude tort liability altogether. It simply shifts the appropriate cause of action to either negligence or strict liability. Courts in battery cases routinely reject as legally insufficient defenses the proffered excuses of infancy,[73] insanity,[74] mistaken identity,[75] benevolent motive,[76] duress,[77] and provocation.[78] One is tempted to generalize and say that no excuse, except for accident, which doesn't really count, is accepted as a defense to a battery action, and that all recognized defenses are in the nature of justifications showing that defendant's conduct under the circumstances was not wrongful at all.

To test this general hypothesis, we should ask first whether the relationship between tort liability and the common good supports the conclusion that courts ought not accept excuses. Secondly, we should ask whether any legally-recognized privilege to inflict an intentional harmful touching must be categorized as an excuse rather than a justification. To answer the first question, we need to explore in more detail plaintiff's potential claim of an individual, private injustice from defendant's excusable conduct, and then see how the judicial response to that claim relates to the common good.

Our general analysis up to this point shows that a plaintiff in a tort action claims that defendant's conduct wronged him, in that:

(1) defendant caused plaintiff harm,
(2) by conduct that was contrary to the community's established standards of conduct, and
(3) defendant's conduct was also contrary to plaintiff's expectations.

If these three conditions are met, there would seem to be a wrong to plaintiff even though defendant had an excuse. For example, take the case of a plaintiff who was jumped upon by a defendant who reasonably mistook him for his roughhousing buddy. That plaintiff will feel wronged by defendant's conduct even though he recognizes that it is "excused" and defendant is not a "bad guy." Plaintiff could legitimately argue that in bringing his battery claim to court he is not seeking to punish defendant

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[72] Generally, insanity, infancy, mistake of fact negating requisite *mens rea*, and accident preclude criminal liability. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW (1972).

[73] *See, e.g.*, Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956). *See also* W. PROSSER, *supra* note 30, § 134 at 996-97.

[74] *See, e.g.*, McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937). *See also* W. PROSSER, *supra* note 30, § 135 at 1000.

[75] W. PROSSER, *supra* note 30, § 17 at 99 & n.12.

[76] Clayton v. New Dreamland Roller Skating Rink, 14 N.J. Super. 390, 82 A.2d 458 (1951).

[77] *See* W. PROSSER, *supra* note 30, § 18 at 106. *Cf.* Gilbert v. Stone, Style 72, 82 Eng. Rep. 539 (K.B. 1648) (trespass to land; duress no defense).

[78] *See, e.g.*, Eisentraut v. Madden, 97 Neb. 466, 150 N.W. 627 (1915), in which plaintiff called defendant "professor." The court held it was clearly provocation to call another "professor," but that provocation was no defense to the battery action. *See also* W. PROSSER, *supra* note 30, § 19 at 110.

as a bad guy. He is only asking defendant to redress the wrong he has in fact done. Plaintiff appeals to the court, as a neutral third party, to tell defendant that his conduct is a wrong to the plaintiff, even though it was excusable and hence morally blameless. Similarly, a plaintiff attacked on the street by a psychotic who believed plaintiff was trying to kill him with a frown can accept defendant's excuse, recognize that defendant is not a bad guy, and still claim that defendant's conduct wronged her and that defendant ought to redress the wrong.

If we put ourselves in the position of these plaintiffs we can understand the force of the objective standard of wrong. All members of a community have a claim on everyone else in that community to respect their interests as they are protected by the community's established standards of conduct. An unjustified breach of that claim is a wrong to plaintiff, regardless of any excusing conditions, because defendant failed to give plaintiff what was plaintiff's due. The wrong is in the defendant's failure to live up to this "duty." Each person in the community expects every other member of the community to live up to these "duties," and acts to fulfill similar duties owed to others in the community. Each person coordinates his conduct with that of others based on these reciprocal expectations, which are themselves based on mutual respect for the personal worth and dignity of each community member. The plaintiff's expectations about defendant's conduct, and plaintiff's accompanying claims, derive from the recognition that defendant is equally entitled to due concern and respect as a member of the community capable of knowing and following the community's rules.

When the community's representatives are called on to examine the defendant's conduct, they may accept excuses if the purpose of the community's involvement is the purpose of the criminal law—to punish and deter morally blameworthy violations of the community's standards of conduct. They may not accept excuses, however, if the purpose of the community's involvement is to redress private wrongs, for the plaintiff is wronged even though the conduct is excused.

The other basic rationales for redressing wrongs support this conclusion as well. If courts recognized excuses, they would weaken the ability of community members to coordinate their activities according to the established patterns. The cautious would try to limit their interactions to those not insane, mistaken, youthful, or ignorant. Further, if people do feel wronged by unjustified but excusable conduct, the courts' recognition of excuses could well lead to the extra-judicial attempts at redress and the choosing up of sides that undermine community and lead to the evil of faction. A good case can be made, then, for concluding that courts in tort cases should accept no excuses for unjustifiable conduct.

Is the Anglo-American law of torts consistent with the no-excuses hypothesis? More specifically, in the focal case of battery, do courts accept defenses that are excuses and not justifications? To answer this question, we must explore the principal defenses to an action for battery.

Courts recognize a number of "privileges" as defenses to an action for

battery: self-defense and defense of others,[79] defense of possession of land or chattels,[80] defense or recapture of land or chattels,[81] defense of lawful arrest or prevention of crime,[82] and the defense of corrective or educative discipline of children.[83] The gist of each of these defenses seems to be justification, not excuse. The courts use language of privilege[84] or justified use of force[85] in explaining and applying these defenses. In each, the privilege is limited so that force used in excess of the privilege is deemed wrongful.[86] The criteria for excessive force are related either to established patterns of conduct[87] or to the community's accepted hierarchy of individual goods,[88] and are not related to anything about the personal moral responsibility of the defendant. Furthermore, except for arrest and self-defense, these privileges depend on the actual existence of facts establishing the privilege—a justification—and not on defendant's reason-

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[79] *See* W. PROSSER, *supra* note 30, §§ 19 & 20.

[80] *Id.* at § 21.

[81] *Id.* at §§ 22 & 23.

[82] *Id.* at §§ 25 & 26.

[83] *Id.* at § 27.

[84] RESTATEMENT (SECOND) OF TORTS § 147 (1965) (discipline); In Matter of Rodney, 91 Misc. 2d 677, 398 N.Y.S.2d 511 (1977) (discipline); RESTATEMENT (SECOND) OF TORTS §§ 88-94 (1965) (land); RESTATEMENT (SECOND) OF TORTS §§ 100-106 (1965) (chattels); Hatfield v. Gracen, 279 Or. 303, 567 P.2d 546 (1977) (defense of land and chattels); RESTATEMENT (SECOND) OF TORTS § 87 (1965) (defense of land and chattels); RESTATEMENT (SECOND) OF TORTS §§ 118-132 (1965) (privilege to arrest); Hatfield v. Gracen, 279 Or. 303, 567 P.2d 546 (1977) (privilege to arrest); RESTATEMENT (SECOND) OF TORTS §§ 63-68 (1965) (self defense); RESTATEMENT (SECOND) OF TORTS § 76 (1965) (defense of others); Haworth v. Elliott, 67 Cal. App. 2d 77, 153 P.2d 804 (1944) (self defense and defense of others).

[85] Shorter v. Shehon, 183 Va. 819, 33 S.E.2d 643 (1945) (use of force to take possession of land and chattels); State v. Schloredt, 57 Wyo. 1, 111 P.2d 128 (1941) (defense of land and chattels); Belcher v. United States, 511 F. Supp. 476 (E.D. Pa. 1981) (privilege to arrest).

[86] W. PROSSER & W. KEETON, HANDBOOK ON TORTS § 27 at 158 (1984) (discipline); Sansone v. Bechtel, 180 Conn. 96, 429 A.2d 820 (1980) (discipline); RESTATEMENT (SECOND) OF TORTS § 94 (1965) (land); RESTATEMENT (SECOND) OF TORTS § 106 (1965) (chattels); Gilbert v. Peck, 162 Cal. 54, 121 P. 315 (1912) (use of force to take possession of land and chattels); Deevy v. Tassi, 21 Cal. 2d 109, 130 P.2d 389 (1942) (defense of land and chattels); RESTATEMENT (SECOND) OF TORTS § 81 (1965) (defense of land and chattels); RESTATEMENT (SECOND) OF TORTS §§ 132-133 (1965) (privilege to arrest); Schulze v. Kleeber, 10 Wis. 2d 540, 103 N.W.2d 560 (1960) (privilege to arrest); RESTATEMENT (SECOND) OF TORTS § 70 (1965) (self defense and defense of others); Garner v. Scott, 225 Ark. 942, 286 S.W.2d 481 (1956) (self defense and defense of others).

[87] Picariello v. Fenton, 491 F. Supp. 1026 (M.D. Pa. 1980) (privilege to arrest); McCombs v. Hegarty, 205 Misc. 937, 130 N.Y.S.2d 547 (1954) (self defense: kicking man when he is down).

[88] RESTATEMENT (SECOND) OF TORTS § 88 (app., reporter's notes) (1966) ("The public interest in freedom from affrays . . . should be superior to the interest of owners of real property in obtaining immediate possession") (use of force to take possession of land and chattels); Katko v. Birney, 183 N.W.2d 657 (1971) (defense of land and chattels); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927) (privilege to arrest); Davis v. Hellwig, 21 N.J. 412, 122 A.2d 497 (1956) (privilege to arrest); RESTATEMENT (SECOND) OF TORTS § 150, comment d (1965) (discipline).

able belief in the existence of those facts—possibly an excuse. The only problem cases for the "no excuses" hypothesis, then, are the reasonably mistaken self-defense cases and the reasonably mistaken arrest cases.

The first apparent exception to the "no excuses" hypothesis—the arrest privilege—on further analysis proves to be consistent with that hypothesis. A private individual has a privilege to use reasonable force to arrest another when a felony has been committed and the actor reasonably suspects the other of having committed it.[89] This privilege seems to be a justification, not an excuse, even though it is formulated in terms of the defendant's reasonable belief. This is confirmed by two features of the privilege. First, reasonable suspicion or even reasonable belief that a felony has been committed is not enough to invoke the privilege. A felony must have been committed in fact.[90] If reasonable suspicion were an excuse instead of a justification, the requirement that a felony had to have been committed would make no sense. Second, the reasonable suspicion standard derives from the social purpose achieved by the practice of citizen's arrest. The purpose is to prevent the escape of one who committed a crime. To condition the privilege on proof of the arrested person's guilt, or proof that the defendant reasonably believed the arrested person guilty, would frustrate that purpose.[91] This is clearly shown by an illustration given by the Restatement Second commentator: "A sees B and C bending over a dead man, D. B and C each accuse the other of murdering D. A is not sure that either B or C did the killing, but he has a reasonable suspicion that either B or C killed D. . . ."[92] If the standard were actual guilt or reasonable belief in guilt, A could not arrest either B or C without risking tort liability, and the purpose of the practice would be stymied. Since the purpose of the accepted social practice is furthered by the reasonable suspicion standard, then, an arrest based on reasonable suspicion alone is justified. The use of force pursuant to that accepted social practice therefore is not wrongful at all.

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[89] *See* RESTATEMENT (SECOND) OF TORTS § 119 (1965). Subject to the rules stated in §§ 127-136, a private person is privileged to arrest another without a warrant for a criminal offense

(a) if the other has committed the felony for which he is arrested, or
(b) if an act or omission constituting a felony has been committed and the actor reasonably suspects that the other has committed such act or omission, or
(c) if the other, in the presence of the actor, is committing a breach of the peace or, having so committed a breach of the peace, he is reasonably believed by the actor to be about to renew it, or
(d) if the other has attempted to commit a felony in the actor's presence and the arrest is made at once or upon fresh pursuit, or
(e) if the other knowingly causes the actor to believe that facts exist which would create in him a privilege to arrest under the statement in Clauses (a) to (d).

Id.

[90] *See* RESTATEMENT (SECOND) OF TORTS § 119, comments h & i on clause (b) (1965).

[91] RESTATEMENT (SECOND) OF TORTS § 119, comment j, illus. 2 (1965).

[92] *Id.*

Judicial recognition of reasonably mistaken self-defense as a defense to battery poses a more difficult problem for the "no excuses" hypothesis. Self-defense is one of a number of privileges with a common theme—the prevention of a threatened wrong. Self-defense is the privileged use of force to prevent a threatened imminent battery to one's person.[93] The extent of the privilege is carefully limited. Force calculated to cause death or serious bodily injury is not privileged unless one is threatened with imminent death or serious bodily injury, and one has no safe means of escape.[94] Mere insulting or provoking words by another do not trigger the privilege.[95] One may not invoke the privilege for a preemptive strike when the other threatens no imminent harm but only harm in the future.[96] One may not invoke the privilege, once the threat is gone, to retaliate.[97] The privilege is thus carefully limited to cases in which defendant acted to prevent a threatened imminent battery.[98] The privilege is limited, consistent with the community's hierarchy of values, with the existence of judicial mechanisms for redressing completed wrongs, and with commonly-accepted and understood patterns of behavior. Self-defense, then, is ordinarily a justification, not an excuse. It is not surprising that courts have traditionally used justification language[99] in tort cases to explain why self defense is a defense to a battery claim.

The problems with interpreting self-defense as a justification are the cases in which the defense was effective for a defendant who hit a completely innocent plaintiff, mistakenly believing himself threatened with an imminent battery. In those cases, the defense of self-defense acts as an excuse, for the completely innocent plaintiff could reasonably expect defendant not to hit him, and the defendant's conduct is an unjustified wrong to that plaintiff. The leading case is *Crabtree v. Dawson*,[100] decided

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[93] W. PROSSER, *supra* note 30, § 19 at 108.

[94] King v. State, 233 Ala. 198, 171 So. 254 (1936); Beale, *Retreat from Murderous Assault*, 16 HARV. L. REV. 567 (1903).

[95] Crotteau v. Karlgaard, 48 Wis. 2d 245, 179 N.W.2d 797 (1970); W. PROSSER & W. PAGE KEETON, HANDBOOK ON TORTS § 19, at 126 (5th ed. 1984).

[96] Tuberville v. Savage, 1 Mod. 3, 86 Eng. Rep. 684 (K.B. 1669); S. SPEISER, C. KRAUSE & A. GANS, AMERICAN LAW OF TORTS § 5:8, at 803 (1983).

[97] Germolus v. Sausser, 83 Minn. 141, 85 N.W. 946 (1901); W. PROSSER & W. PAGE KEETON, HANDBOOK ON TORTS, *supra* note 95, § 19, at 126.

[98] *See* Heidbreder v. Northhampton Township Trustees, 64 Ohio App. 2d 95, 411 N.E.2d 825 (1979); S. SPEISER, C. KRAUSE & A. GANS, AMERICAN LAW OF TORTS § 5:8, at 804 (1983); W. PROSSER, *supra* note 30, § 19, at 109.

[99] Iaegar v. Metcalf, 11 Ariz. 283, 94 P. 1094 (1908); Grabill v. Ren, 110 Ill. App. 587 (1903); S. SPEISER, C. KRAUSE & A. GANS, AMERICAN LAW OF TORTS § 5:8, at 803 (1983).

[100] 119 Ky. 148, 83 S.W. 557 (1904). Defendant Dawson owned a three-story building in Owensboro, Kentucky. One evening, he rented out a large hall on the third floor for a benefit dance. Ollie Noble, drunk, disorderly and obnoxious, was ejected from the third-floor dance for failure to pay the admittance fee. Dawson had words with him in the hall, then forcibly escorted him down to the entry way on the first floor where Noble challenged him to fight. Dawson turned his back on Noble and returned to the second floor. As he reached the second-floor landing,

by the Kentucky Court of Appeals. *Crabtree*, however, should be placed in historical context. *Crabtree* was decided in 1904. The only case directly on point at that time was an 1873 Illinois case, *Paxton v. Boyer*.[101] Both the *Paxton* court[102] and the *Crabtree* court[103] accepted the late-nineteenth century equation of the tort action for battery with the criminal action for battery, in which reasonably mistaken self-defense is accepted as an excuse for reasons derived from the purpose of the criminal law.[104] The mistaken equation of tort and criminal actions for battery was probably influenced by two mutually-reinforcing developments. As the old conceptual categories of trespass and trespass on the case were replaced by the newer categories of negligence and the nominate intentional torts, the intentional tort of battery at first seemed to cover exactly the same conduct as the criminal offense of battery. This confusion could continue only if one refused to recognize that the social purposes of tort and criminal liability are fundamentally different. This confusion was encouraged, therefore, by the theoretical work of the pre-eminent utilitarian torts theorist Oliver Wendell Holmes, Jr., who argued that the purpose of tort liability was the same as the purpose of criminal punishment—to deter potentially harmful behavior.[105]

The late nineteenth century self-defense cases have been enshrined in the Restatement of Torts[106] and the *Crabtree* rule is blithely accepted as

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someone told Dawson, "He is getting some bricks." Dawson retrieved an old musket from a store room off the second-floor landing. Just then, Crabtree, a 17-year old boy eager to get to the dance on the third floor, came running up the dimly-lit stairs. Mistaking Crabtree for Noble, Dawson hit him with the butt of the musket, knocking him to the bottom of the stairs. After a verdict for defendant Dawson at trial, plaintiff Crabtree appealed. He argued that the jury should have been directed to find for him on the liability issue on the facts admitted by defendant. The court reversed on other grounds but rejected this argument, holding that if defendant reasonably believed that Crabtree was Noble and that it was necessary to hit Noble to defend against a threatened attack, defendant would be "excused" on the ground of self-defense and apparent necessity as long as he used no more force than appeared necessary. *Id.* at 160, 83 S.W. at 561.

This holding clearly accepts an excuse rather than a justification, for plaintiff could reasonably expect defendant not to hit him, and Dawson's conduct is an unjustified wrong to Crabtree.

[101] 67 Ill. 132, 16 Am. Rep. 615 (1873). The *Crabtree* court also cited JOYCE ON DAMAGES and ROBERTSON'S CRIMINAL LAW AND PROCEDURE. 119 Ky. at 160; 83 S.W. at 561.

[102] 67 Ill. 132, 16 Am. Rep. 615 (1873).

[103] 119 Ky. 148, 83 S.W. 557 (1904).

