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INTRODUCTION

This Article evaluates the provisions in the *proposed Restatement (Third) of Torts: General Principles* (Discussion Draft) ("Discussion Draft") addressing the element of "breach" in the tort of negligence—that is, the provisions that explicate the substantive content of the negligence standard. In light of the continuing debate among tort theorists over the best understanding of negligence, the Discussion Draft's take on negligence is a matter of some importance within the legal academy. Whether it is a matter of much practical importance may be doubted. Under settled American practice, the jury applies the negligence standard to the facts it finds, and renders only a general verdict that does not explain or justify the outcome. Together with the rules effectively limiting judicial review of jury verdicts to cases of manifest error, these features of trial practice ensure that the operational meaning of negligence is largely determined by juries in particular cases, rather than by the doctrines stated in appellate decisions (and restated in *Restatements* of Torts). Even if these practices are misguided, it is clear that no *Restatement* could repudiate them without drastically departing from the American Law Institute's ("ALI") traditional position that *Restatements* are predominantly positive and only incrementally normative.

On the other hand, the conception of negligence articulated in the *Restatement (First) of Torts ("Restatement (First)")*—which was carried over virtually unchanged into the *Restatement (Second) of Torts ("Restatement (Second)")*, and hence has defined the ALI's position for almost seventy years—has had an important influence on the black letter law, on appellate review of jury verdicts, and on

directed verdict practice in the trial courts.[1] Moreover, one might reasonably expect that courts will rely on the Discussion Draft's provisions in choosing jury instructions in negligence cases. This expectation, however, is undercut by the large gap between contemporary pattern jury instructions, which typically tell the jury to apply the reasonable person standard without explaining or defining it, and the *Restatement* and appellate cases, which typically interpret negligence in cost-benefit terms. Experience thus suggests that the Discussion Draft will have little impact on the negligence instructions juries receive. That may depend, though, on how aggressive the Discussion Draft is in recommending that courts instruct juries in accord with its formulations. In due course, I will explore what the Reporter, Gary Schwartz, has done on this score, and argue that it would be appropriate to do more.

In very general terms, it is evident that the Discussion Draft—like its *Restatement* predecessors—endorses a version of cost-benefit balancing as a central part of determining negligence. Some torts scholars have argued that cost-benefit negligence is a distortion of the traditional (and, they argue, normatively superior) reasonable person standard.[2] Were the Discussion Draft to adopt that view, it would jettison the *Restatement (First)*'s risk-utility test and simply rely on the reasonable person standard. Yet it would be an extraordinary development, to say the least, for the Discussion Draft to repudiate a major and at least moderately influential feature (risk-utility analysis) of the *Restatements (First)* and *(Second)*. Beyond that, as Gary Schwartz ably shows in the Reporter's notes on Section 4 of the Discussion Draft, the Hand Formula balancing approach is recognized as authoritative by judicial opinions in a majority of states, by the leading torts treatises, and by most contemporary torts scholars. And while there is certainly still room for argument about how strongly the courts are committed to Hand Formula balancing, Schwartz rightly points out that there is *no* American jurisdiction "whose cases explicitly (or by clear implica-

1. While appellate review of jury verdicts is unquestionably deferential, a recent study by Eisenberg and Clermont finds that jury verdicts are set aside in a surprisingly high percentage of cases in which an appeal is taken. *See* THEODORE EISENBERG & KEVIN CLERMONT, APPEAL FROM JURY OR JUDGE TRIAL: DEFENDANTS' ADVANTAGE (Working Paper Series, 2000) available at Social Science Research Network Electronic Library, www.ssrn.com.

2. *See, e.g.*, Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315 (1990).

tion) reject the balancing approach as an interpretation of the negligence standard."[3]

Accordingly, my focus in this Article will not be on *whether* Hand Formula balancing is part of negligence law, but on *how*—with what emphasis, what qualifications, what relationship to the reasonable person standard, and above all what underlying value judgments—Hand Formula negligence fits into the broader fabric of negligence law. To put it slightly differently, I will be asking which version of Hand Formula balancing has the best claim to adoption by the Discussion Draft—and what to do if there's no clear winner. With this in mind, I begin by laying out in Part I a basic conceptual framework for thinking about the Hand Formula and the reasonable person standard.

One candidate for "best in show," plainly, is the *Restatement (First)*'s risk-utility approach, which enjoys the uninterrupted endorsement of the ALI, and has also been cited approvingly by many courts over the years. Following a trail blazed by Michael Green in a valuable recent article,[4] I have concluded that the provisions of the *Restatement (First)* on negligence are worthy of more attention than they have received—and than the Discussion Draft gives them. Accordingly, in Part II, I explore in some depth the *Restatement (First)*'s balancing approach and the early scholarship by Terry, Seavey, and Bohlen that heavily influenced that approach. In Part III, I then consider Learned Hand's own version of "balancing" (the Hand Formula), and contrast Hand's approach, Richard Posner's interpretation of Hand's approach, and the *Restatement (First)*. Against this backdrop—which I hope holds some interest in its own right for students of negligence—I analyze and critique the Discussion Draft in Part IV.

I. THE REASONABLE PERSON STANDARD AND THE HAND FORMULA

It is necessary to begin with some conceptual preliminaries. When it comes to giving a positive account of negligence, the "big kids on the block" are clearly the reasonable person standard and

3. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 4 cmt. c (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].

4. Michael D. Green, *Negligence = Economic Efficiency: Doubts* >, 75 TEX. L. REV. 1605 (1997).

the Hand Formula.[5] The relationship between the reasonable person standard and the Hand Formula can take several different forms. Negligence law could use either one to the exclusion of the other. It could also combine the two by characterizing the Hand Formula as the test a reasonable person would use in deciding which precautions to take to avoid accident risks to others.[6] Finally, it could use both as independent and alternative techniques for determining negligence, with each assigned to its own sphere (and with more or less overlap between those spheres).

Implicit in these claims is the proposition that the reasonable person standard and the Hand Formula can each be conceived in a variety of ways. Some of these conceptions make the two converge, others make them diverge. For example, if the reasonable person avoids imposing substantial foreseeable risk of harm on others, no matter how difficult or expensive avoidance may be, then the reasonable person standard is obviously at odds with the Hand Formula. If, on the other hand, the reasonable person takes the same care of the persons and property of others as of his or her own person and property, then the reasonable person standard and the Hand Formula can be seen as two idioms for the same idea—namely, that sensible people balance pros and cons when deciding how to deal with risks to themselves and should use the same criteria when making decisions that involve risks to others. Alternatively, the reasonable person standard can be defined in ways that leave its relationship (if any) to the Hand Formula up for grabs. For example, if the reasonable person follows the prevailing social norms concerning accident risks, we need to know the content of those norms before we can describe their relationship to the Hand Formula.