[104] *See, e.g.*, T. COOLEY, *supra* note 48, at 186-86; F. POLLOCK, *supra* note 49, at 182-86. *See also* Hegarty v. Shine, 2 Ir. L.R. 273 (1878).

[105] O. HOLMES, THE COMMON LAW 36-42, 86-90, 115-29 (M. Howe ed. 1963). On the relationship between Holmes's unified theory of civil and criminal liability, see H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE 11-47 (1984). *See also* Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U.L.Q. 681 (1983).

[106] *See* RESTATEMENT (SECOND) OF TORTS § 65 (1965).

the prevailing law by others.[107] But the *Crabtree* rule is simply an historical anomaly,[108] explainable by the late-nineteenth century confusion of tort and criminal battery, surviving in one small corner of the law—reasonable mistake as to the necessity of self-defense. The rest of the tort law of battery is consistent with the thesis that a tort liability system aimed at redressing private wrongs ought to accept no excuses.[109]

D. Conclusion

A careful analysis of the focal case of battery seems to have confirmed our initial hypothesis that the practical point of tort liability is to redress private wrongs, defined by reference to the community's patterns of co-

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[107] *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 113 (7th ed. 1982); *cf.* P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, CASES AND MATERIALS ON TORT AND ACCIDENT LAW 63-64 (1983).

[108] *Crabtree* is still considered the leading case primarily because the issue has not been faced subsequently by any state's highest court. It may be significant, however, that an intermediate appellate court in Texas (facing the issue 14 years after *Crabtree*) reached the opposite result. That court, unfettered or uninformed by those late-nineteenth century confusions, focused on the different purposes of tort and criminal law:

> The rule recognized as proper in presenting the plea of self-defense in criminal prosecutions is not applicable to civil suits for damages like this. In criminal prosecutions the purpose of the law is to prove and punish conduct prompted by an evil motive; and in determining the animus of the accused in beginning an agressive defense of himself it is necessary to look at the surroundings from his standpoint. But in a civil action for damages resulting from an assault the purpose is compensation for an injury, and the aggressor cannot escape upon a plea of self-defense by merely proving that he thought he was about to be attacked, when no attack was contemplated by the injured party . . . In an action for actual compensation the injured party has some right to have the offensive conduct viewed from his standpoint.

Chapman v. Hargrove, 204 S.W. 379, 380 (Tex. Civ. App. 1918). The *Chapman* court's reasoning is persuasive. If the purposes of tort liability and criminal punishment are different, the excuse of a reasonable belief in the necessity of self-defense should not be accepted in a tort action for battery.

[109] Acceptance of reasonable mistake as to the necessity of self defense in a battery action seems inconsistent with judicial rejection in other battery cases of excuses that seem equally compelling—insanity, infancy, provocation, mistaken identity in relation to consent, etc. One can distinguish *Crabtree*, of course, by arguing that the apparent necessity for self-defense makes a defendant's defensive response reflexive or instinctual, reducing or eliminating the voluntariness of defendant's action. If that is the basis, however, it should apply equally in all cases of self-defense, always making self-defense an excuse. That interpretation is inconsistent with the courts' uniform explanation of self-defense as a justification, not an excuse. Moreover, if self-defense were an excuse, it would be hard to explain why the law draws the line between privileged and unprivileged use of force based on the degree of force used rather than on something more obviously related to voluntariness. Further, if voluntariness is the key to the self-defense privilege, it is hard to see why other excuses (i.e., insanity and infancy) which relate more directly to traditional notions of voluntariness are not accepted as defenses to battery. *Crabtree* thus seems inconsistent with the rest of the law of battery.

ordinating conduct and the correlative expectations of the plaintiff concerning the defendant's conduct. The standard of conduct in battery derives from the community's conventions. It requires neither an evil intent nor moral blameworthiness on the part of defendant. Further, with just a single exception, the law of battery accepts no excuses, but limits defenses to those which justify the defendant's conduct. This surprising discovery was shown to be consistent with the practical point of tort liability and its relationship to the overall public good. An excuse, after all, does not make defendant's conduct any less of a wrong to the plaintiff. Moreover, accepting excuses would reject plaintiff's claim to full dignity in the community and would lessen the community's ability to coordinate conduct by coordination conventions.

V. The Focal Case of Tort Liability: Negligent Infliction of Personal Injury

The preceding analysis of battery as the focal case has confirmed the proposed theoretical analyses of the practical point tort liability, the standard for determining wrongs redressible in tort, and the relationship between the system of tort liability and the common good. The torts theorist would be tempted to rest here, claiming to have finished the critically important task of analyzing the focal case. But the historical reasons we noted at the start of the battery analysis for suspecting that battery might be only half the focal case have been confirmed by a conclusion we drew from the battery analysis itself. Wrongful intent, the distinguishing characteristic separating battery from negligence, was found to be theoretically insignificant, as the standard for determining wrongful intent was simply whether the intended touching breached the community's accepted standards of conduct. If intent in battery is theoretically insignificant, a common explanation of intended and negligently inflicted personal injury seems called for. Analyzing only battery as the focal case, then, would be like listening to the sound of one hand clapping. The theorist must broaden the focal case to include tort liability for unintended but negligently inflicted physical harms.

A. Unreasonable Foreseeable Risk of Harm: Theoretical Origins

The preceding theoretical analysis seems to break down when applied to tort liability for negligently inflicted physical harms, for at the heart of the modern law of negligence we seem to find a standard that defines negligence as conduct that poses an unreasonable foreseeable risk of harm to others. The "reasonableness" of the risk is determined not by reference to the patterns of coordination accepted in the community but by a cost-benefit analysis, weighing the foreseeable benefits derivable from defendant's conduct against its foreseeable risks of harm,[110] and using as a

[110] *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Restatement (Second) of Torts §§ 291-293.

measure the "social value which *the law attaches*"[111] to the respective interests threatened or advanced by the defendant's conduct. This standard of conduct is a purely legal one, which does not just incorporate the prevailing community standards and patterns of behavior.

If the unreasonable foreseeable risk test is really the standard of conduct applied in negligence cases, it would be impossible to claim that the purpose of negligence liability is to redress a private wrong, defined by the community's previously-accepted standards for coordinating the behavior of its members. On the contrary, the purpose of liability would seem to be to influence the conduct of members of the community in the future so as to further the social values adopted by the judges.

For a theorist who takes the internal point of view, there is strong evidence that the unreasonable foreseeable risk test is the negligence standard. That test has been announced as the standard of conduct in negligence cases by respected judges in leading cases;[112] it has been adopted in the Restatement of Torts by those attempting to "restate" accurately the law of negligence;[113] it has been accepted as an accurate description of the negligence standard by leading treatise writers.[114] The descriptive tort theorist cannot ignore this weighty evidence of the understanding of reasonable people operating the tort liability system. The descriptive theory that seemed to best explain liability for battery, therefore, does not seem to explain liability for negligence.

Before giving up on the possibility of a unified descriptive theory of battery and negligence liability, however, it may be helpful to examine the pedigree of the modern understanding that negligence is conduct which poses an unreasonable foreseeable risk of harm to others.

This modern understanding came from Oliver Wendell Holmes Jr.'s 1880 *theory* of negligence liability,[115] not from decisions or opinions of judges in negligence cases. The treatises on torts and negligence published in England and the United States prior to 1880 show a nearly uniform understanding of negligence as the breach of a duty to use due care, with due care understood as the conduct of an ordinary reasonable and prudent man.[116] This understanding of negligence informs Holmes's earlier article

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[111] RESTATEMENT (SECOND) OF TORTS §§ 292-293.

[112] *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (L. Hand, Judge); Burgess v. M/V Tamano, 564 F.2d 964 (1st Cir. 1977) (B. Aldrich, J.); U.S.F. & G. v. Jadaranska Slobodna Plovidba, 683 F.2d 1022 (7th Cir. 1982) (R. Posner, Judge).

[113] RESTATEMENT (SECOND) OF TORTS §§ 292-293.

[114] *See* W. PROSSER, *supra* note 30, at 145; 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.9 (1956).

[115] THE COMMON LAW, *supra* note 12.

[116] *See, e.g.*, T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 630-31 (1880) (Negligence is "the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilence which the circumstances justly demand, whereby such other person suffers injury.) (citing the reasonable man standard set out in Blyth v. Birmingham Waterworks, 11 Exch. 781, 784, 156 Eng. Rep. 1047, 1049 (1856): "The omission to do something which a reasonable man, guided upon those

on Torts[117] published in 1873, as well as Melville Bigelow's scholarly historical treatment of Negligence published in 1875.[118] Only after Holmes's brilliant redescription of the negligence standard in terms of danger foreseeable by the ordinary reasonable man did foreseeability become part of the common explanation of the negligence standard. Leading the way in this was Frederick Pollock, whose treatise on Torts[119] published in 1886 was dedicated to Holmes. What is striking, however, is that before Holmes's lectures on *The Common Law*, "foreseeable harm" played a significant role in negligence cases only as one test of the proximate cause limitation on negligence liability.[120] The few judges who talked of foreseeability in discussing the negligence standard always subordinated foreseeability to the broader question of what an ordinary reasonable man would do.[121] That the origin of the modern understanding is a theory rather than the practical reasoning of judges deciding cases suggests the need for an initial analysis of that theory. If Holmes's theory is inadequate, the modern explanations of tort law embodying that theory may perhaps be discounted.[122]

1. Holmes's Theory of Torts

To understand Holmes's theory of tort liability, one must first understand his theory of judicial decisionmaking. Holmes theorized that the

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considerations which ordinarily regulate the conduct of human affairs, would do."); 1 F. HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 124 (1859) ("Negligence is said to consist in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do."); A. UNDERHILL, PRINCIPLES OF THE LAW OF TORTS 271 (Moak ed. 1881) ("The negligence of the duty which is actionable is the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do."); C. ADDISON, WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS 17 (2d ed. 1870) (negligence is the breach of an obligation to use care). *Cf.* C. ADDISON, *supra*, at 21 (proximate cause limitation of damages to ordinary consequences of negligence act explained in terms of anticipation or foresight of ordinary reasonable man, quoting Greenland v. Chaplin, 5 Exch. 248, 155 Eng. Rep. 104 (1850)).

[117] Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 658-59 (1873).

[118] M. BIGELOW, LEADING CASES ON THE LAW OF TORTS 589-96 (1875).

[119] F. POLLOCK, THE LAW OF TORTS 36-37 (1886) (traditional ordinary reasonable man standard reinterpreted in terms of foresight of ordinary reasonable man).

[120] *See, e.g.*, Greenland v. Chaplin,5 Exch.248, 155 Eng. Rep. 104 (1850); Fairbanks v. Kerr, 70 Pa. St. 86 (1871). *See also* C. ADDISON, *supra* note 116, at 21. Addison was the first treatise writer to use the foreseeable harm notion to explain the proximate cause limitation of damages. The limitation of damages to the ordinary consequences of a negligent act was explained in terms of the anticipation or foresight of an ordinary reasonable man, citing *Greenland v. Chaplin*; Holmes reviewed Addison's treatise in 5 AM. L. REV. 536 (1871).

[121] *See e.g.*, Blythe v. Birmingham Waterworks Co., 11 Exch. 781, 156 Eng. Rep. 1047 (1856); Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850). *Cf.* Greenland v. Chaplin 5 Exch. 248, 155 Eng. Rep. 104 (1850) (2nd injury or crashworthiness case, where Pollock, L.J., explained proximate cause in foreseeable risk terms).

[122] The following critical analysis of Holmes's theory of negligence follows that of the author in Kelley, *supra* note 105. *See also* H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984).

"secret root" of judicial decision, rarely articulated by judges, is legislative policy: "considerations of what is expedient for the community concerned."[123] Regardless of what judges say are the reasons for their decisions, the only real basis for judicial decision is public policy: consideration of the effect on the community of deciding the case one way or the other.[124] The best decision is the one that influences future human action in ways most conducive to overall community welfare.[125] The law influences human beings by what they know of it.[126] For Holmes, effective human knowledge is limited to the prediction of consequences,[127] so, for Holmes, a judicial decision can only be effective by giving people a basis for predicting the legal consequences of their actions.[128]

In formulating his tort theory, Holmes started with the question "whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is."[129] Immediately after he stated the common ground question, Holmes redefined it to incorporate his theory of judicial decisionmaking.[130] Holmes noted that tort law decides whether a defendant is liable for harm he has done: there is no liability in tort unless the defendant's act resulted in harm. Acts that are identical in all relevant respects sometimes cause harm and sometimes do not. Therefore, tort law cannot enable one to predict with certainty "whether a given act under given circumstances will make him liable."[131] But since, for Holmes, the critically important knowledge is prediction of the consequences of acts, he had to discover some way in which tort law gives guidance to future conduct. He found it. According to Holmes, the only guide for the future that can be derived from a tort decision imposing liability is the conclusion that similar, indistinguishable acts are done at the "peril of the actor,"[132] that is, that the actor will be held liable in tort should harm follow. Therefore, Holmes said, to find the general principle of all tort liability, one should eliminate "the event as it actually turns out" (the harm) and look for the principle on which the "peril of an actor's conduct" (the risk of liability should the act result in harm) is thrown upon the actor.[133] By eliminating the harm to the plaintiff from his theoretical

[123] THE COMMON LAW, *supra* note 12, at 32.

[124] For this interpretation of Holmes's theory of judicial decisionmaking, *see* Kelley, *supra* note 105, at 705-07.

[125] *See id.* at 707-08; *see also* H. POHLMAN, *supra* note 105, at 92-105.

[126] *See* THE COMMON LAW, *supra* note 12, at 42-43, 88-89.

[127] *See, e.g.*, Holmes's predictive theory of law, first published in an unsigned *Book Notice* in 6 AM. L. REV. 723 (1872), and later repeated in Holmes's *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[128] *See The Common Law*, *supra* note 12, at 42, 46, 88-89, 115. *See generally* H. POHLMAN, *supra* note 105, at 39-47.

[129] THE COMMON LAW, *supra* note 12, at 63.

[130] *Id.* at 64-65.

[131] *Id.* at 64.

[132] *Id.*

[133] *Id.* at 65.

analysis, however, Holmes ruled out from the start any explanation of tort liability as a means of redressing wrongs, and confined his potential "common grounds" to legislative policies adopted by the courts to influence future human behavior.

After these preliminaries, Holmes proceeded to search for the general principle of all tort liability by analyzing tort liability rules. In his analysis, he paid little attention to the actual reasoning of the courts, as he believed that judges had rarely articulated the legislative policies that were the only real bases for their judgments.[134] Focusing primarily on tort liability for negligently inflicted harm, Holmes considered two possible explanatory principles: first, that a man always acts at his peril and thus should be liable for all harm he causes, and second, that a man acts at his peril only when his acts are personally morally blameworthy. After an extended analysis, he rejected both principles because neither was consistent with the history and current status of legal rules in tort. Instead, the basic test of tort law, according to Holmes, is an external standard of liability for harm caused by conduct that an ordinary reasonable man would have foreseen as dangerous to others.[135] This standard reconciles and advances two legislative policies. It promotes public safety by deterring and preventing dangerous conduct and it preserves socially desirable freedom of action when danger from conduct is not foreseeable.[136]

2. Critique of Holmes's Theory

As descriptive theory, Holmes's theory of tort liability suffers from two flaws. First, Holmes's theory of judicial decisionmaking led him to ignore the actual reasoning of judges explaining their decisions. Only in that way was he able to redescribe the ordinary reasonable man standard in terms of foreseeability, for judges in negligence cases before Holmes had routinely explained the negligence standard as the *conduct* of the ordinary reasonable man.[137] The judges did not present foreseeable danger as the touchstone. When they did refer to it in connection with the standard of conduct in negligence, they subordinated foreseeability or foresight of danger to the broader test of what a reasonable man would do.[138] Foreseeable harm or danger was seen as one influence on the behavior of the reasonable man. "Foresight," in its rare appearances in the opinions, was

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[134] *See* Kelley, *supra* note 105, at 706-07.

[135] THE COMMON LAW, *supra* note 12, at 86-88.

[136] *Id.* at 115.

[137] *See, e.g.*, Vaughan v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P.1837); Blyth v. Birmingham Waterworks Co., 11 Ex. 780, 156 Eng. Rep. 1047 (1856).

[138] *See* Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); Blyth v. Birmingham Waterworks Co., 11 Ex. 780, 156 Eng. Rep. 1047 (1856); Cornman v. Eastern Counties Ry. Co., 4H. & N.780, 157 Eng. Rep. 1050 (1859). *Cf.* Smith v. London & Southwestern Ry. Co., L.R.6 C.P.14 (1870), *affirming* 5 C. P. 98 (1870).

used to mean prudence.[139] Foreseeability was used quite often in the negligence cases before 1880 to test whether defendant's negligent conduct was a proximate cause of planintiff's injury.[140] In that context, however, foreseeable consequences did not set the standard of conduct, but only the limits of liability for conduct already deemed wrongful under the ordinary reasonable man standard. Holmes's theory thus gave significantly greater weight to foreseeable danger than the courts had done up to that time. Holmes saw foreseeable danger as the touchstone of negligence liability; the courts that had discussed foreseeable consequences had used it either as one factor to be taken into account in determining how a reasonable man would act, or as one test for determining the proximate cause limit of liability for negligence. Moreover, Holmes could claim that his utilitarian legislative policies explained the law of torts only by ignoring the reasoning of judges, who time and again in tort cases had said that the purpose of the damage award was to redress the wrong done to plaintiff.[141]

Second, Holmes's theory that foreseeable danger is the touchstone of tort liability in general and negligence liability in particular was not then and is not now consistent with the facts. The law has not imposed liability for unintended harm caused by conduct that most people would say foreseeably endangers others, such as riding a horse carefully, driving a car carefully, or operating a train carefully. This flaw in Holmes's theory was recognized and corrected by Henry Taylor Terry, who in 1915 published an article on negligence that significantly qualified Holmes's theory.[142] According to Terry, foreseeable danger alone was not the touchstone of liability in negligence; but foreseeability of an "unreasonable risk" of harm was. Terry claimed that the reasonableness of a given risk depended on the following five factors:[143]

(1) The magnitude of the risk;
(2) The value or importance of that which is exposed to the risk;
(3) [T]he value or importance of the "collateral" object [sought to be attained by the actor's conduct;]
(4) The probability that the collateral object will be attained by the conduct which involves risk to the principal; the utility of the risk; and
(5) The probability that the collateral object would not have been attained without taking the risk: the necessity of the risk.

Terry's theory was a brilliant reformulation of Holmes's simpler theory. He preserved Holmes's basic deterrence rationale for negligence liability, provided a theory that was more consistent with negligence rules than

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[139] *See* Harvey v. Dunlop, Hill & Den. 193, 194 (N.Y. Sup. Ct. 1843) (cited in HOLMES, *supra* note 12, at 76-77, commented on in Kelley, *supra* note 105, at 723-24.

[140] *See, e.g.*, Greenland v. Chaplin, 5 Ex. 244, 155 Eng. Rep. 104 (1850) (dicta by Pollock, C.B.); Fairbanks v. Kerr, 70 Pa. St. 86 (1871); Sharp v. Powell, L.R. 7 C.P. 253 (1872); Scott v. Hunter, 116 Pa. St. 192 (1863).

[141] *See generally supra* text accompanying notes 27-29.

[142] Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

[143] *Id.* at 42-43.

Holmes's theory, and further preserved in theory Holmes's insistence on the legislative function of courts. Moreover, Terry retained the utilitarian cast of Holmes's theory by embedding in his description of the negligence standard the policy of maximizing social utility.

As descriptive theory, however, Terry's reformulation achieved consistency at the price of vacuity. At key points in the test of unreasonableness, Terry incorporated unguided or very generally guided judgments about such matters as magnitude of the risk, social value of the interest threatened, and social value of the actor's ends. Given the range of reasonable judgments on these issues, virtually any result in any negligence case can be seen as consistent with the test. The theory works as description because it reduces to a description of a judicial *ipse dixit*—explaining a judicial decision by reference to the judge's unfettered choice to assign more weight to this social interest and less weight to that.[144] Terry's test therefore provides little guidance to judges called upon to decide particular cases. Holmes's simpler test of danger foreseeable by a reasonable man, too, seems curiously useless as a basis for deciding particular cases. A reasonable man, after all, can foresee all kinds of dangers from any act, given enough incentive and enough time. How much incentive and how much time should the judge give the hypothetical reasonable man in any case? The real basis for decision in cases purporting to rely on Holmes's foreseeability test would then seem to be the grounds on which the court decides what the reasonable man would foresee. Since Terry's reformulation depends not only on the foreseeability of risks, but also on equally elusive judgments about the foreseeable magnitudes of foreseeable risks and the overall utilitarian net worth of those risks, the problem with Holmes's simpler theory is compounded, not eliminated, by Terry's reformulation.

Similar problems with foreseeability as a decisional standard bedeviled the early utilitarian theorists, whose purely consequentialist ethic seemed to require as a precondition to ethical behavior the ability to foresee the future. Those without a crystal ball, it seemed, could not be good. John Stuart Mill formulated a brilliant reply. No man can foresee all the consequences of his particular actions, he admitted, but mankind over the "duration of the species" has learned inductively, by experience, the general tendencies of actions, which they have embodied in general rules of prudence, morality, and law.[145]

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[144] It may be that any utilitarian descriptive theory must suffer from this problem. If, as John Finnis argues, utilitarian consequentialist ethical theories are necessarily incoherent because the different human goods are incommensurable, the choice to value one good more highly than another incommensurable good must always be arbitrary and standardless: There can be no standards for preferring apples to oranges. FINNIS, *supra* note 22, at 114-18. This may explain why the radical legal realists have such success in exploding the myth of objective judicial decisionmaking in a system that has formally adopted utilitarian standards.

[145] J. Mill, *Sedgwick's Discourse*, in 10 COLLECTED WORKS OF JOHN STUART MILL 31, 58-59 (1969); J. Mill, *Utilitarianism*, in 10 COLLECTED WORKS OF JOHN STUART MILL 205, 224-25 (1969).

Holmes followed John Stuart Mill closely on this point. Mill's emphasis on *rules* derived by mankind inductively, based on experience with the consequences of action, provided one of the bases for Holmes's theory of specification. As judges take the negligence verdicts of juries on recurring similar facts, Holmes thought, they should distill these expressions of mankind's experience into more definite legal rules.[146] The definite rules derived by this process of specification are more effective deterrents than the imprecise general standard of foreseeable danger, so they better achieve the legislative policy of deterring dangerous conduct. Holmes's prediction that the process of specification would replace the general negligence standard in more and more instances has not come true.[147] But more importantly, without specification into definite rules, Holmes's simple foreseeability standard and Terry's more sophisticated unreasonable foreseeable risk test can neither guide judicial decision nor effectively deter undesirable conduct.

3. Dealing with the Remnants of Holmes's Theory

Modern foreseeability standards of negligence are incoherent remnants of a faulty theory of torts. This poses a critical problem for the descriptive tort theorist. How can one formulate a descriptive theory of negligence liability when the understanding of the negligence standard by those acting within the legal system is skewed by acceptance of a faulty theoretical concept? The obvious solution would be to excise the faulty concept from both the raw material for theoretical analysis and the ultimate theory. But how can one excise the concept from the raw material when certain rules are either formulated in terms of foreseeability or understood by the participants in those terms? The descriptive theorist, after all, must start with an existing set of institutional arrangements, rules, principles and patterns of conduct illuminated by the self-understanding of the participants.

This complication, however, does not make the task impossible. The analysis thus far suggests a two-part solution to this problem. First, the theorist should distinguish between "foreseeability" used as a theoretical concept and "foreseeability" used as a working symbol in a set of institutional arrangements and human actions in a human community.[148] The vacuity of foreseeability as a theoretical concept suggests that when it is used in its theoretical sense it is simply a misdescription of a reality that needs more accurate theoretical explanation. When it is used as a working symbol in a human community, however, there will be actual purposes, goals, and meanings associated with its use that the theorist should analyze.[149] Second, the basic task of formulating a descriptive theory of negligence should rely heavily on historical analysis. Since we know, roughly, when the faulty theory was proposed, we can analyze the system

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[146] THE COMMON LAW, *supra* note 12, at 88-103.

[147] *See generally* Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L. Q. 681, 738-40 (1983).

[148] *See* E. VOEGELIN, THE NEW SCIENCE OF POLITICS 27-31 (1952).

[149] For an analysis of foreseeability as used in a working system of tort liability, *see infra*, Section D(2).

of negligence liability before that time to formulate a preliminary theoretical explanation. Then we can analyze the current structure and substance of negligence liability to see how much of it is still consistent with our theoretical explanation of the original system.

B. Early Negligence Law

1. Development of the Negligence Cause of Action

The place to start, then, is the common law system of negligence liability prior to the utilitarian theorizing of the late 19th century. Negligence as a legal conceptual category was a late-blooming plant. It is the result of an historical process that culminated in the modern law of negligence in the early 19th century, and was not really finished until around 1840.[150] "Negligence" arose as a significant legal category in the early nineteenth century, as part of the recategorization of the common law from the old forms of action to the modern legal categories. In this recategorization, what was originally trespass on the case for negligence or default became modern negligence, which eventually became one of the three organizing categories in modern tort law.

The combined efforts of two British scholars, S.F.C. Milsom[151] and M.J. Prichard,[152] have clarified the development of the modern law of negligence. They identified two elements as critically important in the emergence of early negligence law: first, the ordinary reasonable man standard of conduct, applied by the jury, and, second, the technique of pleading a general duty of care. It makes sense, therefore, to begin a theoretical analysis of early negligence law by focusing on these two elements.

2. The Ordinary Reasonable Man and the Jury

Milsom argues that for centuries the jury had the ultimate say in determining whether defendant's conduct was wrongful.[153] This was so because the defendant could deny plaintiff's claim of wrongfulness—a claim implicit in trespass and explicit in trespass on the case—by simply pleading the general issue—"Not guilty."[154] The case would then be sent out to the county for the jury to decide. The jury's decision was effectively insulated from review by the court back at Westminster. In the 18th century, procedures developed by which the litigants could bring back to the court at Westminster the facts developed at the jury trial.[155] This threatened the primacy of the jury in deciding whether defendant's conduct was wrongful. Further, it threatened to reduce the law of torts to a

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[150] As a relative fledgling in the 1880's, then, it was peculiarly susceptible to theoretical misdescription.

[151] S. MILSOM, *supra* note 29.

[152] M. PRICHARD, *supra* note 41.

[153] S. MILSOM, *supra* note 29, at 296-313.

[154] *Id.*

[155] *Id.* at 397; M. PRICHARD, *supra* note 41, at 14-15.

multitudinous set of very specific legal rules of conduct, as the courts at Westminster ruled as a matter of law on individual cases brought back from the jury. The ordinary reasonable man standard of conduct in negligence cases responded to both these threats. The formal legal statement of the standard as the conduct of the ordinary reasonable man was pitched at a high level of generality. Adherence of the law to this level of generality could effectively keep the judges from reviewing jury verdicts on the facts developed at trial, for the judges did not need to decide as a matter of law whether certain conduct was negligent. All they needed to decide was whether the jury could reasonably find that the conduct was not that of the ordinary reasonable man. Thus, the development of the ordinary reasonable man standard blunted the threat that the 18th century development of procedures for reviewing jury verdicts would ultimately reduce the law of torts to a multifarious set of very specific legal rules of conduct. At the same time, it helped maintain the primacy of the jury in determining whether defendant's conduct was wrongful.

The primacy of the jury in applying the ordinary reasonable man standard is consistent with our analysis of the focal case of battery. If the basic test of wrongfulness is whether defendant's conduct was contrary to accepted, established patterns for coordinating activity in a particular community, selecting a group of people from that community and asking them whether defendant acted as an *ordinary* reasonable man would have acted seems to be an excellent method for applying that test. Furthermore, that procedure and that standard provide a solution to the basic problem of extending tort liability to cases in which the defendant intended no contact with the plaintiff. It may have been impossible to reduce to legal rules the multifarious sets of mores and patterns of conduct in particular communities concerning coordination of conduct not intended to cause contact with others. By adopting the jury-applied standard of the ordinary reasonable man's conduct, the judges did not need to know the patterns or mores themselves in any detail; they did not need to risk adopting as the law of England a pattern prevalent only in one geographical area; and they did not run the risk of stating the pattern of expected conduct too broadly in a formal rule that might include other situations governed by different expectations based on different social rules.[156]

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[156] In Vaughan v. Menlove, 3 Bing. 468, 132 Eng. Rep. 490 (N.C. 1837), the attorneys for the defendant argued at the Court of Common Pleas that "[t]he measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence." *Id.* at 472, 132 Eng. Rep. at 492. To reinforce their argument for a subjective determination of negligence, they cited to an action in assumpsit for the endorsement of a bill. Although the jury was instructed to find for the defendant if the plaintiff had been guilty of gross negligence in accepting the bill, the court found this to be the correct standard to measure the conduct of the plaintiff under the circumstances of the case. Crook v. Jadis, 5 B. & Ad. 909, 910, 110 Eng. Rep. 1028 (K.B. 1834).

The defense attorneys in *Vaughan* referred specifically to the dicta by two of the judges in the *Crook* opinion as to the standard of care of a prudent man. (Taunton, J., 5 B. & Ad. at 910, 110 Eng. Rep. at 1028 (K.B. 1834), "I cannot estimate the degree of care which a prudent man should take."); Patteson, J., 5 B. & Ad. at 910, 110 Eng. Rep. at 1028 (1834).

The no-excuses hypothesis seems consistent with the ordinary reasonable man standard as well, for that standard, embodying the community's general standard of conduct, leaves out of consideration the defendant's personal moral blameworthiness and potential excuses. Thus, in the famous case of *Vaughan v. Menlove*[157] in 1837, Chief Justice Tindal rejected the defendant's claim that the standard of conduct should be whether defendant acted bona fide to the best of his judgment.

> That would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various .... Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.[158]

This explicit rejection of a personal moral blameworthiness standard is consistent with the rejection of individual excuses in the intentional tort of battery. The formulation of the standard in terms of the conduct of the ordinary, reasonable man forecloses personal excuses. Chief Justice Tindal's reasoning in *Vaughan* shows that the formulation was clearly meant to do so. As we saw in our analysis of battery, this "no-excuses" principle makes sense if the practical point of tort liability is to redress private wrongs, defined by reference to legitimate expectations about the conduct of others in a community, based on accepted community patterns of coordination.

3. The Duty of Care

Prichard[159] identifies the early common carrier cases of *Ansell v. Waterhouse*[160] in 1817 and *Bretherton v. Wood*[161] in 1821, as the key cases in developing the general duty of care pleading. In both those cases, the judges seemed to understand the pleaded general duty as equivalent to a pleaded custom of the realm. Lord Ellenborough in *Ansell* characterized the general duty pleading there as "tantamount" to pleading custom of the realm.[162] All the courts in the Exchequer Chamber accepted this reasoning in *Bretherton*, where Chief Justice Dallas argued that "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey

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[157] 3 Bing. 468, 132 Eng. Rep. 490 (N.C. 1837).
[158] *Id.* at 475, 132 Eng. Rep. at 493.
[159] *See* M. PRICHARD, SCOTT V. SHEPHERD (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE 28 (1976).
[160] 6 M. & S. 385, 105 All E.R. 1286 (1817).
[161] 3 Brod. & Bing. 54, 129 All E.R. 1203 (1821).
[162] 6 M. & S. at 388-90, 105 Eng. Rep. at 1288.

their goods or passengers safely and securely. . . ."[163] In the earliest duty of care cases, then, the judges recognized the general duty allegation as a way of declaring on the custom of the realm without pleading the specific custom.

Pleading a general duty was obviously safer for the plaintiff's attorney than attempting at his client's peril to plead the proper specific custom of the realm. Given its attraction for plaintiff's attorneys, it is not surprising that the general duty allegation spread rapidly from the common carrier cases to other negligence cases in the early nineteenth century. The judges who authorized this rapid spread may have seen a related advantage for the legal system as a whole, for the general duty of care allegation helped resolve a practical pleading problem in the common law. It did so in the following way. The general duty allegation provided a broad umbrella category under which all sorts of specific facts could be pleaded. Recognition of this broad category avoided the multiple categories that would have developed if customs of the realm had to be pleaded specifically under the new procedural conditions that encouraged accurate fact pleading. With this broad umbrella category, the courts avoided getting bogged down in the minutiae of specifically pleaded customs, with the attendant risk of transferring from the jury to the courts the responsibility for determining the standard of behavior. The general duty pleading, then, like the ordinary reasonable man standard, helped maintain the jury's historic role in determining whether defendant's conduct was wrongful.

This historical analysis raises an important question. If the courts used the general duty of care pleading to solve technical pleading problems that arose at a particular stage in the development of the common law, how can we find any lasting theoretical significance in the "duty of care" concept? This question mirrors the questions that modern critics have raised about the significance of the general duty of care in modern negligence law. Two different arguments have been forwarded. Some cities, following Leon Green,[164] have argued that the duty of care terminology is an empty formula judges use to conceal a simple *ipse dixit*:[165] "There is a legal duty here because the judges say there is." They concluded that it is unrealistic to expect the notion of duty to be of any help in analyzing or deciding cases, as the key instead must be the policy leading the court to declare a "duty." Second, Percy Winfield has argued[166] that the duty question raises issues that are adequately dealt with already under the breach of duty rubric. Under both the duty and breach of duty headings, Winfield argued, the courts take into account what the ordinary, reasonable person would do under the same or similar circumstances. It makes little sense to consider the same question twice, and any other issues

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[163] 3 Brod. & Bing. at 62-63, 129 Eng. Rep. at 1206.

[164] L. GREEN, RATIONALE OF PROXIMATE CAUSE 12-13, 66-71 (1927); L. GREEN, JUDGE AND JURY, 57-77 (1930).

[165] *See* W. PROSSER, *supra* note 30, at 324-26.

[166] Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934).

imported into the duty question can more fruitfully be considered under the headings of "sufficiency of evidence for the jury, contributory negligence, remoteness of damages, inevitable accident, *volenti non fit injuria*."[167] Since "duty" adds nothing that is not better analyzed elsewhere, Winfield concluded that "duty" in negligence cases was a superfluous, empty concept.[168]

The answer to the *ipse dixit* critics is simple. The argument that "duty" is a judicial fiat concealing underlying policy judgments comes naturally to modern tort theorists, for it embodies the prevailing view that duties are positive legal duties imposed by legislators or judges based on their views of desirable social policy.[169] This modern view, however, ignores an earlier understanding of the appropriate bases for judicial decision — the understanding prevalent at the time the general duty of care pleading first appeared. Under that view, judges were to look to the preexisting customs and mores of the community to resolve disputes. The custom of the realm, they thought, was the common law.[170] This understanding guided the judges who first adopted the general duty of care pleading, for they recognized the historical continuity between the older custom of the realm pleading and this new duty of care pleading. From this, one may conclude that the early duty of care pleading was understood as a method of referring in a general way to the specific preexisting customs, conven-

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[167] *Id.* at 64.

[168] *Id.* at 58-66. *But see* the counterarguments in M. PRICHARD, *supra* note 41, at 30-33.

[169] *See, e.g.*, W. PROSSER, *supra* note 30, § 53 at 325-26. *Cf.* L. GREEN, *supra* note 163.

[170] Beaulieu v. Ginglam, Y.B. 2 Hen. 4, f. 18, pl. 6 (1401); *reprinted in* C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW, TORT AND CONTRACT 166 (1949) ("To which TOTA CURIA said: Answer over; for the common custom of the realm is the common law of the realm." *Id.*, C. FIFOOT at 166).

> The practice of declaring against common carriers on the custom of the realm is as ancient as the law itself, and was uniformly adopted until somewhere about the time of Dale v. Hall. Since then it has been usual not to declare in this form, but in contract; yet the modern use does not supersede, although it has supplanted the former practice . . . . This, then, being in substance an action founded on the custom of the realm in tort, . . . against all or any of the parties liable.

Ansell v. Waterhouse, 6 M. & S. 385, 389-90, 105 Eng. Rep. 1286, 1288 (K.B. 1817) (Lord Ellenborough, C.J.)

> This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.