The discussion so far has emphasized the range of behavioral standards that could plausibly be used to explicate the reasonable person standard. The Hand Formula can be subjected to a similar analysis, but in order to do so we must first distinguish the two dis-

5. The Hand Formula is set forth in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability [of an accident] be called P; the injury, L; and the burden [of adequate precautions] B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL."). I use "Hand Formula approaches" as a shorthand for the whole range of approaches that balance the costs and benefits, however defined, of taking greater care to avoid an accident.

6. An important variant of this approach posits that a reasonable person uses the Hand Formula as one—but not the only—source of guidance concerning how much care to take.

tinct inquiries the Hand Formula requires.[7] The first inquiry is *factual and descriptive*: what was the probability of an accident given the actor's behavior? What harm (or range of harms) would occur if there were an accident? Would the precaution the opposing party claims the actor should have taken have reduced or eliminated the accident risk? If so, what costs (of any and every kind) would the actor have incurred in taking that precaution? As Learned Hand pointed out, it will often be impossible to arrive at a "quantitative estimate" of any of the factors comprising the Hand Formula.[8] But that observation does not alter the factual character of what is being estimated, be the estimate qualitative or quantitative. A jury that finds that a drunk driver created a grave risk of a collision that would cause serious personal injuries to another driver is engaged in factfinding no less than a jury that, armed with statistical information by the parties, is able to express its findings quantitatively.

The "Hand Factors," if you will, are thus the raw data to which the "Hand *Formula*" is applied to determine whether there was negligence in accordance with the "Hand *Norm*." The Hand Norm tells us that it is negligent to omit a precaution if the reduction in expected accident costs would have been greater than the costs of the precaution. The Hand Formula expresses the Hand Norm in algebraic terms: it is negligent to omit a precaution if PL > B. But factual information about each of the Hand Factors is not enough to apply the Hand Formula. That information must be *evaluated* in a way that allows for the comparative judgment required by the Hand Norm. For example, suppose that a surgeon could, by ordering tests costing $1,000, have obtained additional information about his patient's condition that would have avoided a 1% chance of a surgical injury that would deprive her of the use of her left leg. These facts relating to the Hand Factors only set up the problem; they cannot solve it. To compare $1,000 with a 1% chance

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7. *See* Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1029-32 (1994); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

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> [O]f these factors care is the only one ever susceptible of quantitative estimate, and often it is not. The injuries are always a variable within limits, which do not admit, of even approximate, ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries.

Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949).

of losing the use of a leg, the decisionmaker must make a value judgment.[9]

It is a question of law what criterion should be used to make these value judgments. Just as there is a range of ways in which the law could conceive of the reasonable person standard, so there is a range of ways in which the law could conceive of the Hand Norm.[10] Here are some of the salient alternatives one encounters in contemporary torts scholarship:

(1) The willingness-to-pay approach, which interprets the Hand Norm as intended to maximize wealth, and expresses the Hand Factors in monetary terms. This approach has long been championed by Richard Posner and William Landes.[11]
(2) The utilitarian approach, which interprets the Hand Norm as intended to maximize social welfare, and expresses the Hand Factors in terms of utility. This is the approach favored by welfare economists such as Louis Kaplow and Steven Shavell.[12]
(3) The social contract approach, which interprets the Hand Norm as calling for balancing freedom of action against security so as to maximize the overall well-being of individuals. Gregory Keating has developed this approach as central to a Rawlsian account of fair terms of social cooperation in the realm of potential accidents.[13]

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9. The need to make a value judgment should not be confused with the issue of "objectivity," which can arise as to both facts and values. For example, the law could elect to focus on how hard it would be for the average person to take some precaution, rather than on how hard it would be for the actor to have done so. Similarly, the law could elect to focus on how the average person in the community would value the cost of taking a precaution, rather than on how the particular actor would value it. Nor must the issue of objectivity be resolved in the same way for facts as for values. One can imagine a negligence standard that inquired into the actor's actual, "subjective" precaution costs, but evaluated those costs by using prevailing community values or some other "objective" method.

10. For a full and very insightful exploration of this point, see Kenneth W. Simons, *The Hand Formula in the Draft* Restatement (Third) of Torts: *Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901 (2001).

11. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 353-92 (1990); Faya v. Almaraz, 620 A.2d 327 (Md. 1993).

12. *See* LOUIS KAPLOW & STEVEN SHAVELL, PRINCIPLES OF FAIRNESS VERSUS HUMAN WELFARE: ON THE EVALUATION OF LEGAL POLICY, ch. 3 (Olin Center Discussion Paper No. 277, Mar. 2000).

13. Keating, *supra* note 7, at 312-13.

(4) The egalitarian approach, which interprets the Hand Norm as supporting an egalitarian goal of equal resources, and deploys the willingness-to-pay criterion for that purpose. Ronald Dworkin proposed this approach in *Law's Empire*.[14]
(5) The virtue-based approach, which interprets the Hand Norm as commanding that persons choose prudently and jettisons the Hand Formula, but uses the Hand Factors to try to arrive at an intuitive understanding of which course involves the lesser evil. James Gordley argues for such an account of the reasonably prudent person (which he traces to Thomas Aquinas).[15]

The fact that a wide range of normative views can plausibly be used to ground the Hand Formula and guide evaluation of the Hand Factors matters for several reasons.[16] First, we can say that the Hand Norm—in its most general, inclusive form—stands for the pragmatic proposition that persons should choose to take greater care when the expected good consequences outweigh or overbalance the expected bad consequences. All of the approaches summarized above agree that—in the limited context of individual decision-making about the accident risks to others associated with one's conduct—persons should compare the expected consequences if they take greater care with the expected consequences if they do not.[17]

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14. *See* RONALD DWORKIN, LAW'S EMPIRE 276-313 (1986).

15. James Gordley, *Tort Law in the Aristotelian Tradition*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 131, 147 (David Owen ed., 1995) ("[W]hile they thought that a prudent person would weigh factors like those of the Hand formula, Thomas and Cajetan had a different idea from modern economics of what it meant to do so . . . . [They] were discussing virtue. For them, an outcome is good or evil, and a prudent person will seek or avoid it, to the extent it furthers or detracts from the distinctively human life that is one's ultimate end. Morever, they did not think that a prudent person could make his decision by any sort of calculus or deductive argument. A prudent person moves from the premise 'the greater evil is to be avoided' to the conclusion 'this is the proper course of action' by means of a minor premise 'this course of action avoids the greater evil,' which is not itself demonstrable but is apprehended by a type of prudence (*intellectus* for Thomas, *nous* for Aristotle) which has been translated as 'understanding' or 'intuition.' ") Drawing on Smith and Hume rather than Aquinas, Heidi Li Feldman argues for a virtue-based understanding of the reasonable *prudent* person standard, in which the Hand Formula plays little if any part. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000).

16. This Article does not address the normative question of which conception of the Hand Formula is best as a matter of legal policy.

17. *See* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 270-72 (1996). Hurd maintains that deontologists can accept the consequentialist, Hand Formula conception of negligence. Her basic argument is that deontological rules trump consequentialist considera-

Second, it may be that there is something close to consensus in support of using the Hand Factors to structure the factual inquiry into negligence, yet wide disagreement on how the evaluation of those factors is to proceed. If so, that raises an important question about the role of the Discussion Draft: should it choose the conception that has the most support in the case law, the "best" conception that has *some* support in the case law, or a very general "umbrella" approach that is consistent with a wide range of Hand Norms?