Bretherton v. Wood, 3 Brod. & Bing. 54, 62, 129 Eng. Rep. 1203, 1206 (Ex. Ch. 1821) (Dallas, C.J.). *See generally* I. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Introduction, § 3 at 67-79 (9th ed. 1783).

tions, and coordinating practices of the community.[171] Understood in that way, the duty terminology is not an empty formula. If tort liability is imposed to redress a private wrong, defined by reference to the practical coordination norms of the community, it seems only natural to characterize that wrong as breach of a duty owed by defendant to plaintiff. You wrong someone when you fail to give him what is "due" him, that is, when you fail to fulfill your "duty" to him. There is no circularity or judicial *ipse dixit* here, because the courts reason from pre-judicial community-defined obligations, based on the accepted coordination norms of the community, to a conclusion about legally redressing a wrong understood as a breach of that community-defined obligation. The early judicial understanding of the general duty of care pleading thus seems to support the theory of tort liability developed by analyzing battery as the focal case. Negligence liability, like battery, seems to redress a wrong defined as an injurious breach of a specific coordinating norm accepted by the community.

But if that is true, isn't Winfield right that the duty question is theoretically indistinguishable from the question of whether the defendant was negligent—whether he breached the relevant custom or social norm? And isn't the latter question fully and adequately answered by asking the jury whether the defendant acted as an ordinary reasonable person under the circumstances?

These questions require us to look more closely at convention-defined duties. In determining whether the defendant failed to act as an ordinary reasonable man, the jury uses its collective understanding of the community's social customs and coordinating norms. In effect, the negligence question asks the jury to decide whether defendant breached a commu-

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[171] Ansell v. Waterhouse, 6 M. & S. 385, 391-93, 105 Eng. Rep. 1286, 1289-90 (K.B. 1817). ("In the present case, however, the duty, as it seems to me, attaches entirely on the defendant, from the general obligation cast on him by the law as a common carrier .... And it is clear, that a common carrier may be charged ex delicto."). *Id.* at 392, 105 Eng. Rep. at 1289 (Abbott, J.).

> This action is found on that which is collateral to contract; for the terms of contract with a common carrier, provided they do not vary his general responsibility, are quite immaterial .... Now, according to the ancient law, a common carrier is, in the nature of a public officer, bound to the discharge of a general duty; and any person who undertakes it is answerable as such. So innkeepers are considered in the same light.... It seems to me, therefore, that although the law will raise a contract with a common carrier to be answerable for the careful conveyance of his passenger, nevertheless he may be charged in an action upon the case for a breach of his duty; and that the declaration in question is not formed upon the implied contract, but on the general obligation of law arising from the defendant's duty as a common carrier.

Id. at 392-94, 105 Eng. Rep. 1289-90 (Holroy, J.).

Bretherton v. Wood, 3 Brod. & Bing. 54, 64, 129 Eng. Rep. 1203, 1207 (Ex. D. (1821) (Dallas, C.J.) ("In the present case, a duty was imposed on the defendants which did not arise by the contract, but by the custom or common law of England.").

See also Readhead v. Midland Railway Co., 2 L.R.Q.B. 412, 421 (1867), *aff'd*, 4 L.R.Q.B. 379, 382 [1861-73] All E.R. 30-33 (1869) (Montague Smith, J.).

nity's custom or norm. That norm or custom, however, may not impose a duty to all the world, for it may have developed only to protect people in a certain kind of relationship with the persons subject to the norm or custom. A farrier, for instance, who undertakes to shoe a horse, may well owe a duty only to the horse's owner. In a social system that includes a great many coordinating norms guiding all aspects of human behavior, we may recognize that one may owe certain conduct to people in particular relationships, but not to everyone, whatever their relationship. In that system, then, it makes sense to separate questions of duty from questions of breach of duty, for breach of a limited-purpose social norm may not wrong every person injured by it.

The duty notion thus had the potential to focus attention on the underlying specific social rule and the scope of the particular "duties" it imposes. For the most part, however, the courts in the middle to the late nineteenth century did not use the duty concept in that way. The reason for this is understandable. The generalized duty of care allegation was originally just a way of pleading on the custom of the realm without pleading the specific custom. This method of pleading solved an important practical problem of pleading in the common law. The solution carried on the common law tradition of technical *pleading* solutions to technical pleading problems, replacing one formulaic pleading system with another, simpler one. But the new system still relied on a formula: the general duty of care. The common law, however, was moving rapidly away from a systematic law of pleadings toward a systematic substantive law. The more accurate factual pleadings,[172] plus the continued stream of adjudicated facts returning to the courts at Westminster, together with the more theoretical, less technical conception of the law promoted by Blackstone and his progeny,[173] continued to press for a substantive common law to replace the older common law of pleading. The general duty of care was the courts' brilliant solution to a technical pleading problem. Both the problem and its solution were squarely within the older common law tradition of the law as a law of pleading. What was a brilliant solution to a technical problem in the law of pleading, however, became a stumbling block in the emerging common law, for the general duty of care provided an unstable base for developing the *substantive* law of negligence.

The problem was this. The general pleaded duty of care was all that was formally embodied in the law. One could easily lose the understanding that this was a technical device to refer to the specific custom of the realm at stake in the particular case. The words of general duty tended to lure judges and lawyers into thinking of general duties as real things in themselves, and not as just pleaded markers for specific duties. The courts, starting with *Winterbottom v. Wright*,[174] used the assumption that

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[172] *See generally* MILSOM, *supra* note 29, at 73-81.

[173] *See* S.F.C. MILSOM, *The Nature of Blackstone's Achievement*, in STUDIES IN THE HISTORY OF THE COMMON LAW 197-208 (1985); A.W.B. Simpson, *The Rise and Fall of the Legal Treatise*. 48 U. CHI. L. REV. 632, 651-668 (1981).

[174] 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

duties in tort cases had to be general duties, owed to all the world, to argue against liability in cases where plaintiff's claim was based on a limited-purpose social rule. The courts' rigid assumption that tort duties must be general obligations owed to all the world thus diverted attention away from the important question posed by claims based on limited-purpose social rules: "What general criteria can we use to determine who is wronged by breach of a limited-purpose social rule?"

The courts faced this question directly only in the area of statutory negligence, where they had to decide when, and under what circumstances, breach of a criminal statute causing harm to plaintiff would be deemed actionable negligence. In statutory negligence cases, the courts could not escape the specific rule-specific duty issue, for in those cases they were forced to decide whether a particular statutory rule imposed a duty cognizable in a negligence action. We should examine carefully the development of statutory negligence law, then, for clues to the potential scope of a particularized duty concept in common law negligence.

Once negligence came to be understood as the breach of a general duty, the question naturally arose whether breach of a legal duty imposed by statute is always negligence. The answer the courts gave was "no, not always," but they went through a number of different reasons for this answer before they finally settled on the current explanation. The English courts in the earliest statutory negligence cases in the mid-nineteenth century asked the question whether the legislature intended to provide or allow a private cause of action in addition to the statutory remedy.[175] If they determined that the legislature did not intend to allow or provide a private cause of action, but intended the statutory remedy to be exclusive, they rejected the plaintiff's statutory negligence claim.[176] Later, the courts focused on the protective purpose of the statute. Who did the legislature intend to benefit or protect, they asked, and what did they intend to protect against? If the statute was only intended to protect the public good in general, and not any particular group or class of people, plaintiff could not recover for harm caused by breach of the statute.[177] The courts

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[175] *See* Couch v. Steel, 3 El. & Bl. 402 (Q.B.); 23 L.J.Q.B. 121 (1854).

[176] *See* Stevens v. Jeacocke, 11 Q.B. 731, 116 Eng. Rep. 647 (1848); Vallance v. Falle, 13 Q.B.D. 109 (1884).

A. UNDERHILL, PRINCIPLES OF THE LAW OF TORTS; OR, WRONGS INDEPENDENT OF CONTRACT 18-20 (1st Am. ed., from the 2d Eng. ed. 1881).

> Statutory Rights and Duties. Rule 5. When a statute gives a right, or creates a duty, in favor of an individual or class of individuals, then unless it enforces the duty by a penalty recoverable by the *party aggrieved* (as distinguished from a common informer), any infringement from such right, or breach of such duty, will, if coupled with damage, be a tort remediable in the ordinary way.

Id. at 18 (emphasis in orginal).

"Statutory Remedy. Sub-rule 1. But where the statute creating a new duty, or obligation, provides a mode of obtaining compensation for private special damage by means of a penalty recoverable by the party aggrieved, there is not other remedy—as the remedy is then prescribed by the act . . . ." *Id.* at 20.

[177] Atkinson v. Newcastle & Gateshead Waterworks Co., 6 L.R.-Ex. 404 (1871), *rev'd*, 2 Ex.D. 441 (1877); The Guardians of Holborn Union v. Vestry of St. Leonard, Shoreditch, 2 Q.B.D. 145 (1876).

thus looked to the legislative purpose behind the statutorily imposed rule,[178] but they formulated the ultimate conclusion of this analysis in terms of duty. The statutory duty, they said, was owed only to those intended to be protected against the kind of harm the statute was intended to protect against.[179] This is now familiar to lawyers and law students as the dual "hazard-class" test. If the statutory rule was intended to protect the class of people to which plaintiff belongs from the particular hazard that eventuated in harm to the plaintiff, then plaintiff may recover for breach of the statute; otherwise, not.[180]

The classic case on the "hazard" portion of the test is *Gorris v. Scott*.[181] An order of the Privy Council, authorized by statute, required that sheep on ships be kept in separate pens. The court held that the statutory purpose was to protect against spread of disease, not to prevent the sheep from being washed overboard. Plaintiff, whose unpenned sheep were washed overboard in a storm, could therefore not recover. An illustrative case on the "class protected" portion of the test is *Kelly v. Henry Muhs Co.*[182] A fireman fell down an unguarded elevator shaft in defendant's factory. The court held that the fireman fell outside the class of those to be protected by a Factories Act requirement that all factory elevators be protected by trap doors or guardrails. According to the court, the statute was intended to protect factory workers only. The injured fireman could therefore not use defendant's breach of the Factories Act to establish defendant's negligence.

The "hazard-class" test in statutory negligence cases may ultimately tell us more about the duty of care in negligence cases, but initially the theoretical conclusions suggested by the test are essentially negative,

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[178] J. SALMOND, THE LAW OF TORTS § 660 (5th ed. 1920).

> The breach of a duty created by statute, if it results in damage to an individual, is prima facie a tort, for which an action for damages will lie at his suit. The question, however, is in every case one as to the intention of the Legislature in creating the duty, and no action for damages will lie if, on the true construction of the statute the intention is that some other remedy, civil or criminal, shall be the only one available.

Id. at 562-63.

> Notwithstanding the general rule, however, there are many cases in which no action for damages will lie in respect of injuries caused by the breach of statutory duty. For there is no such remedy unless the Legislature, in creating the duty, intended that it should be enforceable in this way . . . .

Id. at 564.

[179] *See, e.g.*, Gorris v. Scott, [1874] 9 L.R-Ex. 125 (1874); Kelly v. The Glebe Refining Co., 20 R. 833 (Scot. 1st Div. 1893); Groves v. Wimborne, 2 L.R.Q.B. 402 (Ct. App. 1898). *See generally* J. SALMOND, *supra* note 175, § 160 at 562-68. S. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS § 12 (2d ed. 1901). F. POLLOCK, *supra* note 49, at 23-24. T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARE INDEPENDENT OF CONTRACT 654-58 (1879). A. UNDERHILL, *supra* note 175, at 20.

[180] *See, e.g.*, W. PROSSER, *supra* note 30 at § 36, 192-97; 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS 599-648 (2d ed. 1986).

[181] 9 L.R.-Exch. 125 (1874).

[182] 71 N.J.L. 358, 59 A. 23 (1904).

ruling out or questioning certain hypotheses about the duty of care. In developing the "hazard-class" test in statutory negligence cases, for example, the courts must have rejected any simple equation of the duty of care in negligence cases with positive legal obligation,[183] for that equation would require a finding of duty in every statutory violation case. Moreover, the "hazard-class" test cannot be explained as an attempt to discern whether the legislature intended to impose civil liability for breach of the statutory rule, for the test focuses on the protective purposes of the rule, not on the intent or presumed intent of the legislature to impose civil liability for violation of that rule. Finally, since it focuses on the purpose of the legislative rule, not on the foreseeable risk of harm from violation of that rule,[184] the "hazard-class" test is difficult to reconcile with modern negligence theories that describe negligence as conduct posing an unreasonable foreseeable risk of harm to others.

The negative conclusions one could draw from the "hazard-class" test in statutory negligence law could be weakened if the test is an aberration, or of limited theoretical significance. But nothing could be further from the truth. Careful analysis of the relationship between the duty terminology in negligence cases and the basic purposes of tort liability suggests that the "hazard-class" test in statutory negligence cases is paradigmatic.

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[183] Groves v. Wimborne, 2 L.R.Q.B. 402 (1898).

> [I]t cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.... But again, the fact that the Legislature has provided that that remedy shall enure, or under some circumstances shall enure, for the benefit of the person injured, is not conclusive of the question (as to whether such remedy is exclusive of an action at law), and, although it may be a cogent and weighty consideration, other matters also have to be considered. In such a case ..., look at the general scope of the Act and the nature of the statutory duty; and in addition one must look at the nature of the injuries likely to arise from a breach of that duty, the amount of the penalty imposed for a breach of it, and the kind of person upon whom it is imposed, before one can come to a proper conclusion as to whether the Legislature intended the statutory remedy to be the only remedy for breach of the statutory duty.

Id. at 415-16, (1895-99) (Vaughan Williams, L.J.).

[184] *Cf.* Coe v. Platt, 6 Ex. 752, 155 Eng. Rep. 748, (1851) (Parke, B.).

> Though its main object may have been to afford security to children and young persons, who are more likely to sustain injury than others; yet there is a positive enactment that, in all factories within the interpretation clause, when any part of the machinery is used for any manufacturing process, it shall be securely fenced; consequently, if any person sustains an injury through the violation of this enactment, he has a right to bring an action. That duty is clearly imposed on the owner, although the motive of the legislature was the protection of chidren and young persons employed in these factories; and if it should happen that a factory of this sort was without children or young persons employed in it ..., still the same obligation is imposed by the statute.

Id. at 757, 155 Eng. Rep. at 750-51 (Parke, B.).

It provides a key to understanding the relationship between community standards of conduct and the individual, private wrongs redressible by tort liability.

The "hazard-class" test, at bottom, focuses on the legitimate expectations of those intended to be protected by the statute in a system of reciprocally coordinated behavior. This was explained succinctly by the Minnesota Supreme Court in the 1885 case of *Bott v. Pratt.*[185] A city ordinance prohibited anyone having charge of a team of horses in the street attached to a vehicle from leaving them unhitched or unheld. Defendants left a team of horses in the street attached to a wagon, unhitched and unattended. The horses started, ran through the streets, and collided with the plaintiff's wagon, injuring the plaintiff. The court asked whether the ordinance imposed a duty for the benefit of the public generally or a duty to a particular class. It concluded that the ordinance imposed a duty on defendant toward plaintiff because the ordinance was intended to protect those like him. The court explained: "The city ordinance under consideration was undoubtedly intended for the benefit of persons traveling on the streets, and *all such persons while so traveling would have the right to expect the ordinance to be observed and to govern themselves accordingly*."[186] The court thus assumed that those intended to be protected by the ordinance have a right to rely on others' compliance with the ordinance.

Further analysis of the relation between social convention and individual wrongs may make clearer the assumption underlying the *Bott* opinion. A breach of a convention may not be a wrong to a person injured by the breach. Take, for example, the following case. Before the days of automatic flashing warning lights, a railroad company runs one and only one train a day through a crossing. The train enters the crossing every day at exactly 1:00 p.m. and clears the crossing by 1:15 p.m.. This goes on every day for several years. The railroad discontinues this practice, without any warning that it has done so. A local resident familiar with the practice and relying on it crosses the tracks at 3:00 p.m., when she is hit by a late train. The railroad company's failure to follow its customary practice is not a wrong to the injured motorist,[187] for we would not say that the railroad company owed it to her to continue following the practice.

What more must be added to regularity of conduct to give rise to a claim that the conduct is owed to a particular person? The statutory negligence cases provide a clue. Patterns of conduct or community standards of behavior are developed so that certain goods can be achieved by some, or certain evils can be avoided by others, if everyone follows the practice. Those engaged in the practice pretty well understand what those

[185] 33 Minn. 323, 23 N.W. 237 (1885).

[186] *Id.* at 327, 23 N.W. at 239 (emphasis added).

[187] *See* Truelove v. Durham & S. Ry. Co., 222 N.C. 704, 24 S.E.2d 537 (1943). *Cf.* Cline v. McAdoo, 85 W. Va. 524, 1025 S.E. 218 (1920).

purposes are. For the practice to give rise to a claim, therefore, one must be within the class of those whose interests the practice was developed to protect, and the hazard resulting in harm must be that which the practice was developed to protect against.

A variation on the late-train example makes this clear. Before the days of automatic flashing warning lights, a railroad company posts a flagman at a busy crossing to warn of approaching trains. This goes on every day for several years. The railroad discontinues the practice, without any warning that it has done so. A local resident familiar with the practice, relying on the absence of a warning from the flagman, crosses the tracks and is hit by a train. The railroad company's failure to follow its customary practice wronged the injured motorist,[188] for we would say that the railroad company owed it to him to continue following the practice or to give adequate notice of its discontinuance. The only difference between this example and the late-train example, where there was no wrong, is the purpose of the practice. In the second example, but not in the first, the railroad's customary practice was for the purpose of protecting motorists like plaintiff from collisions at the crossing.

One could, of course, argue that the motorist's reliance on the railroad's customary practice was "reasonable" in the second example and "not reasonable" in the first. But what is the basis for those conclusions? In each case, the motorist's prediction of the railroad's future conduct is based on an unfailing past pattern of conduct. Based on probabilities alone, therefore, the actions of the two motorists were equally reasonable. The reason we would say that the second motorist's reliance is reasonable and the first motorist's is not can be stated in several different ways. The second motorist had a *right* to rely on the practice and the first did not; the second motorist had a legitimate claim against the railroad to continue the practice, and the first did not, so the second motorist's reliance was *justified*. However we state the difference, it is clear that our different characterizations of the two motorists' reliance depend ultimately on the difference between the purposes of the two practices.[189]

That makes sense. If Alice is harmed because Joe breached a convention intended to protect the class of people to which Alice belongs, Joe has wronged Alice because he has rejected her standing claim against other members of the community to respect her pursuit of the good for her. That general standing claim becomes concrete in a number of specific claims to conduct conforming to conventions intended to protect Alice and others like her under certain circumstances. A necessary condition for translating the standing general claim into a specific claim is a convention or practice intended to protect Alice's class from certain hazards.

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[188] *See* Erie R.R. Co. v. Stewart, 40 F.2d 855 (6th Cir. 1930), *cert. denied*, 282 U.S. 843 (1930).

[189] *Cf.* Truelove v. Durham & S. Ry. Co., 222 N.C. 704, 245 S.E.2d 537 (1943) (no breach of duty owed to plaintiff).

Only their expectations give rise to claims of wrong when frustrated. The "hazard-class" test, developed to determine when breach of a statutorily-prescribed convention is also a private wrong to plaintiff, can thus be expanded. We can use the "hazard-class" test to determine when breach of any conventional rule or practice is a private wrong to plaintiff.

4. Conclusion: The Underlying Unity of Battery and Negligence

Our analysis of the two most important elements in early negligence law supports a descriptive theory that sees negligence as a breach of a particular social convention. Both the ordinary reasonable man standard, applied by the jury, and the general duty of care are best explained by that theory.

The jury is a representative cross-section of the community. Asking a jury what an ordinary reasonable man would have done, then, seems aimed at discovering whether the defendant breached an accepted community norm. The "no excuses" principle we saw in the law of battery seems to carry over into the law of negligence, too. The ordinary reasonable man standard of conduct, divorced from the peculiarities and limitations of the particular defendant, was clearly intended to reject proffered excuses.

The general duty of care pleading was originally understood as a way of pleading on the custom of the realm without specifying the custom. That supports the conclusion that the wrong redressible in a negligence action is breach of a specific coordinating convention.

Moreover, the duty language seems peculiarly apt to focus on the characteristics of the particular preexisting social rule to determine whether a harmful breach of that rule was a wrong to the plaintiff. The general duty formula distracted the courts from that kind of analysis, however, except in the area of statutory negligence, where the courts necessarily had to grapple with the "duties" imposed by a specific social rule. The courts there looked to the purpose of the rule, and determined that breach of a statute wronged plaintiff only if the statute was intended to protect people like plaintiff from the hazard that caused plaintiff harm. We saw that this analysis could be extended to all social conventions. If the purpose of the social rule is to protect people like plaintiff from hazards like this one, the rule should be said to impose a duty to the plaintiff.

This understanding of early negligence law thus tracks with our explanation of battery. The purpose of early negligence law, like that of battery, was to redress a private injustice, defined by reference to the accepted conventions and coordinating norms of the community. Defendant wrongs plaintiff when he breaches a social coordinating norm, intended to protect plaintiff from that kind of harm, which plaintiff relied on in coordinating his conduct with that of defendant. The law adopts a wholly objective, socially-defined standard that seems to reject all proffered excuses.

We should not be surprised to find this underlying unity of purpose and of liability standards, for the torts of intentional battery and negligent infliction of personal injury both grew out of the predecessor torts of trespass and trespass on the case. The formal distinction between intent and negligence explains the different formal structures of the two causes of action, but a theoretical analysis shows their underlying unity. In battery, the defendant is liable because she intentionally caused a harmful or offensive touching of defendant in breach of a social convention intended to protect plaintiff from such invasion. In negligence, the defendant is liable because he breached a social coordinating norm intended to protect plaintiff from the kind of hazard the breach occasioned. The practical reasoning justifications for redressing the wrongs defined by the battery cause of action thus seem to apply as well to the early negligence cause of action.

There seems to be, then, a common structure to the claims of wrong redressible by the early negligence cause of action and the claims of wrong redressible by the modern intentional battery cause of action. First, there must be a social convention or coordinating norm intended to protect people like plaintiff from a particular hazard. Second, plaintiff coordinated her conduct with that of defendant on the assumption that defendant would follow the social convention; plaintiff relied on the norm and expected defendant to follow it. Third, defendant failed to follow that social norm. Fourth, defendant's breach of the social norm subjected plaintiff to the hazard the norm was intended to protect plaintiff from and thereby caused her harm.

In early negligence law, both the duty of care pleading and the ordinary reasonable man standard were formulated in general terms. These general formulations avoided the potential problem of "legalizing" a multitude of specific community conventions. The general duty language and the general standard of conduct also protected the jury's traditional function in making the ultimate judgments about claims of private wrong. Early negligence law can thus be seen as a brilliant attempt to retain customary or conventional norms as the basis for tort judgments without transferring from the community to the judges the authority to define and change those norms. The system relied heavily on what we might call "covering generalities" to refer to, but not to specify, the conventional norms. The system also used a procedure that left the ultimate judgment to the community-representing jury.

It remains to be seen whether other important negligence doctrines fit into this explanation. Can other general concepts in traditional negligence law be understood as covering generalities too? What about proximate cause and contributory negligence? Do they, too, refer to different aspects of the unspecified but underlying conventional norms? We will explore that question in the next section.

C. Other General Concepts in Traditional Negligence Law: Contributory Negligence and Proximate Cause

1. Contributory Negligence

Contributory negligence is the failure of the plaintiff to act as an ordinary reasonable man would have acted to avoid danger to himself, when that failure contributes to cause that harm concurrently with the defendant's negligence.[190] Under traditional negligence law, contributory negligence was a complete defense to plaintiff's claim.

The utilitarian theorists explained the contributory negligence defense in deterrence terms: the contributory negligence rule deterred people from engaging in conduct posing foreseeable dangers to themselves.[191] The defense, understood and applied as a deterrent, has been attacked as unrealistic and excessively harsh.[192] An analysis of the early development

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[190] *See* W. PROSSER, *supra* note 30, at § 65.

[191] The original utilitarian deterrence theorists explained the contributory negligence defense in a chillingly simple way: since the purpose of tort law is to prevent harm by deterring dangerous behavior, the contributory negligence rule was justified as a means of deterring plaintiff from engaging in conduct posing foreseeable dangers to himself. *See* Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 270 (1890); *cf.* C.F. BEACH, A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE 9, 11-13 (1885). From the standpoint of tort law's deterrent purpose, then, the negligent defendant and the contributorily negligent plaintiff were equally "at fault," because the conduct of each threatened foreseeable harm, even though the ultimate harm threatened by plaintiff's conduct was to no one but himself.

[192] The deterrence rationale for contributory negligence was undercut from two directions. First, common sense kept intervening to suggest that in the circumstances posited by the utilitarian view, defendant has wronged plaintiff, but plaintiff has wronged no one. Only the most rigidly ideological utilitarian can maintain that the plaintiff's conduct was just as bad as the defendant's, or that they were even comparable. Second, the deterrence rationale itself was called into question. It was argued that, in order for the contributory negligence rule to have any deterrent effect on plaintiff's conduct, plaintiff would have to foresee the risk of harm to himself from his conduct and his subsequent inability to recover damages from defendant for that harm. But since one must foresee the risk of injury before one can foresee the inability to recover for injury, the legal inability to recover damages would seem to add little additional deterrent. The foreseen threat of actual physical harm should be sufficient deterrence. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.2, at 1203-06 (1956); W. PROSSER, *supra* note 30, at 433.

Under straight or modified deterrence theories, then, contributory negligence became *defensio non grata*. Under a straight deterrence theory, the possible defense of contributory negligence reduced the threat of liability for defendant's negligence, and hence reduced the deterrent effect of primary negligence liability. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 681-83 (1934). In more sophisticated optimal cost avoider theories, the contributory negligence defense was unwelcome because it haphazardly interfered with the allocation of accident costs to the optimal cost avoider. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.2, at 1205 (1956). And, of course, under modern utilitarian theories based not on

of contributory negligence before the utilitarian redescription, however, may serve to rehabilitate the much-maligned defense by showing its real point, which had little to do with deterrence.

One of the first cases in the development of the contributory negligence defense was *Proctor v. Harris*,[193] an 1830 nisi prius case decided by a jury upon instructions by Chief Justice Tindal of the Court of Common Pleas. In that case, a pub-keeper had opened the flap door in the sidewalk over his cellar to let in a butt of beer, at night, with only the street lamps to light the opening. Plaintiff, a pedestrian, fell in and was injured. In instructing the jury, Chief Justice Tindal said:

> The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along these footpaths with ordinary security.[194]

Chief Justice Tindal's formulation captures an important feature of most community patterns of coordination—their reciprocity. We act in certain ways to coordinate our conduct with that of others based on what we expect them to do. They, in turn, act based on what they expect us to do. Ordinarily, then, if we act in a way that would not cause harm to others acting as we can expect them to act, we have acted properly. The contributory negligence formula in *Proctor* focused the jury's attention generally on the reciprocal expectations that had to be taken into account in determining whether the pub-keeper wronged the pedestrian. The jury would have to apply that general formula to the reciprocal expectations associated with the accepted patterns of conduct in that community.

Although we are handicapped by the passage of years, which prohibits direct access to the customs of that historical community, we can reconstruct a plausible basis for the jury's verdict for plaintiff in *Proctor*. The streets are lit by street lamps. Pedestrians walk about at night on the sidewalks without carrying their own lamps to light the way. The pub-owner ought to realize this. If, in the available light provided by the street lamp, his dark opening through the flap door in the sidewalk could be mistaken by a pedestrian for the sidewalk itself, he should take precau-

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deterrence but on maximizing utility by spreading the cost of accidents through the optimum insurer, the contributory negligence defense is anathema as well, for it necessarily impairs the desired allocation of costs to insured defendants. G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). It is not surprising, then, that contributory negligence has been the focus of a number of reform movements, culminating in the current rage for comparative negligence. *See* C.R. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 3.50 (1978); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.1 at 3 (1986) ("The march of comparative negligence is now a stampede."); H. WOODS, COMPARATIVE FAULT § 1.11 (1978).

[193] 4 C. & P. 337, 172 Eng. Rep. 729 (N.P. 1830).

[194] *Id.* at 337, 172 Eng. Rep. at 730.

tions to prevent injury, by lighting the hold, placing warning lamps or barricades around the hold, or stationing a servant on the sidewalk to warn pedestrians. The pedestrians, on the other hand, can expect to be warned in some way of dangers in the sidewalks not apparent in the available light to a pedestrian keeping a normal lookout. The contributory negligence question, then, reduces to the question of whether, under the available light, a pedestrian keeping a normal lookout would have seen the opening in the sidewalk. And that question is really just another way of asking whether defendant acted properly under the circumstances, since he would have to take special precaution to warn pedestrians of the hole only if it could not be easily seen under the available light by a pedestrian keeping a normal lookout.

A finding of "contributory negligence" could be seen as one way of finding that defendant did not wrong the plaintiff in the first place, given the reciprocal expectations about other's conduct derived from the generally established patterns of coordination in that community.[195] This understanding of the contributory negligence doctrine is consistent with the fact that even after the 1834 Hilary Rules required parties to specially plead many particular defences in trespass on the case for negligence,[196] contributory negligence could still be raised simply by pleading the general issue—not guilty.[197] This suggests that the judges understood that contributory negligence went to the basic question of whether defendant's conduct wronged plaintiff.

This understanding of contributory negligence is consistent with *Butterfield v. Forester*,[198] an 1809 case thought to be the granddaddy of modern

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[195] *See also* Drew v. The New River Co., 6 C. & P. 754, 172 Eng. Rep. 1449 (N.P. 1834) (another *nisi prius* case by Tindal).

[196] *See, e.g.*, Frankum v. Earl of Falmouth, 6 C. & P. 529, 172 Eng. Rep. 1350 (N.P. 1834) (In an action for the wrongful diversion of water from a stream, the defendant must specially plead the question of whether he had the right to divert the water, thereby negating the wrongfulness.); Taverner v. Little, 5 Bing. (N.C.) 678, 132 Eng. Rep. 1261 (C.P. 1839) (in an action for negligently driving a cart into plaintiff, stating the cart was owned and operated by the defendant, any information to establish ownership or operation in another would have to be specially pleaded); Hart v. Crowley, 12 A. & E. 378, 113 Eng. Rep. 856 (K.B. 1840) (same as *Taverner*); Webb v. Page, 6 Man. & G. 196, 134 Eng. Rep. 863 (C.P. 1843) (In an action against a common carrier, information to show that the plaintiff had helped load goods and thereby assumed a duty to load them safely had to be brought under a special plea.).

[197] Where there is a contention of contributory negligence on the part of the plaintiff, the defendant must bring that forth under the general issue. It could not be answered specially. If it was brought under a special plea, it would be judged bad, and the action discharged. Later, the courts would allow the plea to be amended or repleaded and then retried.

See, e.g., Bridge v. Grand Junction Ry. Co., 3 M. & W. 244, 150 Eng. Rep. 1134 (Ex. 1838); Webb v. Page, 6 Man. & G. 196, 134 Eng. Rep. 863 (C.P. 1843); Holden v. Liverpool New Gas & Coke Co., 3 C.B. 1, 136 Eng. Rep. 1 (C.P. 1846); Dakin v. Brown, 8 C.B. 92, 137 Eng. Rep. 443 (C.P. 1849); Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (C.P. 1849); Dimes v. Petley, 15 Q.B. 276, 117 Eng. Rep. 462 (Q.B. 1850).

[198] 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

contributory negligence law. In that case, defendant placed a pole across a city street while making repairs to his nearby house. The plaintiff rode his horse full tilt into the pole after leaving a nearby pub. In an action on the case for obstructing the street, the trial judge instructed the jury that the injured rider could not recover if a rider using reasonable and ordinary care would have seen and avoided the obstruction. After jury verdict for defendant, this instruction was held to be correct by the Court of King's Bench.

An analysis of the purpose behind the social rule against obstructing city streets may help explain *Butterfield*. Both then and now, obstructing a public street was considered a public nuisance,[199] because it interfered with the public's right to travel over the public streets. The social rule against obstructing streets, therefore, was not intended to protect against personal injury by those running into the obstruction, but to protect against interference with the public's right of passage. Invocation of the clear rule against obstructing streets, therefore, does not prove that defendant wronged plaintiff in *Butterfield*, because plaintiff's personal injury from collision with the obstruction does not come from the hazard which that social rule was intended to protect against.

The question of whether this public obstruction was also a personal wrong to the injured plaintiff must therefore be decided by reference to a set of reciprocal expectations about others' conduct very similar to those we looked at in *Proctor v. Harris*. The relevant facts for this analysis are set out in the report of the case. The defendant put a pole across a city street in Derby. It was light enough at the time of the accident to see the obstruction one hundred yards away. Plaintiff was galloping through the streets after leaving a nearby pub. Judge Bayley made the obvious points: "The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault."[200] We can detect the basic analysis underlying Judge Bayley's terse opinion. People ordinarily ride their horses slowly along city streets. Plaintiff's obstruction posed no danger to one riding like people ordinarily do, for a person riding slowly and keeping a normal lookout would have seen and easily avoided the obstruction. Since plaintiff's obstruction posed no threat of physical harm by collision to those using the street in the ordinary, expected way, the accident was not a wrong to the plaintiff, but was entirely plaintiff's own responsibility.

This assumes, of course, that the content of defendant's "duty" to those using the road is to protect from physical harm those using the road in the normal, expected way. Some social rules, however, are intended to protect even those acting abnormally. One would conclude from the above

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[199] *See* James v. Hayward, 1631, Cro. Car. 184, 79 Eng. Rep. 761; Harrower v. Ritson, 37 Barb. 301 (N.Y. 1861); Pilgrim Plywood Corp. v. Melendy, 110 Vt. 112, 1 A.2d 700 (1938), *cited in* W. PROSSER & W. PAGE KEETON, *supra* note 95, at 644, n.20.

[200] *Butterfield*, 11 East 60, 61, 103 Eng. Rep. 926, 927 (K.B. 1809).

analysis that in cases in which that kind of rule is breached the contributory negligence rule would not apply, since the content of defendant's duty would not depend on the expectation that people in plaintiff's position would act normally. The second leading case on contributory negligence from the early nineteenth century supports this conclusion.

In *Davies v. Mann*,[201] decided in 1842 by the Court of the Exchequer, the plaintiff owned a donkey, which he turned out into the public highway with its fore-feet fettered. It was grazing by the side of the road when the defendant's waggon came down a slight rise at a fast pace, knocked the donkey down and ran over it, causing its death. At trial in an action in case for negligence, the trial court instructed the jury:

> that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon, the action was maintainable against the defendant . . . .[202]

The jury found for the plaintiff and defendant's attorney moved for a new trial for error in the jury instruction. Defendant claimed that *Butterfield v. Forester* controlled, and that if plaintiff was negligent in letting his donkey out on the road so fettered, he could not recover. Baron Parke of the Exchequer upheld the jury instruction here and found no inconsistency with *Butterfield*, stating "for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief."[203]

How are we to understand *Davies v. Mann*? Recurring to the theoretical explanation of *Butterfield* given above, we can see how *Davies* is consistent with *Butterfield*. In *Davies*, plaintiff claimed that defendant's servant was driving too fast to stop within the assured clear distance ahead. That conduct breached a general community rule of the road intended to protect all who venture on the highway, however they get there. The rule protects those there illegally, as well as those who through negligence are unable to get out of the road quickly. Since defendant breached a social rule intended to protect plaintiff even if plaintiff acted negligently, the defendant's general wrongful conduct was also a specific wrong to plaintiff.[204]

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[201] 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

[202] *Id.* at 547, 152 Eng. Rep. at 588.

[203] *Id.* at 549, 152 Eng. Rep. at 589.