Third, descriptive assessments of negligence doctrines and negligence cases must bear in mind that there are many Hand Norms, not one. The Hand Norm or "balancing" approaches all agree that evaluating the good and bad consequences of choosing more or less care is crucial to which choice a reasonable person would make. But they differ as to how those pros and cons should be evaluated.[18] Consequently, the mere fact that a court looks to the consequences of the challenged aspect of a party's conduct does not tell us that the court endorses every (or any) particular conception of the Hand Norm.

Fourth, the plasticity of the Hand Norm raises questions about jury instructions parallel to those we touched on earlier in discussing the reasonable person standard. Let us assume that courts were to agree that some version of the Hand Norm should be used to define unreasonable conduct. The next question is whether this conception of the Hand Norm is to be enforced via jury instructions or only via appellate review. Enforcement at the jury level could be minimal, weak, or strong. Minimal enforcement would simply track existing practice, giving the jury an undefined reasonable person instruction, with no reference to the Hand Formula. Weak enforcement would employ an open-ended Hand Formula instruction telling the jury to balance the Hand Factors without telling it *how* to balance them. Strong enforcement would employ instructions telling the jury what criterion it was expected to use to evaluate the Hand Factors.

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tions, but that many areas of life are *not* governed by deontological rules. In those realms, consequentialism is the appropriate source for moral (and legal) norms. Alternatively, as Professor Simons argues in his contribution to this Symposium, a deontological theory might treat the expected consequences of a person's act as relevant to the actor's fault, while rejecting the strong consequentialist claim that the act's rightness or wrongness depends solely on the favorability of the outcome. *See* Simons, *supra* note 10 at 909-14.

18. They may also sometimes differ as to whether a particular consequence should be regarded as good or bad.

II. THE *RESTATEMENT (FIRST)*'S CONCEPTION OF NEGLIGENCE

A. The Reasonable Person and Risk-Utility Analysis

In order to put the Discussion Draft's conception of negligence in perspective, it will be helpful to work through the approach taken by the *Restatement (First)*. Because the *Restatement (Second)* made only minor changes to the relevant provisions, the *Restatement (First)*'s conception of negligence has effectively been the ALI's official position for almost seventy years. The *Restatement (First)*'s approach has been influential in the courts. Indeed, as Michael Green has suggested, it may well have inspired Learned Hand to propound his Formula.[19] Beyond that, while I would not make any grand claims that the *Restatement (First)* was a Constitution for tort law, it was the product of sustained deliberations among leading torts scholars, judges, and lawyers over more than a decade.[20] Finally, the *Restatement (First)*'s heavy debt to early torts theorists such as Henry Terry and Warren Seavey, and its comparatively tenuous grounding in the then-prevailing black letter law, raises issues with interesting parallels for the Discussion Draft.

For as long there has been a tort of negligence, American courts have defined negligence as conduct in which a reasonable man (nowadays, a reasonable person) would not have engaged.[21] The *Restatement (First)* accordingly gave "marquee billing" to the reasonable person standard.[22] Section 282 defines negligence as conduct falling below "the standard established by law for the protection of others against unreasonable risk of harm."[23] The standard established by law, in turn, is the behavior of "a reasonable man under like circumstances."[24] By implication, therefore, an "unrea-

19. Green, *supra* note 4, at 1606-07.

20. Francis Bohlen was appointed Reporter and commenced work on the *Restatement (First)* in June 1923. The first two volumes, including the provisions on negligence, were published in 1934. *See* RESTATEMENT (FIRST) OF TORTS xiv (1934). Judges such as Cardozo and Hand (though not Holmes) were deeply involved in this collaborative venture. *Id.* at xii-xiii.

21. Many courts speak instead of a reasonably *prudent* or *careful* person, and this difference may be an important one. *See* Feldman, *supra* note 15, at 1432-35 (arguing that these instructions are meant to appeal to a virtue-based conception of reasonable care). As we will see, although the black letter text of the Discussion Draft simply speaks of the reasonable person, the commentary also endows that person with the virtues of prudence and carefulness.

22. Green, *supra* note 4, at 1630.

23. RESTATEMENT (FIRST) OF TORTS § 282.

24. *Id.* § 283.

sonable risk" of harm to others is a risk the reasonable person would not take.[25]

Thus, the *Restatement* sets up the reasonable person as the template for determining negligence.[26] Importantly, the reasonable person plays this role in negligence per se as well as ordinary negligence cases. Section 285 provides that the reasonable person standard may be established by statute or judicial decision, or it may simply be "applied to the facts" by the factfinder in the absence of a statute (or decision). According to the *Restatement*, in enacting a prohibitory safety statute, "the legislative body declares its opinion that the risk involved is unreasonable," thereby "defining what it regards as the standard conduct of a reasonable man."[27] Moreover, the reasonable person is expected to "know the statutory and common law, in so far as it establishes a standard of obligatory behavior, at the risk of incurring liability if he falls below it . . . ."[28] The theory of the *Restatement*, therefore, appears to be that the reasonable person is expected to know and comply with the legislature's statutory judgments about which risks to others (and self) a reasonable person should avoid.[29]

This brings us to the case-by-case application of the reasonable person standard. Rather than simply providing that the jury should decide how a reasonable person would act under the circumstances, the *Restatement (First)* adopted a balancing (or Hand Norm) approach some years before Learned Hand first articulated the Hand Formula.[30] The *Restatement*'s approach takes the form of a risk-utility test: "the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards

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25. I will take up shortly the relationship between this *implicit* definition of "unreasonable risk" and the *Restatement*'s *explicit* definition of "unreasonable risk" in terms of risk-utility balancing.

26. The discussion in the text omits the important provisions in the *Restatement (First)* making *recognizable* (i.e., reasonably foreseeable) risk a necessary condition for the existence of an unreasonable risk. *Id.* §§ 289-90. The reasonably careful person standard also controls the application of this requirement. As Section 291 phrases it, the question is whether "the act is one which a reasonable man would recognize as involving a risk of harm to another . . . ." *Id.* § 291.

27. RESTATEMENT (SECOND) OF TORTS § 285 cmt. i (1965).

28. RESTATEMENT (FIRST) OF TORTS § 290 cmt. n.

29. Presumably the same reasoning would apply to rules specifying reasonable care announced in judicial decisions.

30. Green, *supra* note 4, at 1606-07. Professor Green points out that *Gunnarson v. Robert Jacob, Inc.*, 94 F.2d 170, 172 (2d Cir. 1938) rather than *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), is the first case in which Hand described a risk-benefit test for negligence. *Id.* at 1606 n.10. The court noted in *Gunnarson* that "[i]n such cases liability depends upon an equation in which the gravity of the harm, if it comes, multiplied into the chance of its occurrence, must be weighed against the expense, inconvenience and loss of providing against it."

as the utility of the act or of the particular manner in which it is done."[31]

Now, one might argue that this language effectively *substitutes* a risk-utility inquiry into "unreasonable risk" for an inquiry into what a reasonable person would have done, thereby supplanting the reasonable person standard. This interpretation is superficially appealing but incorrect. The *Restatement*'s theory in fact *incorporates* risk-utility balancing into the decisionmaking of a reasonable person. The *Restatement* argues that a reasonable person impartially and disinterestedly balances risk and utility in making judgments about whether conduct is unreasonably risky.[32] Comment c to Section 291 states that the actor's judgment as to whether a risk is unreasonable "must conform to the standard of a reasonable man." In turn, Comment a to Section 283—which sets forth the qualities possessed by the reasonable person—explains that the judgment of the reasonable person is based on "whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires not only that the actor should give to the respective interests concerned the value which the law attaches to them, but also that he should give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to that of others."[33]

I will have more to say shortly about this remarkable—and I think undeniably *moral*—conception of the reasonable person standard. The immediate point is that the risk-utility test is clearly meant to be an aspect of the reasonable person standard, rather than a replacement for it. According to the *Restatement*, in the absence of a statutory command, the reasonable person is an impartial risk-utility balancer. As Bohlen put it in a revealing Reporter's Commentary on the 1929 Tentative Draft, the question is "not merely . . . what a reasonable man would do, but . . . what a reasonable man would do with his attention centered upon the risk which his conduct involves and the gain to society or to himself, and

31. RESTATEMENT (SECOND) OF TORTS § 291.

32. *See id.* § 291 cmts. c, d, & e. The actor's judgment as to whether a risk is unreasonable "must conform to the standard of a reasonable man, neither more nor less." *Id.* § 291 cmt. c.

33. *Id.* § 283 cmt. d (noting that the reasonable person is "reasonably 'considerate' of the safety of others and does not look primarily to his own advantage").

through himself to society, which is likely to result from his conduct."[34]

But why does it matter whether risk-utility balancing takes place "inside the head" of the reasonable person,[35] or instead is a free-standing inquiry that makes the reasonable person superfluous? I suggest that there are important rhetorical and cognitive differences between these alternatives. The free-standing approach is reminiscent of the economist's assumption that people behave *as if* they were rational. It invites the court (or jury) to apply an external Hand Formula analysis to the behavior of the actor whose conduct is in question. By contrast, the inside-the-head approach links the Hand Formula to intuitions and experience about how reasonable people behave.[36] In effect, it posits that cost-benefit analysis is an important part of *practical reasoning* about accident avoidance. Because they are not trained economists, judges and juries (especially juries) are more likely to resist—and less likely to be adept at—cost-benefit analysis presented as a free-standing methodology. They will find it easier, more appealing, and more useful to refer to the Hand Formula for guidance when it is presented as a central feature of the reasonable-person standard than when it substitutes for that standard. They will be encouraged to bring to bear both imagination and calculation. Furthermore, they will be doubly reminded—once by the structure of the Hand Formula, and once by the structure of the reasonable-person-in-the-circumstances inquiry—that the assessment of negligence is to be done *ex ante* rather than *ex post*.

B. How Risk-Utility Works: Analysis of Factors

The next set of questions concerns how risk-utility balancing works. Although the relevant provisions of the *Restatement (First)* are somewhat murky, in the end they track the Hand Formula quite closely. To decipher the *Restatement*, it is best to begin with Henry Terry's pioneering account of the calculus of risk in his 1915

34. RESTATEMENT (FIRST) OF TORTS, Commentary on Section 172, Tentative Draft No. 4 (1929). Michael Green gets the credit for discovering this important source. Green, *supra* note 4, at 1628-29.

35. Thanks to Neal Feigenson for suggesting this characterization.

36. To be sure, in everyday life there often is not time or occasion for cost-benefit analysis, because one is guided by rules of thumb, habits, or other behavioral shortcuts. Yet, reasonable people commonly consider costs and benefits in a variety of contexts, and calibrate their behavior accordingly. In addition, of course, the reasonable person looks to laws, social norms, customs, habits, experience, intuition, and anything else practical reason might usefully draw on.

article on negligence,[37] on which Bohlen drew heavily in drafting the *Restatement.* Terry defined negligence as "conduct which involves an unreasonably great risk of causing damage," while likewise affirming that the actor "must judge and decide as a reasonable and prudent man would."[38] But whereas Learned Hand would later set out three factors for determining whether a risk was unreasonable, Terry used five: the chance of harm (Hand's P), the value of what will be harmed (Hand's L), and, on the other side of the balance, three factors: the value of the actor's goal, the utility of the actor's conduct in achieving that goal, and the necessity of the actor's conduct to achieve that goal. These three factors are aspects of Hand's B: they measure the actor's expected gain from not taking greater care, which is the obverse of the actor's expected loss from taking greater care. Thus, Terry's analysis tracks each of the Hand Formula factors.[39]

Yet, there is a difference between Terry's approach and the Hand Formula, and that difference carries over to the *Restatement (First).* Unlike the Hand Formula, which on its face is completely silent regarding whether, and if so how, B, P, and L are to be evaluated, Terry's language explicitly calls for judgments about the *values* of PL and B. The *Restatement (First)* both follows Terry's lead and specifies how those judgments are to be made.

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37. *See* Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915); *see also* HENRY T. TERRY, SOME PRINCIPLES OF ANGLO-AMERICAN LAW 175-78 (1884). Michael Green has traced Terry's influence on Bohlen, Seavey, and the *Restatement of Torts*. *See* Green, *supra* note 4, at 1622-30; *see also* LAURENCE H. ELDREDGE, MODERN TORT PROBLEMS 6 (1941) (suggesting that many of Terry's ideas on negligence "became incorporated into Sections 291, 2, and 3 of the *Restatement of Torts*").

38. Terry, *supra* note 37, at 40-41.

39. Indeed, although Terry's notation is more awkward, it spells out more clearly than Hand's that the issue is the *marginal* costs and benefits of additional precautions. Consider the example Terry used—the famous case of *Eckert v. Long Island Railroad Co.*, 43 N.Y. 502 (1871). Eckert was killed trying to rescue a child about to be struck by one of the defendant's trains, and the railroad argued he shouldn't recover because he had been contributorily negligent. For Terry (as for Hand) the risk consisted of the chance that Eckert would be killed multiplied by the loss of his very valuable life if he were. To avoid that risk, Eckert could have taken the precaution of not trying to rescue the child. To take that precaution for Eckert's own safety, however, would have meant the child would not be rescued. A simplistic Hand Formula analysis would therefore say that B was the value of the child's life. Terry's analysis looked more discriminatingly at the facts by asking the marginalist question: how much did Eckert's attempt to rescue the child increase the child's chances of survival? If the attempt at rescue couldn't possibly have succeeded, then nothing would be lost by not making the attempt. In other words, B would have been zero. Conversely, if the child would have been saved anyway, B would also have been zero. Put differently, B is the *difference* in the child's probability of survival attributable to Eckert's attempt to rescue it, multiplied by the value of the child's life. (On the facts, Terry plausibly judged that this difference must have been fairly great, because Eckert did rescue the child).