[204] This analysis of *Butterfield v. Forester* and *Davies v. Mann* shows their consistency and would prevent courts from relying on the modern "last clear chance" interpretation of *Davies v. Mann*, that sees *Davies* as an exception to the contributory negligence rule when defendant's negligence occurred after plaintiff's so that defendant had the last clear chance to avoid the harm. *See* W. PROSSER, *supra* note 30, at § 66. Courts following this interpretation have emphasized the temporal sequence of plaintiff's and defendant's allegedly negligent behavior, holding, for example, that if defendant fails to keep a proper lookout and doesn't stop his car in time to avoid hitting plaintiff, helpless on the road

A theoretical explanation of the contributory negligence defense consistent with its original thrust, then, would understand contributory negligence as one method of determining whether defendant had wronged the plaintiff in the first place. If defendant acted in a way that would not harm those following the generally-expected course of conduct, and defendant did not breach a social rule intended to protect those acting abnormally, the plaintiff's failure to follow the generally-expected course is deemed "contributory negligence." The contributory negligence label just means that defendant did not wrong plaintiff in those cases where the specific content of defendant's duty to plaintiff is defined by reference to plaintiff's expected conduct. When defendant is expected only to act so as to avoid harm to others in plaintiff's position acting normally, plaintiff's abnormal behavior is contributory negligence.[205] As *Davies v. Mann* so clearly illustrates, however, contributory negligence as a defense should be strictly limited to those instances in which the social rule defendant is accused of breaking defines the specific content of defendant's duty by reference to plaintiff's expected conduct. When defendant

because of plaintiff's antecedent negligence, plaintiff can recover. *See, e.g.*, Williams v. Spell, 51 N.C. App. 134, 275 S.E.2d 282 (1981). In many cases where the courts apply the last clear chance doctrine, defendant will have breached a rule of the road—such as the proper lookout rule or the assured clear distance rule—whose purpose is to protect anyone on the road. The last clear chance approach in such cases leads to the same result as the approach suggested here.

Courts that take seriously the time sequence embodied in the last clear chance rule, however, may reach unfortunate results. For instance, courts have refused to apply the last clear chance rule when plaintiff is helpless on the road because of his negligence and defendant failed to stop in time to avoid hitting plaintiff because of brake failure due to defendant's antecedent negligence in maintaining his brakes. *See, e.g.*, Illinois Cent. R.R. v. Nelson, 173 F. 915, 917 (8th Cir. 1909) ("A defect in mechanical appliances existing before . . . the injury . . . is not suprevening negligence . . . ."); Kelley v. Keller, 211 Mich. 404, 179 N.W. 237 (1920) (driving truck on highway with inadequate brakes was negligence clearly antecedent to that of boy struck and killed by truck, but plaintiff recovered on other grounds); Thompson v. Salt Lake Rapid Transit Co., 16 Utah 281, 52 P. 92 (1898) (recovery for deaf mute struck and killed by trolley car when brakes on car failed to work). Although these bad brake cases are consistent with the formal last clear chance rule, they ignore the relevant question of the hazard and class analysis applied to social practices concerning maintenance of brakes. One of the reasons we maintain our brakes in good working condition is to be able to use them in an emergency to avoid hitting someone or something on the road, regardless of how it got there. The purpose of the social practice concerning maintenance of brakes is thus similar to the purpose of the social rule involved in *Davies v. Mann*—to protect those on the highway, regardless of how or why they are there. The decisions rejecting liability in the brake failure case because of the rigidly chronological "last clear chance" interpretation of *Davies v. Mann* are unfortunate.

[205] This may hold true even though the defendant's conduct, as in *Butterfield*, is in violation of another social rule, and hence a potential wrong to those intended to be protected by that rule, if the other rule was not intended to protect against this kind of harm, and the only relevant standard of conduct governing the interaction between plaintiff and defendant is a reciprocal expectation standard.

breaches a social rule whose content is not fixed by reciprocal expectations, the contributory negligence defense should not apply if careless folks like plaintiff are within the class the fixed rule was intended to protect.

This analysis of the traditional contributory negligence doctrine sees it either as a special application of the particularized duty question, by which one asks whether plaintiff's conduct takes him out of the class the social rule defendant violated was intended to protect, or as an aid in determining the specific content of the defendant's duty to plaintiff when societal coordinating norms turn on reciprocal expectations about the conduct of others. These two inquiries come into focus only if one understands negligence as the breach of a particular social rule intended to protect people like plaintiff from harm like that which befell plaintiff. The misdescription of negligence in the mid-nineteenth century as breach of a general duty of care, however, led courts and commentators to an equally general concept of contributory negligence. This general concept was then ripe for the utilitarian redescription of the contributory negligence defense in terms of deterrence. Underneath the conceptual and theoretical overlay, however, one can see the remnants of, and the potential for, a practical, specific inquiry into the relationship between plaintiff's conduct and plaintiff's claim to have been wronged by defendant's conduct.

2. Proximate Cause

Proximate cause is an element in the plaintiff's *prima facie* negligence case. Plaintiff must establish that defendant's negligence was a "proximate cause" of plaintiff's damages. Modern tort theorists have lavished seemingly boundless attention on the problem of explaining proximate cause, but the consensus of law students and others is that proximate cause remains a hopeless riddle.[206] The current difficulties in explaining proximate cause may reflect problems in the prevailing utilitarian descriptive theory of negligence.[207] They may not reflect any difficulties inherent in the subject matter. It may be helpful, therefore, to analyze three typical nineteenth century proximate cause cases, decided before the utilitarian redescription of negligence law, as a basis for a theoretical explanation of the "proximate cause" requirement.

In *Denny v. New York Central Railroad Company*,[208] decided by the Massachusetts Supreme Judicial court in 1859, the defendant railroad negligently delayed shipping plaintiff's wool from Syracuse to Albany. When the wool reached its final destination, the railroad stored it in its

[206] *See, e.g.*, Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 343 (1924); L. GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927); James & Perry, *Legal Cause*, 60 YALE L.J. 761 (1951). *See also* W. PROSSER, *supra* note 30, at 250.

[207] For a thorough analysis of this question, see Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U.L.Q. — (1991).

[208] 79 Mass. (13 Gray) 481; 74 Am. Dec. 645 (1859).

Albany warehouse awaiting pick-up, where it was damaged by a sudden extraordinary flood. The court held that, since the railroad was not negligent in storing or safeguarding the stored goods in Albany, it was not liable for the flood damage, even though the goods would not have been damaged had the railroad shipped them promptly from Syracuse to Albany, as the wool would then have been picked up from the warehouse before the flood. The court reasoned that since the flood that harmed the wool happened after the wool was carried to Albany, the flood alone was the proximate cause of the harm. The railroad's negligent delay in shipping the wool to Albany was deemed "remote," since "[i]t had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse . . . ."[209]

In *Carter v. Towne*,[210] an 1870 case also decided by the Massachusetts Supreme Judicial Court, a merchant sold a pistol, a box of percussion caps, and two pounds of gunpowder to a nine-year old boy, who took them home and put them in a cupboard, with the knowledge and approval of his aunt, who was baby-sitting him at the time. A week later, on July 4, the boy's mother took the pistol and some of the powder from the cupboard and gave it to him. The boy celebrated Independence Day by shooting off about a pound of the powder in the pistol. Four days later, the boy took a quarter-pound flask of the gunpowder from the cupboard without his mother's knowledge. He was burned when it exploded after he fired a trail of powder leading to the flask. On these facts, the court held that a directed verdict against the child plaintiff was required, reasoning that, since the gunpowder sold by the merchant defendant to the child had been in the custody and control of his parents or his aunt for more than a week before the accident, the injury was not a "direct or proximate" consequence of the merchant's act of selling gunpowder to a child.[211]

These two cases are easily explained by using the theory of negligence liability elaborated above in the discussion of duty. In *Denny*, the hazard to be prevented by the rule requiring prompt shipment was economic loss because of delayed delivery. That hazard did not include harm from the wholly fortuitous flood, which could just as well have happened at an earlier time, destroying promptly-shipped goods. In *Carter*, the hazard to be prevented by the rule prohibiting sale of gunpowder to children was the dangerous unsupervised use of the gunpowder by an immature child, unpreventable by the child's guardians. That hazard ended when the child's aunt, and subsequently his mother, knowingly took possession and custody of the gunpowder. The guardians' knowing possession of the gunpowder was just what they would have had if they had purchased the gunpowder themselves. The wrongful sale to the minor was therefore simply fortuitous.

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[209] *Id.* at 487, 74 Am. Dec. at 648.
[210] 103 Mass. 507 (1870).
[211] *Id.* at 509.

We see in *Carter* and *Denny* a strong relationship between proximate cause conclusions and the protective purpose of the social rule that defendant violated. This relationship is also reflected in the reasoning of the New York Court of Appeals in the 1878 case of *Kennedy v. Mayor, Aldermen & Commonality of the City of New York*.[212] Plaintiff alleged that he was backing up his cart to load it with brick on a public wharf when his horse became unmanageable, through no fault of his own, and backed off the unguarded end of the wharf into the East River, where it was lost. Plaintiff alleged defendant city was negligent in not providing a barrier at the end of the wharf. The trial court dismissed the complaint on the ground that the unmanageability of the horse and not the defect in the dock was "the cause" of the accident. The Court of Appeals reversed, pointing out that "the duty . . . to put a string-piece upon the dock . . . was imposed for the purpose of protecting persons and animals on the dock from falling into the water."[213] This purpose extends to protecting a momentarily unmanageable horse, when "a barrier is especially needed."[214] The court concluded that, on the facts alleged, the absence of the barrier was the proximate cause of the horse's loss.[215]

The above analysis of three early and typical proximate cause cases, therefore, suggests the following conclusions. First, the proximate cause question is this: "When is defendant's violation of a community standard of conduct, causing injury to plaintiff, nevertheless not a personal wrong to the plaintiff?" Second, the recurring answer embodied in judicial decisions, if not always adequately articulated, goes back to the purpose of the specific community standard defendant breached. If that standard of conduct was to protect people in plaintiff's position from the kind of hazard that eventuated in harm to plaintiff, then the breach is a proximate cause of plaintiff's injury. If plaintiff was not within the class to be protected by the standard, or if the hazard eventuating in harm to plaintiff was not a hazard the standard was intended to protect against, then the breach is not the proximate cause of plaintiff's injury. These two conclusions are consistent with the theory elaborated above in the discussion of duty, which suggested that when the hazard/class test is not met, defendant's conduct in breach of some social rule is not a personal wrong to the plaintiff.[216]

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[212] 73 N.Y. 365, 29 Am. R. 169 (1878).

[213] *Id.* at 367, 29 Am. R. at 170.

[214] *Id.* at 368, 29 Am. R. at 170.

[215] *Id.*

[216] The above analysis parallels the argument by Joseph Bingham in his brilliant 1909 article, *Some Suggestions Concerning 'Legal Cause' Common Law*, 9 COLUM. L. REV. 16, 136 (1909). Bingham, too, used *Denny*, *Carter*, and *Kennedy* to make his point, and he, too, suggested that proximate cause should be analyzed as a question of the purpose of specific duties. For a thorough discussion of Bingham's achievement, see Kelley, *supra* note 207 at ___.

The theory elaborated above in the duty section suggested that these questions can be understood as questions about the scope of specific duties. One might therefore ask why these questions were farmed out to the proximate cause concept. The answer is simple. The conceptualization of the pleaded general duty as a real thing rather than a pleading device kept the courts in negligence cases from focusing on the specific duty issues raised by looking at the purposes of particular social rules. Barred artificially from the duty category, these questions naturally migrated into the proximate cause category because questions about the protective purposes of a social rule could be plausibly reformulated, in cases where breach of the rule caused harm, as questions of remoteness or causation. As the following discussion shows, these "duty" questions can be reformulated as "causation" issues under either the modern causation concept of necessary condition or the scholastic concept of causal potency.

Under the modern notion of causation as a necessary condition of the subsequent harm, the hazard test can easily be turned into a causation test. If the plaintiff's injury did not come about because of the hazard that defendant's conduct wrongfully threatened, one can say that defendant's wrongful conduct did not cause plaintiff's harm because precisely similar conduct that did not pose the wrongful hazard would still have caused that harm. Richard Wright[217] has recently reformulated the argument of Robert Keeton[218] on this question. Both Wright and Keeton argue that causation in negligence cases must be traceable to the negligent portion of defendant's conduct, that is, the part threatening the hazard the social rule at stake was intended to prevent. These theorists would explain *Denny* by saying that the flood damage was not caused by the negligent portion of the railroad's delay in shipping because the same harm would have occurred if the goods had been received later and shipped promptly. They would explain *Carter* by saying that the negligent portion of the merchant's sale of gunpowder to the child was not the cause of his harm, since the same harm would have occurred had the merchant sold the gunpowder directly to the child's mother.

Under an older scholastic view of causation as causal capacity, the proximate cause cases can be understood in causal terms as well. The scholastic distinction of the Aristotelian efficient causes into "proximate" and "remote" causes was based primarily on the notion of the *power* or *capacity* of the "proximate" cause to bring about a particular effect. The "remote" cause, which was merely a necessary condition, was without the capacity or power to bring about the effect itself.[219] This distinction between those necessary conditions with the power or capacity to bring about a particular result and those without such power was readily ap-

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[217] Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1737, 1763-74 (1985).

[218] R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963).

[219] *See generally* Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870), *reprinted in* N. GREEN, ESSAY ON TORT AND CRIME. 1 (1933) and in 9 RUTGERS L. REV. 452 (1954).

plicable to explain proximate cause cases. Take *Denny*, for example. The delayed transportation of the wool, a necessary condition of damage by flood after late arrival, does not have the power or capacity to cause damage by adventitious flood. It is a different matter, however, when the railroad delays a shipment of apples in the fall, for then the delay has the capacity to bring about damage to the apples from freezing due to the onset of winter.[220] Or take *Carter*, for example. The sale to the child was a necessary condition of the harm, but after the intervention of the child's aunt and mother, the sale to the child lost its capacity to bring about the harm.

A look at two typical examples suggests that a proximate cause explanation using the new "causation-by-the-negligent-portion-of-plaintiff's-conduct" test and one using the old scholastic causal potency test both refer to the same reality as the hazard/class duty explanation. First, let's look at the case where a defendant motorist's prior speeding brings him to a particular intersection at the same time another car darts into the intersection without warning, and the defendant motorist could not have stopped in time had he been going the speed limit.[221] Under the causal potency language, speed can be said to have the capacity to bring about a particular position of a car at a particular point in time, but position alone doesn't have the capacity to cause an accident. Under the "negligent-portion-of-defendant's-conduct" test, defendant's speeding at 80 m.p.h. to get to the point of the accident is not a cause of the harm because the negligent portion of the defendant's conduct was not a necessary condition of the harm, as defendant could have been at the same place at the same time without speeding, if she had started earlier. This is like saying that the hazard that excessive speeding risks is harm from impaired ability to stop, or avoid collision, or otherwise maneuver, not the fact that a certain speed will get you to a particular point at a particular time.

Second, let's look at the case where defendant practices medicine without a license and treats the plaintiff, causing plaintiff harm.[222] Under the causal potency test, we can say that practicing medicine without a license does not, in itself, have the capacity to harm a patient. Under the "negligent-portion-of-defendant's-conduct" test, the violation of the license statute is not a cause of plaintiff's harm because the same harm would have occurred had the defendant obtained a license. This is like saying that the hazard that the rule against practicing medicine without a license was intended to protect against was unskillful treatment. If defendant treated plaintiff skillfully, even without a license, the harm was not within the hazard.

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[220] *See* Fox v. Boston & Maine R.R., 148 Mass. 220, 19 N.E. 222 (1889), *contrasted with Denny* in *Bingham, supra* note 213, at 27-28.

[221] *See, e.g.*, Tennessee Trailways, Inc. v. Ervin, 222 Tenn. 523, 438 S.W.2d 733 (1969). *See, e.g.*, A. Becht & F. Miller, The Test of Factual Causation in Negligence and Strict Liability Cases 67-73 (1961).

[222] *See, e.g.*, Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197 (1926).

An analysis of two common ways that social norms develop further supports the conclusion that the two causal explanations of proximate cause doctrine and hazard-class duty analysis are interchangeable. A social norm forbidding certain conduct in certain circumstances may develop because that conduct has the capacity to cause certain kinds of harm. Thus, the rules prohibiting speeding arose because speeding has the capacity to cause harm by impaired control, *not* because speeding would bring about certain positions at certain times. A social norm forbidding certain conduct in certain circumstances may develop, too, just because those in society start to coordinate their conduct in certain ways in order to avoid harm. For example, people driving carriages or automobiles drive on the right side of the road. Once that pattern of coordination becomes generally accepted and relied on by members of the community to coordinate their conduct, breach of that convention has the capacity to bring about harm to others relying on the convention.[223] For example, driving on the left side when everyone else drives on the right has the capacity to harm those driving on the right. In both cases the resulting social norm seems equally explainable under the hazard/class duty test, the scholastic proximate cause test and the negligent-portion-of-defendant's-conduct test of causation.

Because "hazard" questions relating to the purpose of the social rule could so easily be seen as causation questions, courts tended to analyze them under that conceptual heading. As a result, the generality of the formal law of negligence was maintained. The law of negligence embodied a general duty, with a general standard of conduct, subject to limitation by a general doctrine of proximate cause. But the proximate cause limitation, as applied, helped conform the law to the specific rules and specific duties which the generalities in the formal law concealed. On this point, the history of the proximate cause doctrine is telling. Originally, remoteness was considered a limitation on recoverable damages, not a substantive limitation on liability.[224] The application of a broader proximate cause limitation in tort accompanied the emergence of the negligence cause of action, formally stated as breach of a general duty of care. The spread of the full-blown proximate cause doctrine beyond negligence has been limited and haphazard.[225] That is understandable, if one sees the

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[223] H.L.A. Hart & A.M. Honore's theory parallels this analysis. *See* H. HART & A. HONORE, CAUSATION IN THE LAW, Ch. II (2d. ed. 1985) (conduct deviating from ordinary, expected behavior is causal). *See also* A. HARARI, THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS (1962). For attempts to analyze the relationship between convention and norms, see E. ULLMAN-MARGALIT, THE EMERGENCE OF NORMS, 74-133 (1976); D. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 5-83 (1968); D. SCHWADER, THE STRATIFICATION OF BEHAVIOR 233-80; 281-308 (1965). For suggestive applications of these notions to legal analysis, see Postema, *Coordination and Convention at the Foundations of Law*, 11 J.L. STUD. 165 (1982); Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969).

[224] *See*, I. T. SEDGWICK, A TREATISE IN THE MEASURE OF DAMAGES, ch. III (Remote and Consequential Damages) (6th ed. 1874) (first edition in 1847); J. MAYNE, A TREATISE ON THE LAW OF DAMAGES 36-45 (1856).

[225] *See generally* H. HART & T. HONORE, CAUSATION IN THE LAW 84 (2d ed. 1985); *see also* McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569 (1988).

proximate cause development in negligence as a response to the seriously underelaborated concept of duty in the formal law of negligence. The better-defined intentional torts did not need a back-up method of delineating the scope of a defendant's duty, so the proximate cause limitation has been little used in intentional torts such as battery.

3. Conceptual Redundancy in a Convention-based System

The hazard part of the hazard/class test of duty thus seems to explain much of the law of proximate cause in negligence cases. And the "class" part of the hazard-class test of duty seems to explain much of the law of contributory negligence. This is not surprising. There is no necessary connection between the hazard-class analysis and the concept of duty. "Duty" is a way of expressing the conclusion that plaintiff has been wronged by breach of a particular rule when plaintiff was within the class the rule was designed to protect and plaintiff was harmed by the hazard the rule was intended to protect against. The hazard-class analysis seems to capture the deep structure of our judgments about who is wronged by an injury-causing breach of a social norm. If this is in fact the deep structure of our judgments about private wrongs, we should expect it to turn up underneath particular judgments about wrongs, whether the conclusory language of duty, proximate cause or contributory negligence is used to express those judgments.

The identification of a deep structure to our judgments about private wrongs may explain a curious phenomenon in the law of negligence—the apparent redundancy, or doubling of many key elements or defenses in the negligence system. Duty analysis seems to duplicate proximate cause analysis;[226] contributory negligence often sounds like proximate cause[227] or like no-duty;[228] assumption of the risk often sounds like no-duty;[229] duty analysis often seems to mimic breach of duty analysis.[230] This conceptual redundancy is understandable. Judges familiar with the tort system and the recurrent explanations of tort liability know that the purpose

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[226] *See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927).

[227] *See, e.g.*, Butterfield v. Forrester, 11 East 60, 61, 103 Eng. Rep. 926, 927 (K.B. 1809) ("If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault."); Ackerman v. James, 200 N.W.2d 818 (Iowa 1972) (last clear chance explained in proximate cause terms); W. PROSSER, *supra* note 30, at 417, n.13.

[228] *See supra*, text accompanying notes 191 to 201.

[229] *See, e.g.*, Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929); Kavafian v. Seattle Baseball Club Ass'n, 105 Wash. 219, 181 P. 679 (1919). *See generally* 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS 187-205 (2d ed. 1986) [hereinafter F. HARPER].

[230] *See, e.g.*, Lance v. Senior, 36 Ill. 2d 516, 224 N.E.2d 231 (1967); Durr v. Stille, 139 Ill. App. 3d 226, 487 N.E.2d 382 (1985). *See generally*, Winfield, *supra* note 165.

of negligence law is to redress private wrongs. Because they are members of the community as well, they know, by and large, what is a private wrong. When the elements and principal defenses in the negligence action are formulated in broad, conclusory terms, then, judges may use these malleable tools to reach the results they already know are right. Each of the tools, in practice, will come to focus on all or a particular part of the underlying deep structure of a private wrong.

We saw this doubling in detail in the preceding discussions of contributory negligence and proximate cause, but other examples of redundancy in negligence law can be found almost anywhere. Harper and James, for instance, have argued that implied assumption of the risk duplicates duty analysis at one end and contributory negligence at the other.[231] For another example, the history of the attractive nuisance doctrine concerning the liability of landowners to trespassing children shows that the rule has been variously explained as a question of the duty of landowners,[232] a question of what is negligent conduct by landowners when they know children will come onto their land,[233] and a question of the scope of generalized assumption of the risk or contributory negligence doctrines applied to trespassing children.[234] These redundant explanations all make sense if we keep in mind the deep structure of private wrongs. The underlying reality in attractive nuisance law is the set of special social rules we expect landowners to follow when they know uninvited children may come onto their property. As those rules are limited-purpose rules to protect children, they can be characterized by duty language. As the content of those rules depends on reciprocal expectations about the conduct and understanding of children, they may be characterized in generalized contributory negligence or assumption of the risk terms. As the rules are those we as a society expect landowners to follow, they can be characterized by straight negligent conduct language—what would a reasonable landowner do under the circumstances?

This doubling or redundancy has frustrated precisionists, who are always trying to clarify the distinction between this and that: between duty and proximate cause,[235] for one example, or between contributory negligence and assumption of the risk,[236] for another. It has provided ammu-

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[231] The implied assumption of risk that duplicates no-duty analysis, they call primary assumption of risk, the implied assumption of risk that duplicates contributory negligence they call secondary. *See* F. HARPER, *supra* note 229, at 187-205. *Compare* W. PROSSER, *supra* note 30, at 439-41 (not all implied assumption of risk cases reducible to either no-duty or contributory negligence).

[232] *See, e.g.*, Peters v. Bowman, 115 Cal. 345, 47 P. 113 (1896), *overruled*, 53 Cal.2d 340, 348 P.2d 98 (1959).

[233] *See, e.g.*, Barrett v. Southern Pac. Co., 91 Cal. 296, 27 P. 666 (1891).

[234] *See, e.g.*, Copfer v. Golden, 135 Cal. App. 2d 623, 288 P.2d 90 (1955).

[235] *See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); W. PROSSER, *supra* note 30, at 250-70.

[236] Compare F. HARPER, *supra* note 229 at 187-205 with W. PROSSER, *supra* note 30, at 439-41.

nition for the legal realists, who delighted in pointing out how courts manipulate these malleable doctrines to come up with the conclusions they "want."[237] It has been the despair of theorists, for how can one explain a system in which the key concepts change into each other when you're not looking? But this redundancy gives the negligence system a wonderful resiliency. If one element gets diverted from its focus on the underlying structure of private wrongs, another element can be used to refocus the analysis. In the nineteenth century, for example, when the duty element was diverted by the assumption that tort duties were by definition general, the proximate cause doctrine took up the slack. In modern negligence systems with a comparative negligence rule, the work that used to be done by the contributory negligence defense may now be done by duty or proximate cause doctrines.[238] What is important, ultimately, is not the covering generality but the underlying structure of private injustice to which it relates, and the particular social rule and its purpose to which it points.

D. Custom, Foreseeability Tests and Judicial Decisionmaking in Modern Neglience Law

The preceding descriptive theory of negligence, which sees community convention as the heart and soul of negligence law, must face at least two challenges to its adequacy. First, how is it consistent with the formal place of custom in negligence law? The courts, after all, say that evidence of conformity to custom or violation of custom is relevant, but not conclusive, on the negligence question. Second, how can this theory be accepted when courts deciding negligence cases often apply an obviously utilitarian test of negligence as conduct posing an unreasonable foreseeable risk of harm to others. The following answers to these two questions tend to reinforce the community convention theory of negligence liability.

1. The Formal Place of Custom in Modern Negligence Law

The formal place of custom in negligence law provides a challenging puzzle for the theory elaborated above. The general rules are simple. Nonconformity to custom is admissible, but not necessarily conclusive, to show negligence.[239] Conformity to custom is admissible, but not nec-

[237] *See* L. Green, *supra* note 225; L. Green, Judge and Jury (1930).

[238] *See, e.g.*, Dunn v. Baltimore & O.R.R., 127 Ill. 2d 350, 537 N.E.2d 738 (1989) (no duty); Turner v. Rush Medical College, 182 Ill. App. 3d 448, 537 N.E.2d 899 (1989) (no duty).

[239] *See, e.g.*, Turner v. Chicago Housing Authority, 11 Ill. App. 2d 160, 136 N.E.2d 543 (1956) (deviation from standard of painting metal steps not negligent). *See also* Restatement (Second) of Torts § 295A, Comment c (1965).

essarily conclusive, to show due care.[240] Juries in general are free to find that conduct contrary to custom is due care, just as they are in general free to find that conduct conforming to custom is nevertheless negligent.[241] In rare cases, courts have even held certain customary conduct negligent as a matter of law.[242]

How can these general rules about the place of custom in negligence law be consistent with the theory elaborated above? If the basis of negligence liability is a breach of community expectations, should not customary conduct always conclusively set the applicable standard of conduct? In this theory, as in Blackstone's understanding of the common law, should not custom be accepted as the law?

To answer these questions we must examine the jury's role in determining the standard of conduct in negligence cases. That role is roughly the same now as in Blackstone's day. The jury back then decided whether defendant had wronged plaintiff, under the blank plea of the general issue, even when the plaintiff specifically based his cause of action on the custom of the realm.[243] And this is as one would expect under a community expectations standard, for the jury as a cross-section of that community is better able than the judge to determine whether, in fact, the claimed custom truly is an established pattern of conduct forming the basis for coordinating individuals' activities in the community. The existence of the custom is a social fact, which the jury may be better able than the judge to determine. Moreover, the jury is in a better position to judge whether the custom, if it does exist, is applicable to the particular facts of this case. In other words, the jury is better able to determine the scope of the customary practice. Reliance on the jury to decide these questions makes sense. Established practices often differ depending on minute variations in circumstances, and customary practices change relatively frequently.[244] Thus, a feasible method of incorporating customs into the law is to leave particular cases to a representative cross-section of the community, without formally adopting the particular customary rule as law.

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[240] *See, e.g.*, Texas & Pac. R.R. v. Behymer, 189 U.S. 468 (1903) (usual practice of bumping railroad cars together with brakeman standing on roof held to be negligent when roof was covered with ice); The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932) (failure to install radios on tugboats held to be negligent although most tugs did not have them). *See also* RESTATEMENT (SECOND) OF TORTS) § 295A, Comment b (1965).

[241] *See* RESTATEMENT (SECOND) OF TORTS § 295A, Custom (1965). In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them.

[242] *See, e.g.*, Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974) (opthamologists' practice of not testing patients under the age of 40 for glaucoma held to be negligent as a matter of law); Mayhew v. Sullivan Mining Co., 76 Me. 100 (1884) (fact that no mining company guarded or lighted ladder holes in mines held to be negligent as a matter of law).

[243] *See, e.g.*, Turberville v. Stamp, 3 Ld. Raymond 375, 12 Mod. 152 (K.B. 1697) (defendant pleading general issue to plaintiff's action in case based on custom of the realm), *reprinted in* C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 167-68 (1949).

[244] *See* W. PROSSER, *supra* note 30, § 33.

Moreover, the jury is in a good position to make two important judgments called for by appeals to custom as the standard of conduct. We might call these issues the collective judgment question and the coercion question. To illustrate the significance of these two questions, let's take the example of a railroad that always runs its trains at 60 miles per hour through a large city's railroad crossings. In a claim by a plaintiff injured in a crossing accident, the railroad defends on the grounds that it is customary for it and the other railroads running through large cities to run through city crossings at 60 m.p.h. A jury could reasonably reject this defense, on either of two grounds. First, as we noted in discussing the reasoning of Chief Justice Tindal in *Vaughan v. Menlove*,[245] the rationale for the objective community standard of conduct applied by the jury is that it reflects the composite community judgment about appropriate behavior. Since only railroad companies run trains, however, their "customs" may not reflect the composite community standard. The "customs" of one small subsegment of society may thus be more like the habits of one individual or the idiosyncratic "best judgment" of the hay-rick keeper in *Vaughan v. Menlove*.[246] The jury is in the best position to determine whether the claimed custom embodies the collective community norms.

One could, of course, argue that the railroad should prevail regardless of the community normative judgment. Since the railroad habitually runs its trains through the city at 60 m.p.h., others in the community must expect it to do so, and therefore either reasonably coordinate their conduct with that, or assume the risk of injury from the railroad's conduct if they proceed to confront it. But these arguments ignore basic features of the contributory negligence and assumption of the risk defenses. As we have seen, the traditional contributory negligence question reduces to the question of whether defendant breached a duty to plaintiff. The jury, consistent with contributory negligence doctrine, ought to be able to determine that the railroad owed a duty to users of the public highways and sidewalks even though the users could take action to avoid the harm threatened by the railroad's breach of its duty. A jury could make that determination based on its judgment that users of the public highways and sidewalks should be able to expect more from railroads, regardless of their recurrent dereliction. Furthermore, the jury could reject the generalized assumption of the risk argument on the grounds that the choice of those using the highways to proceed to encounter the known risk is not voluntary. The jury could conclude that the railroad wrongfully coerces highway users

[245] 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (C.P. 1837).

[246] *See, e.g.*, Low v. Park Price Co., 95 Idaho 91, 98, 503 P.2d 291, 298 (1972). "No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort or money, to set its own uncontrolled standard at the expense of the rest of the community." (quoting RESTATEMENT (SECOND) OF TORTS § 295A, Comment c (1965)).

when it presents them with the unpalatable choice of either foregoing city routes crossing railroad tracks or facing annihilation by a speeding train.[247] Again, the jury as a representative cross section of the community is in a good position to make the wrongfulness decision implicit in the voluntariness issue in assumption of the risk cases.

The formal place of custom in the law of negligence is thus consistent with a community convention theory of negligence liability. The rules denying conclusive weight to evidence of conformity with a violation of custom preserve the important role of the jury to determine the existence, scope, and community acceptance of an alleged custom. That these issues are resolved by a representative cross section of the community reinforces the community convention theory of negligence.

2. Foreseeability Tests and Judicial Decisionmaking

We concluded after examining its history that "foreseeable risk" was imported into negligence law as part of an inadequate theoretical description of that law. We saw that when the foreseeability concept is examined carefully in its original context as part of a utilitarian theory of negligence liability, its main flaw is its indeterminacy. That indeterminacy gives the concept its power as a retroactive explanation of decisions, but weakens it as a tool for actually making decisions. As a matter of fact, however, courts make use of the foreseeability concept in explaining some of their decisions in negligence cases. In the tort systems in the United States, where juries decide most negligence questions under "or-

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[247] *See, e.g.*, Donovan v. Hannibal & St. Joseph R.R., 89 Mo. 147, 1 S.W. 232 (1886) (Plaintiff was not required to stop grazing cattle in a field simply because defendant had breached a duty to keep the field fenced from an adjoining railroad track.). *But see* Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927) (Holmes, J.).
See also W. PROSSER, *supra* note 30.

> In particular, the plaintiff may not be required to surrender a valuable right or privilege merely because the defendant's conduct threatens him with what would otherwise be an unreasonable risk . . . . He is not to be deprived of the free, ordinary and proper use of his land because his neighbor is negligent, and he may leave the responsibility to the defendant.

Id., § 65 at 425.

> Even where the plaintiff does not protest, the risk is not assumed where the conduct of the defendant has left him no reasonable alternative. Where the defendant puts him to a choice of evils, there is a species of duress, which destroys all idea of freedom of election . . . . In general, the plaintiff is not required to surrender a valuable legal right, such as the use of his own property as he sees fit, merely because the defendant's conduct has threatened him with harm if the right is exercised . . . By placing him in the dilemma, the defendant has deprived him of his freedom of choice, and so cannot be heard to say that he has voluntarily assumed the risk.

Id., § 68 at 451.

dinary reasonable person" instructions,[248] the actual role of the foreseeability concept in negligence cases is extremely limited. Nevertheless, it has clearly influenced some judicial opinions, and it has become part of the set of working symbols we consider appropriate for judges to use in justifying decisions in negligence cases. Judges sometimes use the concept of foreseeable risk in deciding whether there is sufficient evidence of negligence to go to the jury; in determining in proximate cause cases whether harm to the plaintiff comes within the unreasonable foreseeable risk making defendant's conduct negligent in the first place; and in deciding cases tried to the court without a jury. Given that concept's bankruptcy in theory and its indeterminacy as a guide to judicial decision, must we conclude with the legal realists that judges using the concept are simply concealing under an empty formula the actual policy bases for their decisions?

Once a theoretical concept becomes accepted as a working symbol within a particular human institution, the inadequacy of the concept as theory should not preclude us from examining the practical function and meaning of the working symbol in its institutional context.[249] We should, then, take a careful look at how judges in fact use the concept of "foreseeable risk" in negligence cases. That description may then help us understand the concept's practical function and meaning in the system of negligence liability.[250]

In applying the foreseeable risk test, most courts take seriously the idea that foreseeability must be determined from the standpoint of the ordinary reasonable person in defendant's position before the accident.[251] In deciding what an ordinary reasonable person in that position would foresee, judges often look to what people in that position would ordinarily do. If defendant has breached a conventional practice intended to protect against this kind of harm, the judge can easily find that an ordinary person in defendant's position would have foreseen serious harm from

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[248] *See e.g.*, RECOMMENDED ARIZONA JURY INSTRUCTIONS, *Negl.* 2 (1974); COLORADO JURY INSTRUCTIONS, *Civil* § 9:4 (2d ed. 1980); FLORIDA STANDARD JURY INSTRUCTIONS § 4.1 (1982); INDIANA PATTERN JURY INSTRUCTIONS § 5.01 (1966); IOWA UNIFORM JURY INSTRUCTIONS, *Civil* No. 2.1 (1982); MARYLAND PATTERN JURY INSTRUCTIONS, *Civil* § 15:1 (1977); MINNESOTA PRACTICE JURY INSTRUCTION GUIDES, *Civil* § 101G-S (2d ed. 1974); MISSOURI APPROVED JURY INSTRUCTIONS § 11.02 (1981); NEW YORK PATTERN JURY INSTRUCTIONS, *Civil* § 2:10 (2d ed. 1974); NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES, *Civil* § 750.00 (1980); OKLAHOMA UNIFORM JURY INSTRUCTIONS, *Civil* § 9.2 (1982); WASHINGTON PATTERN JURY INSTRUCTIONS, *Civil* § 10.01 (2d ed. 1980); INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 101-101 (2d ed. 1962); VIRGINIA MODEL JURY INSTRUCTIONS, *Civil* No. 4.000 (Supp. 1981); STANDARDIZED JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 50 (1968); MISSISSIPPI JURY INSTRUCTIONS § 3494 (1953); R. FORD & A. CLEMENTS, TRIAL JUDGES MANUAL OF CHARGES 49-50 (1972); SOUTH DAKOTA PATTERN JURY INSTRUCTIONS, *Civil* § 10.01 (1968); PATTERN INSTRUCTIONS FOR KANSAS § 3.01 (1966).

[249] *See* E. VOEGELIN, THE NEW SCIENCE OF POLITICS 27-31 (1987).