Thus, the factors the *Restatement* sets out for determining whether a risk was unreasonable include both factual and evaluative elements. To determine the magnitude of the risk (Hand's PL), Section 293 calls for consideration of "the extent of the chance" that the actor's conduct will cause harm[40] (Hand's P), "the extent of the harm likely to be caused to the interests imperiled"[41] (Hand's L), and "the number of persons" exposed to harm (likewise an aspect of Hand's L).[42] Section 293 also lists another factor, however—"the social value which the law attaches to the interests which are imperiled"[43] —that specifies how value judgments about accident risks are to be made. This factor is a Hand Norm with no analog in the Hand Formula itself.

A similar mixture of factual and evaluative factors surfaces in the *Restatement (First)*'s framework for determining B in the Hand Formula—which, in the *Restatement*'s cumbersome formulation, is represented by the utility of the actor's conduct or the utility of "the particular manner" in which the actor behaves.[44] These factors (which closely track Terry's) include "the extent of the chance" that the actor's interest will be advanced by the conduct[45] (Terry's "utility of the risk"), and "the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct"[46] (Terry's "necessity of the risk"). Also included, however, is a plainly evaluative factor—"the social value which the law attaches to the interest which is to be advanced or protected by the conduct"[47] —with no analog in the Hand Formula.

The analysis up to this point has shown that the *Restatement*'s factual analysis can fairly be characterized as a precursor of the Hand Formula. Bohlen followed Terry, and Hand agreed with them, while pruning the list of factors into a simpler form that

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40. RESTATEMENT (FIRST) OF TORTS § 293(b) (1934).

41. *Id.* § 293(c).

42. The idea appears to be that L is higher if several persons face some constant probability of injury than if only one person does.

43. *Id.* § 293(a).

44. *Id.* § 291(1). Although inelegantly expressed, the idea seems clear enough: the objection to an actor's conduct may be that the activity was unreasonably risky, or that the actor engaged in the activity in an unreasonably risky way. The *Restatement* thus brings both the actor's choice of activities and the actor's choice of precautions within the ambit of the negligence inquiry. (There is no indication, however, that the *Restatement* anticipated modern economic analysis of activity-level issues concerning the frequency, extent, or intensity of an activity. *See generally* Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980)).

45. RESTATEMENT (FIRST) OF TORTS § 292(b).

46. *Id.* § 292 (c).

47. *Id.* § 292 (a).

could more readily be expressed as "an equation."[48] But this description of the relationship between the *Restatement (First)* and the Hand Formula ignores the evaluative dimension. As I will discuss at greater length in Part III, Learned Hand's way of stating the Hand Formula removes the question of value judgments from the calculus of risk—though without in any way denying that those value judgments need to be made. That, however, was not Terry's approach. Rather, he stated the two sides of the ledger in terms of the "value" of what was at stake. The *Restatement* also takes this approach: on both sides of the risk-utility balance, it calls for measurement in the common coin of "social value," and it interweaves the factual and evaluative aspects of the inquiry by treating the social values of the conflicting interests as "factors" in the risk-utility test.

C. How Risk-Utility Works, Continued: Evaluation of Risk and Utility

The next step is to unpack the *Restatement (First)*'s approach to evaluating the Hand Factors. The two central features of the *Restatement*'s account are its choice of "social value" as the metric for weighing risk against utility, and its insistence that the relevant social values are those "which the law attaches to the interests" that are (on the risk side) imperiled and (on the utility side) protected or advanced by the actor's conduct. The *Restatement* says that "what the law regards as the utility of the actor's conduct" is determined in light of the social value the law attaches to the interest in question. For the *Restatement*, then, human beings have various interests, and those interests have more or less social value.[49]

The burning question, however, is how we determine what social value the law attaches to these multifarious interests.[50] Aside from endorsing certain obvious propositions—for example, that the

48. Gunnarson v. Robert Jacob, Inc., 94 F.2d 170, 172 (2d Cir. 1938); *see also* Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949) (alluding to "an equation for negligence").

49. *See* RESTATEMENT (FIRST) OF TORTS § 1 ("The word 'interest' is used throughout the *Restatement* of this Subject to denote the object of any human desire.").

50. The *Restatement (First)*'s choice of the term "social value" (rather than simply "value") may have been a signal to progressives that the *Restatement* was not committed to a neoclassical theory of subjective value. *See* Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805, 826-35 (2000) (discussing the progressive theory of social value). My failure to pursue these sorts of questions in this Article should not be taken as a suggestion that they are unimportant. It would be useful to know more about the broader intellectual context of the *Restatement (First)*.

social value of an activity such as manufacturing includes its benefits to "the whole community"[51]—the *Restatement* largely sweeps this problem under the table. Its brief discussions of legal valuation contain some uncontroversial *comparative* judgments about social value—for example, that the risks of carefully operated railroads are "more than counterbalanced by the service which they render the public."[52] That explains why we subject railroads to negligence liability rather than *banning* railroading. But it tells us nothing about how to use "social value" to help determine what precautions a reasonably careful railroad would take.

Similarly, the *Restatement* informs us that it is reasonable to create greater-than-normal risks when an interest "to which the law attaches a preeminent value" is at stake.[53] While that explains why speeding may be justifiable in "pursuit of a felon or in conveying a desperately wounded patient to a hospital,"[54] it does not tell us when the value of driving (carefully) justifies the risks. Indeed, on that question, the *Restatement* argues that the law regards the freedom to travel by highway "as of sufficient utility to outweigh the risk of carefully conducted traffic," regardless of how unimportant a particular trip may be.[55] Now, this *refusal* to engage in case-by-case evaluation of social value may well be justified in the case of driving,[56] but it also illustrates the limits of the *Restatement*'s strategy of deriving guidance about social values by looking at our existing safety laws and practices. The judgments embedded in those sources of authority are typically too general and categorical to be of much use in deciding negligence cases.

Perhaps in tacit recognition of this difficulty, the *Restatement (First)* also appeals to public opinion as a source of legal valuation. Section 292 asserts that "[t]he value attached by the law

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51. RESTATEMENT (FIRST) OF TORTS § 292 cmt. a ("The irreducible minimum of risk both to employees and outsiders which is inherent in manufacture is not regarded as unreasonable, not so much because manufacture is profitable to those who carry it on, but because it is believed that the whole community benefits by it.").

52. *Id.*

53. *Id.* § 291 cmt. e.

54. *Id.*

55. *Id.*

56. The *Restatement* also fails to provide concrete examples of how the reasonable person makes risk-utility judgments. It offers not a single illustration (other than the easy cases referred to in some of the comments) of how the risk-utility balancing approach works. We learn, for example, that driving a car extremely fast is justified only by an errand "of great importance such as the extinguishment of fire or the saving of human life." *Id.* § 293 cmt. b. Contrast this with § 289's elaborately detailed treatment of which risks an actor should be expected to recognize, which includes twenty illustrations. The same tendencies are evident in the *Restatement (Second)* as well.

to the great majority of interests is identical with the value which popular opinion attaches to them," while adding that there are some interests to which "a persistent course of decisions has, expressly or by implication, attached a value different from that which the jury would ordinarily attach thereto."[57] Where such a conflict is present, the *Restatement* asserts that "the legal and not the popular valuation" controls.[58]

The *Restatement*'s thesis that legal and popular valuations are usually identical is important for two reasons. First, this "convergence" thesis, if correct, suggests that the *Restatement*'s failure to explain how free-standing legal valuation works may not matter very much. Given the jury's traditional role in applying the negligence standard, in most situations there will be no judicial decisions specifying the social value of particularly described interests.[59] As a practical matter, therefore, the best way to ascertain what social value the law attaches to an interest will usually be to consult popular opinion. Second, the *Restatement* essentially equates the value public opinion attaches to an interest with the value *the average jury* would attach to it. This suggests that the real meaning of the "social value" criterion for balancing costs and benefits depends on the extent to which courts police jury evaluations of the Hand Factors.[60] As I will next explore, these themes were indeed prominent in the thinking of the scholars who had the greatest influence on the *Restatement (First)*.

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57. *Id.* § 292 cmt. b.

58. *Id.* On the other hand, the *Restatement* also suggests that when the legal valuation diverges from "a persistent and long-continued course of public conviction, as distinguished from a novel and possibly ephemeral opinion, courts should and often do re-examine their valuation and make it conform to the settled popular opinion." *Id.* § 291 cmt. d.

59. There may be broad language in opinions about the importance of this or that general interest, but it is hard to see how such generalities could be of much help in evaluating concrete factual situations. Consider, for example, the *Eckert* court's statement that "[t]he law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." Eckert v. Long Island R.R. Co., 43 N.Y. 502 (1871).

60. It may be fruitful to think of the *Restatement's* references to the legal valuation of interests as designed to legitimize a particular type of jury control. The *Restatement* suggests that courts are warranted in overriding jury decisions they think are at odds with the law's valuation of the affected interests. And its use of activity-level examples suggests that courts should be most willing to intervene when the claim the jury is considering is that an entire activity is unreasonably risky even if carefully conducted.

D. Seavey's Moral Conception of Negligence and the Restatement (First)

As we have seen, the *Restatement (First)* incorporates risk-utility analysis into the impartial decisionmaking of the reasonable person and further posits that the reasonable person's judgments about risk and utility should be based on the values public opinion assigns to different interests. But why should the values that happen to prevail in the community be given this normative significance? An important article by Warren Seavey, written during the formative years of the *Restatement (First)* for use by Bohlen and the scholars collaborating with him, sheds considerable light on how Bohlen's circle viewed these matters.[61]

Seavey was primarily interested in investigating the extent to which the standard for negligence took into account the actor's "subjective" characteristics rather than "objective" characteristics supplied by law. He divided human qualities into physical, mental, and—most important for present purposes—moral. The gist of his position was that the reasonable man was endowed by law with the individual actor's physical qualities, but with "standard moral and at least average mental qualities . . . ."[62] Within the realm of mental qualities, Seavey endorsed Terry's position that an actor was not liable unless the risk was both foreseeable and unreasonable, borrowed Terry's five-factor balancing approach, and incorporated it into the deliberations of the reasonable person.[63] But Seavey departed from Terry's approach in two important ways. First, whereas Terry had commingled the factual and evaluative dimensions of risk-utility, Seavey sharply distinguished between them. Second, Seavey expressly tied the reasonable person's evaluation of the Hand Factors to the reasonable person's standard moral qualities:

> In this computation there are invoked two distinct kinds of problems. The first is purely mathematical, namely the ascertainment of the degree of likelihood that certain events will or will not occur. As to this, the result would be the same under any system of law; it is achieved by purely intellectual processes. The complete answer can be obtained, however, only by solving the other type of problem, that is the comparative values of the conflicting interests of the actor and the one whose interests are threatened. *This evaluation calls for the so-called moral qualities.* To the extent that the solution of these problems involves standardized elements, or,

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61. Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 1 n.1 (1927).

62. *Id.* at 27.

63. Seavey qualified his endorsement of Terry's position in a long footnote asserting "[w]e must not assume that we can rely upon any formula in regard to 'balancing interests' to solve negligence cases. The phrase is only a convenient one to indicate factors which may be considered and should not connote any mathematical correspondence." *Id.* at 8 n.7.

> phrasing it differently, to the extent that the actor's conduct is determined with reference to the community valuations, we may say that an objective test applies.[64]

But why does Seavey think that moral qualities are needed to evaluate interests? Because he thinks one of our two basic moral qualities is "the ability to evaluate interests; or, to put it in accord with the classical statement, the ability to distinguish right from wrong."[65] The reasonable person is endowed with the "standard morality," that is, the standard ability to evaluate interests, and therefore "evaluates interests in accordance with the valuation placed upon them by the community sentiment crystallized into law."[66] On this view, the reasonable person both assesses the Hand Factors accurately and evaluates the competing interests in accord with the prevailing moral views of their relative value.

Like Seavey, the *Restatement (First)* endows the reasonable person with normal morality: "[T]he judgment of the actor . . . must conform to the standard of a reasonable man, neither more nor less. He is not excused because he is peculiarly inconsiderate of others or reckless of his own safety nor is he negligent if his moral or social conscience is so sensitive that he regards as improper conduct which a reasonable man would regard as proper."[67] Also like Seavey, the *Restatement* links that normal moral character to the risk-utility test. It does so by requiring that the reasonable person's *judgments* about risks "give to the respective interests concerned the value which the law attaches to them," and "give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests."[68] This combination of knowledge of what is socially valued and equal respect for others constitutes the *Restatement (First)*'s version of Seavey's standard morality.[69]

The *Restatement*'s claim that reasonable persons balance risk and utility is thus embedded in an overall conception of ethical decisionmaking in situations where one's own interests conflict

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64. *Id.* at 8 (emphasis added).

65. *Id.* at 3. The other fundamental moral quality he identifies is the will.

66. *Id.* at 10.

67. RESTATEMENT (FIRST) OF TORTS § 291 cmt. c. *Cf.* Seavey, *supra* note 61, at 11 ("Excessive altruism is as much a departure from the standard morality as excessive selfishness, although in practice it is seldom actionable.").

68. *See* RESTATEMENT (FIRST) OF TORTS § 283 cmt. d (explaining that the reasonable person is "reasonably 'considerate' of the safety of others and does not look primarily to his own advantage").

69. For a contemporary account of negligence drawing on the ethical idea of the Golden Rule, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

with the safety of others. Indeed, the *Restatement* does not claim that a reasonable person always balances risk and utility by engaging in a free-standing inquiry into the Hand Factors. Rather, the reasonable person is guided by a moral sense that tracks the comparative judgments about the relative value of interests that most people in the community would make.