[250] The author reviewed all cases citing to the RESTATEMENT (SECOND) TORTS §§ 292-293 or United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

[251] *See generally*, W. PROSSER, *supra* note 30, at 146.

that breach. If defendant has followed common, accepted practice, the judge can easily find that an ordinary person in defendant's position would not have foreseen an unreasonable risk of harm from that conduct.

The way that courts applying the foreseeable risk test actually defer to customary standards by using what people ordinarily do as evidence of what risks they would foresee, can be seen in a typical case, *Winsor v. Smart Auto Freight Co.*[252] A semi-trailer truck driver and his helper were cooperating to hitch the cab to a trailer. Following the ordinary practice, the driver backed the cab at an angle to the trailer, the cab and the trailer body forming a V. His helper stood in the open side away from the closed angle, calling directions to the driver and waiting for the cab to come close enough for the helper to make the coupling. This practice protected the helper from injury, since an overshooting cab would collide with the trailer body on the closed V side, and thereby prevent injury to the helper on the open side. Plaintiff's decedent, a new man on the job site, stepped into the dangerous closed angle side during this process and was crushed by the cab before the helper could get the driver to stop. The plaintiff's decedent was not working in the area when the hitching process began; he was not asked to help; the truck helper yelled at him to get away as soon as he saw him. The trial court dismissed the case against the trucking company with prejudice, finding there was insufficient evidence of negligence. The appellate court affirmed.

The court held that the foreseeable risk from defendant's procedure was not unreasonable as a matter of law. The court reasoned that "the act was useful and necessary, *[and] in accordance with standard good practice*."[253] The risk of someone stepping into the closed side of the V during the coupling operation, on the other hand, was "relatively slight," and defendant "*had a right to expect that no one would do so*."[254] The court's judgments of foreseeability and reasonableness were thus contingent on its recognition of the controlling established customary practice.

The expanded unreasonable foreseeable risk test from the *Restatement (Second) of Torts* and the *Carroll Towing Co.* case tells the courts to determine whether the burden of taking precautions, including the foregone benefits from defendant's conduct, is less than the foreseeable gravity times the foreseeable probability of harm from defendant's conduct. In applying that test, courts often defer to customary standards of conduct by taking what people ordinarily do as evidence of the utility of defendant's conduct, or as evidence of the burden of alternative, safer conduct. Thus, if others in defendant's position ordinarily take precautions to prevent this kind of harm, and defendant did not, one can infer that the burden of taking such precautions must be light. Or if others in defendant's position ordinarily do not take precautions against this kind of harm, one can infer that the utility of defendant's customary conduct must be high.

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[252] 25 Wash. 2d 383, 171 P.2d 251 (1946).
[253] *Id.* at 388, 171 P.2d at 254.
[254] *Id.* at 389, 171 P.2d 255.

The way in which courts applying the expanded unreasonable foreseeable risk test in fact defer to customary standards can be seen in the following two typical cases. In *Crane v. Smith*,[255] the defendant grocery store kept a coffee grinder in an open aisle in its store. The grinder had no guards over the grinding mechanism. Plaintiff, a three-year-old child, stuck her finger in the grinder while it was working. Experts testified that unguarded grinders were ordinarily kept behind a counter, out of the public's reach. In finding that there was substantial evidence to support the trial court's judgment for the plaintiff, the appellate court relied specifically on this evidence that defendant breached a custom aimed at preventing this kind of harm. The court went on to analyze the facts under the *Restatement*'s unreasonable risk standard. In light of the custom to keep grinders behind the counter, the court readily found that the utility of keeping the grinder in the aisle rather than behind the counter was minimal, and that this minimal utility was clearly outweighed by the risk to intermeddling children.

In *State of Louisiana ex. rel. Guste v. The Testbank*,[256] the chemical pentachlorophenol (PCP) was discharged into the Mississippi River Gulf Outlet following the collision of two ships that were attempting to pass each other in the outlet. A claim was made that it was negligent to store the tanks of PCP on deck, where they could be ruptured and spill in such a collision. The court held this not to be negligent, citing and applying the *Carroll Towing Co.* test, as follows: since PCP was not highly toxic, the potential loss was not great; since collisions were infrequent, the probability of harm was low; since the alternative of stowing the PCP tanks below decks posed greater danger to the crew and other cargo, as well as greater risk of harm in the event the ship sank, the burden of avoiding this harm would be great. This discussion followed a prior finding of fact that stowing the PCP on deck "was in conformance with existing customs in the industry."[257] This finding was based on the apparently uncontradicted expert testimony of a chemist with experience in packaging toxic substances and two sea-captains employed by other lines.

The above descriptive analysis suggests that courts purporting to apply the theoretical negligence calculus often defer in fact to customary standards of conduct. The unreasonable foreseeable risk, after all, is to be determined from the standpoint of the ordinary reasonable person in defendant's position prior to the accident.[258] Abstract foreseeability, with its wide-ranging indeterminacy, is thus bounded. By keeping the unreasonable foreseeable risk test tied to the ordinary reasonable person standard, courts give objective content to the indeterminate judgments of foreseeability and utilitarian balancing formally called for by the test. The primary way in which courts have reduced questions of foreseeability and reasonableness to questions of what ordinary reasonable persons do is to use the facts of customary conduct as evidence of one of the factors in the *Carroll Towing Co.* negligence calculus.

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[255] 23 Cal. 2d 288, 144 P.2d 356 (1944).
[256] 564 F. Supp. 729 (E.D. La. 1983).
[257] *Id.* at 737.
[258] *See* W. PROSSER, *supra* note 30, at 146.

If people ordinarily do not take precautions against certain risks, the courts may defer to that community judgment by plugging that fact into the negligence calculus either explicitly or implicitly. The judicial reasoning may take one of the following three forms, with the first premise in each either explicit or implicit:

(1) since people ordinarily do not take precautions against this danger, the ordinary, reasonable person would not foresee this danger from this proposed conduct;[259]

(2) since people ordinarily do not take precautions against this danger, an ordinary reasonable person may foresee this risk, but could judge its likelihood so small as not to warrant taking precautions;[260]

(3) since people ordinarily do not take precautions against this danger, an ordinary reasonable person foreseeing the risk of harm from this conduct, would nevertheless not take precautions against the risk because the burden of taking precautions would be too great.[261]

Similarly, if people ordinarily do take precautions against certain dangers, the courts may defer to that community judgment as well, either explicitly or implicitly plugging that fact into the foreseeability test: since people ordinarily do take precautions against this danger, the burden of taking precautions against such danger must be less than the foreseeable gravity times the foreseeable probability of harm threatened.[262] Of course, when it is subordinated in this way to the standard of conduct of the ordinary reasonable person, the unreasonable foreseeable risk test is just another way of stating the test of conventional, expected conduct traditionally at the heart of negligence liability.

Some courts that insist that foreseeability must be judged from the standpoint of the ordinary reasonable person in defendant's position have turned the foreseeability test into a useful decision-making device without reducing the test to the conduct of the ordinary reasonable person. Focusing on the harm that could be foreseen by an ordinary member of the community is one way of getting at the purpose of a particular community coordinating rule. If the conduct under scrutiny violates a social norm intended to protect against certain kinds of harm to others, those

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[259] *See, e.g.*, Clinton v. Commonwealth Edison Co., 36 Ill. App. 3d 1064, 344 N.E.2d 509 (1976); Taylor v. Travelers Indemnity Co., 241 So. 2d 564 (La. App. 1970); Van Skike v. Zussman, 22 Ill. App. 3d 1039, 318 N.E.2d 244 (1974) (no duty, harm not reasonably foreseeable).

[260] *See, e.g.*, Winsor v. Smart's Auto Freight Co., 25 Wash. 2d 383, 171 P.2d 251 (1946); Maramba v. Neuman, 82 Ill. App. 2d 95, 227 N.E.2d 80 (1967) (no duty).

[261] *See, e.g.*, Wisconsin Power & Light Co. v. Columbia County, 18 Wis. 2d 39, 117 N.W.2d 597 (1962); Meyers v. Robb, 82 Mich. App. 549, 267 N.W.2d 450 (1978).

[262] *See, e.g.*, Alaska Freight Lines v. Harry, 220 F.2d 272 (9th Cir. 1955); Crane v. Smith, 23 Cal. 2d 288, 144 P.2d 356 (1944); Schaut v. Borough of St. Mary's, 14 A.2d 583 (Pa. Super. 1940).

knowing the rule and its purpose would, if asked, say they "foresaw" the risk of just that kind of harm. If the harm caused was not within the hazard the rule was intended to protect against, on the other hand, those knowing the rule and its purpose would say they did not foresee the risk of that kind of harm. As thus applied by the courts, the unreasonable foreseeable risk test seems, in practice, to be a device for ferreting out the hazard that the social rule in question was intended to protect against. This explains the satisfying results achieved by courts using the modern test of proximate cause that finds proximate cause only if the harm resulted from the unreasonable foreseeable risk that made the defendant's conduct negligent in the first place.[263] In practice, this test replicates the test of proximate cause that looks to the hazard the social rule in question was intended to prevent.

Practically reasonable judges will find a way to bend any conceptual tool to the work they know they must do. In application, judges have even transformed the unreasonable foreseeable risk test into a useful decision-making device in a convention-based negligence system.

Judicial enthusiasts for utilitarian risk-benefit analysis, however, have not always deferred to preexisting community norms. In rare instances, judges have divorced the unreasonable foreseeable risk question from preexisting social realities. When judges take seriously the invitation to judicial legislation implicit in the formal statement of the unreasonable foreseeable risk test, we get decisions in which judges impose tort liability on defendants who breached no existing social rule, and who could not reasonably expect that they would be made to pay for harm they innocently failed to prevent. In these few cases, the court imposes liability on the defendant to tell the members of the community how they ought to act in the future, based on the judges' independent assessment of the risks and utility of defendant's conduct, even though the defendant at the time followed all the community's accepted rules of behavior. The most famous examples of this are *The T.J. Hooper*,[264] *Helling v. Carey*[265] and *Kelly v. Gwinnel*.[266] In *The T.J. Hooper*,[267] in 1932, the United States Court of Appeals for the Second Judicial Circuit imposed liability on a ship owner for the loss of cargo in a storm that could have been avoided had the ship owner taken the unusual step of installing a radio set to monitor weather reports. In *Helling v. Carey*,[268] the Washington Supreme Court imposed liability as a matter of law on an ophthalmologist who, following ordinary medical practice, failed to perform a test for open-angle glaucoma on a patient whose age made the condition highly unlikely. In *Kelly v. Gwinnel*,[269] the New Jersey Supreme Court held that a social host could

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[263] *See* RESTATEMENT (SECOND) OF TORTS § 281(b), Comments c,e,f; F. HARPER, *supra* note 229, at 138-43; *cf.* W. PROSSER, *supra* note 30, at 253-54 (criticizing within the foreseeable risk theories of proximate cause).

[264] 60 F.2d 737 (2d Cir. 1932) (L. Hand., J.), *cert. denied*, 287 U.S. 662 (1932).

[265] 83 Wash. 2d 514, 519 P.2d 981 (1974).

[266] 96 N.J. 538, 476 A.2d 1219 (1984).

[267] 60 F.2d 737 (2d Cir. 1932) (L. Hand., J.), *cert. denied*, 287 U.S. 662 (1932).

[268] 83 Wash. 2d 514, 519 P.2d 981 (1974).

[269] 96 N.J. 538, 476 A.2d 1219 (1984).

be held liable for injury caused by the driving of a drunken guest after the host served liquor to the obviously drunken guest knowing he would thereafter attempt to drive home. In each of these cases, the court authorized or imposed liability when defendant had clearly not breached any social rule, and plaintiff could not have expected defendant to have acted differently. These cases are rare, even now, for most judges subordinate the unreasonable foreseeable risk test to the goal of redressing wrongs. The problem with the unreasonable foreseeable risk description of the negligence standard, however, is that it serves as a continual, apparently legitimate invitation to judges to adopt a purely legislative role.

And what's the matter with that? Why shouldn't judges adopt a purely legislative role?

The preceding analysis of traditional convention-based tort liability helps us clarify exactly what it would mean for courts to exercise a purely legislative role in tort cases. In providing redress of a wrong that is a breach of a preexisting community norm, the court does not exercise a legislative role at all, as it simply takes the norms of the community as they are and uses them to determine whether plaintiff has in fact been wronged. In negligence law, which uses covering generalities to point to but not incorporate the specific social rules, and which uses the jury to determine the existence, scope and acceptance of particular social rules, the court doesn't even embody particular community conventions in the law. To exercise a truly legislative role in a tort case, either the court has to impose liability for violation of a judicially-created rule that was not accepted as binding by the community at the time plaintiff was hurt, or the court has to refuse to impose liability for harm caused by violation of an accepted community coordination norm because the court does not like behavior pursuant to the norm. As so defined, of course, it is not true that courts necessarily exercise a legislative function in deciding tort cases. And the arguments against exercising a purely legislative function, as so defined, are just the arguments for redressing convention-based wrongs, run backwards.

Judicial refusal to redress an injurious breach of a community's accepted coordinating convention because the court disapproves of the convention goes against all the reasons we have seen for redressing these wrongs. Judicial refusal to redress the wrong rejects plaintiff's claim to be a full and respected member of the community, denies plaintiff the good of corrective justice, undermines the ability of the community to coordinate behavior through accepted coordination norms, opens up the potential for extra-judicial attempts to redress wrongs, and fails to provide a satisfactory resolution to a dispute brought to court on the assumption that the court will redress injurious breaches of the community's accepted coordination norms.

Judicial imposition of liability in tort for violation of a judicially-created rule that was not accepted as a coordination norm by the community at the time plaintiff was hurt is just as bad if not worse. Instead of providing corrective justice to plaintiff, the liability judgment in such a case imposes

a positive injustice on defendant, who acted properly and could therefore expect that she would not be required by the court to pay damages for purely accidental harm caused by proper behavior. The court aids the plaintiff, who was not wronged by defendant, in imposing a wrong on defendant. Instead of reaffirming existing community norms and ensuring their continued effectiveness, the court enforcing a new judicially-created norm by a tort liability judgment causes uncertainty and confusion. People will wonder what conduct found acceptable by the community will in the future be deemed unacceptable by the court. This uncertainty may undermine people's reliance on current accepted community norms, as they may fear judicial liability for harm caused by conduct complying with all relevant community standards. The judicial judgment will not be a satisfactory resolution of the dispute, as defendant will be deeply resentful of a judgment that she has to pay damages when she has done no wrong, and the community, deep down, will not believe that justice was done. Such judgments do not demonstrate the community's commitment to justice, as justice is neither promoted nor achieved.

The policy reasons often given for tort decisions adopting a purely legislative role fail to provide adequate justification for these decisions. Spreading the cost of innocently-caused injury can better be done, if it is to be done at all, by broad-based social insurance schemes. The effectiveness of new tort liability rules to change previously accepted behavior is questionable, as is the court's capacity to determine that its proposed rule of behavior is better, all things considered, than the community's existing rule.

The most telling argument against a purely legislative role for judges in tort cases is, in the deepest sense, a constitutional claim. If the commonly understood function of the court in tort actions is to redress wrongs, a court adopting a purely legislative role has overstepped its bounds. A court usurps the legislature's authority when it uses its judicial power in a tort case, not to redress a wrong but to tell people how they ought to act in the future, by imposing liability on an innocent defendant who failed to act that way in the past. More fundamentally still, the court attempts to usurp the people's authority—our authority—to decide how we should act.

VI. CONCLUSION

Using John Finnis's social science methodology, we have identified the two halves of the focal case of tort liability: intentional battery and negligent infliction of personal injury. We saw a theoretical unity underlying both causes of action. They have the same practical point—to redress private injustices. They have the same justification from practical reasoning—to recognize plaintiff's claims to full status in the community, to see that justice is done, and to allow members of the community to continue coordinating their conduct according to their accepted conventions. They have the same criteria for determining a private injustice—

breach of a social rule intended to protect people like plaintiff from the hazard that caused plaintiff harm. We saw beneath the covering generalities in negligence law and the more specific rules of battery a common underlying structure to the private wrongs redressed by these institutions of tort law. First, there must be a social convention or coordinating norm intended to protect people like plaintiff from a particular hazard. Second, plaintiff coordinated his conduct with that of defendant on the assumption that defendant would follow the social convention; plaintiff relied on the norm, and expected defendant to follow it. Third, defendant failed to follow that social norm. Fourth, the defendant's breach of the social norm subjected plaintiff to the hazard the norm was intended to protect plaintiff against and thereby caused plaintiff harm. The hazard-class test the courts evolved in statutory negligence cases thus points to the deep structure of private injustice in a convention-based system of corrective justice.

This theoretical understanding was possible in the teeth of a competing utilitarian descriptive theory that has become partially embedded in the institutional structures it originally attempted to describe. That competing theory explained negligence as conduct posing an unreasonable foreseeable risk of harm to others. The key to a more accurate descriptive theory was fourfold. First, we had to recognize the theoretical origins of the foreseeable risk language. Second, we proceeded to analyze the inadequacy of the foreseeable risk test as descriptive social theory. Third, we then focused on negligence law prior to the utilitarian misdescription to formulate a provisional descriptive theory. Fourth, and finally, we analyzed current negligence law to see how much of it is still consistent with the descriptive theory explaining early negligence law, and how much is attributable to the utilitarian theoretical misdescription. This last step required us to be sensitive to the defects in the competing utilitarian theory and to be persistent in our search for the practical point, in application, of symbols derived from the defective theory.

The biggest difference between this understanding and the competing social-policy based theories of tort liability is a difference that goes to the heart of a democratic society. If courts in tort cases decide whether the defendant wronged the plaintiff by referring to the accepted community safety conventions at the time of the injury, they are not telling us after the fact how we should act, based on their view of appropriate social policy. The people, instead, by adopting and acting on safety conventions, decide how we ought to act and what we can expect of others. Judges in tort cases have a difficult and important function. They are called on to adjudicate and redress claims of wrong. When they go further, and tell us how the defendant ought to have acted and how we ought to act in the future, based on their views of social policy, they go beyond what we expect of them. And they risk positive injustice when they require a defendant to pay the plaintiff, ostensibly to redress a wrong, when that defendant has commited no wrong.