By grounding the reasonable person's value judgments in the standard or normal morality of the community, Seavey and the *Restatement (First)* elevate community norms to the status of law. Seavey justifies this move on the grounds that the values of conflicting interests have somehow been "fixed by the community" and "crystallized into law." That assertion, however, seems no more persuasive than the *Restatement (First)*'s parallel claim that the reasonable person is guided by the social values attached by "the law" to conflicting interests. Unless we expand what we mean by "law" beyond judge-made or statute law and include informal but widely shared community norms, these arguments are descriptively untenable.

Such an expansion may be exactly what Seavey and the *Restatement (First)* ultimately have in mind. On Seavey's view, the common law sets up the standard of a reasonable person who is endowed with the "standard morality," and who therefore knows the prevailing values of the community and applies them in regulating his own conduct. Actors cannot complain that they should not be held to this standard because they can fairly be expected to be familiar with prevailing community values,[70] and because the common law has chosen to treat them as authoritative. Moreover, this account helps buttress the traditional role of the jury in determining negligence. Jurors can safely be presumed to be familiar with

70. In this connection, it is noteworthy that Seavey was concerned with showing that the law was consistent with "our sense of justice." Seavey, *supra* note 62, at 12. Many people's sense of justice would be offended, however, if the rule were that each person is expected to act in accordance with whatever values happen to prevail in the community—even if those values have no legal provenance. Freedom of conscience might thereby be thought subordinated to popular opinion. But if the prevailing values of the community are treated as already part of the law—because the common law chooses to treat them as authoritative—then one can argue, as Seavey does, that "[t]o permit one who knows but does not accede to the community valuation of interests to have an individual standard would at once destroy the law." *Id.* at 11. *Cf.* Employment Div. v. Smith, 494 U.S. 872, 885 (1990) (refusing to apply heightened scrutiny to neutral, generally applicable laws that conflict with an individual's religious beliefs, on the grounds that this would be "permitting him, by virtue of his beliefs, 'to become a law unto himself'"); *see also* Reynolds v. United States, 98 U.S. 145, 166-67 (1879) ("Can a man excuse his [unlawful] practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

prevailing community values. Beyond that, in consulting community values, the jury would in an important sense be applying the "law" because the common law has designated those values as part of the reasonable person standard.

This argument meshes with the *Restatement (First)*'s formulations. Recall the *Restatement (First)*'s position that the reasonable person standard "may be *established* by a legislative enactment or a judicial decision," or "*may be applied to the facts of the case* by the trial judge or the jury, if there be no such legislative enactment or judicial decision."[71] These formulations treat legislatures and appellate courts as lawmakers, while treating trial courts and juries as law-appliers. Obviously, insofar as the negligence standard is not fully defined or specified, the law cannot simply be applied. By establishing popular valuations as controlling for purposes of the risk-utility test, however, the *Restatement* can be seen as giving those informal social norms the force of law.

Now, you may think this solution to the *Restatement (First)*'s fiction that interests have "social values" that have already been "attached" to them by "law" rests on an equally fictitious idea—that there are well-defined popular valuations for the interests at stake. I agree that there are serious questions here.[72] But I am trying to describe—not defend—an approach to the reasonable person standard that cuts across the lines of contemporary negligence scholarship in an interesting way. On one side are the partisans of the Hand Formula; on the other are those, like Patrick Kelley, who argue that community norms are the bedrock for the reasonable person. The evidence I have presented suggests that this dichotomy is overdrawn. The approach taken by Seavey and the *Restatement (First)* combines the reasonable person, the norm of equal respect for the interests of others, the analytic technique of the Hand Formula, and reliance on community valuations of the conflicting interests of potential injurers and victims. At least superficially, the result is an appealingly pluralist conception of negligence. Whether it is in the end coherent or descriptively adequate is a different question.

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71. RESTATEMENT (FIRST) OF TORTS § 285 (emphasis added).

72. These issues are ably explored by Professor Abraham in his contribution to this Conference. *See* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187 (2001).

E. Bohlen's View of the Roles of Court and Jury in Determining Negligence

One of the crucial questions for any version of Hand Formula balancing is whether, and if so how, the judge should instruct the jury to apply it. How one answers that question obviously depends on one's position on the respective roles of judge and jury in determining the negligence standard. Francis Bohlen staked out his position on these issues in an article written in 1924 (that is, early in the development of the *Restatement (First)*).[73] Bohlen took the jury's application of the negligence standard to the facts of the case to be the paradigmatic example of a "mixed question of law and fact."[74] He suggested that this label reflected the "peculiar nature" of the jury's function in deciding "questions for the solution of which the law has declared no definite pre-existing rule."[75] The law cannot formulate definite standards in advance to govern the innumerable specific cases that might arise. The best the law can do is "announce broad general principles, which give the materials and general directions for the construction of the standard to be applied in each specific case."[76]

In negligence cases, Bohlen (following Terry) took the relevant general principle to be that the defendant is negligent if "a 'reasonable man' in the defendant's place would have realized that his conduct would unduly imperil the plaintiff's interests."[77] Moreover, he accepted Terry's argument that the negligence question, so understood, would be "purely one of fact" if it entailed an inquiry into "the average conduct of mankind under similar circumstances."[78] Yet, Bohlen *rejected* Terry's conclusion that juries were merely finding facts when they applied the negligence stan-

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73. Francis A. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

74. *Id.* at 112.

75. *Id.*

76. *Id.* at 113.

77. *Id.*

78. *Id.* Terry argued that the issue of negligence turns on what "a standard man," *not* "an ideal or perfect man, but an ordinary member of the community," would have done under the circumstances. Terry, *supra* note 37, at 47. Questions of negligence are left to the jury "because the jury is supposed to consist of standard men, and therefore to know of their own knowledge how such a man would act in a given situation." *Id.* Moreover, Terry thought this the more appropriate standard because these are questions of fact: "the inference of reasonableness or unreasonableness, of due care or negligence, is in its nature one of fact, the data furnishing the minor premise and the major premise being drawn from common experience [i.e., the jury's knowledge of how an ordinary person would act], whereas in a true inference of law the major premise is a rule of law." *Id.* at 50.

dard, denying Terry's premise that the reasonable person is an ordinary or average person:

> [T]he 'reasonable man' is not the average man. He is an ideal creature, expressing public opinion declared by its accredited spokesman, whether court or jury, as to what ought to be done under the circumstances by a man, who is not so engrossed in his own affairs as to disregard the effect of his conduct upon the interests of others. He may be called a personification of the court or jury's social judgment. The factor controlling the judgment of the defendant's conduct is not what *is*, but *what ought to be*.[79]

These social judgments, Bohlen maintained, were "more nearly akin to a declaration of law than to a finding of fact," because they created obligatory standards used to determine the rights and liabilities of the parties.[80] On the other hand, because the jury's judgment applies only to the particular case before it, Bohlen pointed out that it was not lawmaking in the strong sense of laying down a rule to govern all cognate cases in the future.[81] He was thus led to a surprising conclusion: that the jury's function in defining the standard of conduct was neither factfinding nor lawmaking, but should instead be "properly termed 'administrative,' " because it was necessary to the "administration of the pre-existing broadly stated law by making it capable of application to the facts of specific litigated cases."[82]

Bohlen used his "administrative" characterization of the evaluation of negligence as the foundation for some large claims about the respective roles of court and jury. He argued that case-by-case jury determination of the standard of conduct raises serious questions of fairness, consistency, and predictability. The difficulty, he suggested, stems from "the fact that the common law has no machinery, like the legislatively created administrative board, which

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79. Bohlen, *supra* note 73, at 113 (emphasis in original). It is not easy to know who is right here. If the law calls for an inquiry into the average person's values, or even into the prevailing values in the community, it seems right to characterize this inquiry as factual. Facts about the values people hold are still facts. There is some support for the view that courts embraced this rationale at the time of the *Restatement (First)*. *See* FRANCESCO PARISI, LIABILITY FOR NEGLIGENCE AND JUDICIAL DISCRETION 226-27 (2d ed. 1992) (suggesting that American courts at the turn of the century tended to define negligence in terms of the care the average person would take). On the other hand, the idea that the reasonable person impartially balances conflicting interests seems more normative than descriptive, because many (if not most) people fail to conform to that standard in their daily lives. In the end, I am inclined to agree with Bohlen, because I think most juries approach their task by asking how a reasonable person *should* behave rather than how an average or ordinary person *would* behave. *See* NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 104-11 (2000) (presenting evidence that jurors try to do "total justice" between the litigants).

80. Bohlen, *supra* note 74, at 114.

81. *Id.*

82. *Id.* at 115.

can make rulings reducing general rules to that particularity necessary for their application to individual cases," and which can reexamine those rulings periodically "to determine whether they are still valid in view of changed conditions and changed public opinion as to the value of the respective interests."[83]

His solution to this problem had two components. First, Bohlen suggested that courts should (and already did) exercise far greater control over the jury's determination of standards of conduct than they do over its findings of fact.[84] One might have expected him to make the Holmesian argument that courts, as repeat players who acquire experience and give reasons for their decisions, are better placed than juries to render these administrative judgments.[85] Instead, Bohlen argued that juries cannot be trusted to weigh utility against risk. Bohlen claimed that juries, moved by the plaintiff's injuries and the defendant's wealth, will often employ a *de facto* norm of strict liability.[86] Even if the jury did apply the reasonable person standard, he suggested that it would give scant weight to the utility of the defendant's conduct in light of its injurious consequences. Courts could appropriately intervene to override "the jury's insistence on an overly stringent standard of conduct."[87]

Second, Bohlen believed appellate courts needed prodding to intervene even more aggressively than they were accustomed to in jury determinations. He believed they were held back, not by deference to the jury, but by fear that the rules they announced would be impervious to change. The culprit was *stare decisis*. Bohlen argued that it was out of place here. Courts, he wrote, should not apply "the traditional view that a judicial ruling on any subject announces a principle of law fixed, permanent, and immutable" to judicial decisions defining the negligence standard.[88] Defining negligence is not a matter of declaring unchanging common-law princi-

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83. *Id.* at 117.

84. *Id.* at 117-18.

85. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 123-24 (1881).

86. Bohlen, *supra* note 73, at 118 ("The general utility of such conduct is not likely to receive much consideration from a jury who sees before them a plaintiff whose vital interests have been harmed by a particular instance of it. A court might emphasize to the jury *ad nauseam* the social value of the act, but the jury would only see one man injured by another. And only the most confirmed optimist would dare to hope that they would judge the defendant's conduct by what that ideal creature, the 'reasonable man' would do . . . . The concept universal among all primitive men, that an injury should be paid for by him who causes it, irrespective of the moral or social quality of his conduct, while it has disappeared from legal thought, still dominates the opinion of the sort of men who form the average jury.").

87. *Id.* at 119.

88. *Id.* at 116.

ples, but rather of administrative specification of a standard of conduct that is dependent on changing social values.[89]

How can Bohlen's belief that juries frequently ignore the utility of the defendant's conduct be reconciled with his adoption of a risk-utility test in the *Restatement (First)*—particularly one that relies heavily on popular valuation of interests? Isn't this just inviting juries to hold defendants to a standard approaching strict liability, exactly as Bohlen feared?

The fullest statement of Bohlen's views on these issues is contained in the Reporter's Commentary he wrote to accompany the 1929 Tentative Draft of the *Restatement (First)*'s provisions on negligence. Generally speaking, these Draft provisions were substantively equivalent to the final text of the *Restatement (First)*. All the key features—the overarching reasonable person standard, the unreasonable risk test, the use of risk-utility analysis, and the resort to social values to determine the weight of the interests to be balanced—were in place (as was most of the specific wording). In commenting on these provisions, Bohlen made three key points. First, he acknowledged that adopting risk-utility analysis represented a shift in the formal doctrinal test for negligence.[90] Second, he argued that this shift would *not* hinder the courts in policing jury decisions applying the negligence standard: "there is no reason why the courts should not exercise the same control over the jury's exercise of its discretion in determining the relative values of the interests concerned and in otherwise comparing the risk with the utility, which they now exercise in controlling the jury's application of the more usual and general formula of 'the conduct of a reasonable man under the surrounding circumstances.' "[91] Third, he urged courts to modify their reasonable-person instructions to juries: "the Reporter can see no danger and some hope of gain in calling to the jury's attention the fact that their judgment should be controlled not merely as to what a reasonable man would do, but as to what a reasonable man would do with his attention centered upon the risk which his conduct involves and the gain to society or to himself, and through himself to society, which is likely to result from his conduct."[92]

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89. *Id.* at 119-20.

90. RESTATEMENT (FIRST) OF TORTS, Commentary on Section 172, Tentative Draft No. 4 ("The comparison between the social utility of the act and the magnitude of the risk is occasionally, but only occasionally, stated as the basis of decision in negligence cases.").

91. *Id.*

92. *Id.*

Plainly, an important part of Bohlen's motivation for incorporating risk-utility analysis into the reasonable person standard was to both reinforce the ability of courts to oversee jury determinations of the negligence standard, and to facilitate the judicial adoption of reasonable-person instructions that directed juries to refer to the Hand Factors in their deliberations. Bohlen believed that juries could apply the Hand Factors and evaluate them in terms of popular valuation of interests. The problem was to get them to do so, to overcome their tendencies to be swayed by sympathy for the victim, by hindsight, and by the pull of strict liability intuitions. The solution was to ask the jury to imagine how a reasonable person would have behaved—and then give them a reasonable person who (1) balances interests impartially, (2) looks at all the relevant consequences, and (3) relies on prevailing community values in assessing both sides of the ledger. And if that didn't work? Well, making risk-utility part of the black letter law would tend to strengthen appellate oversight of jury verdicts in negligence cases because it would give courts a structure for picking apart one-sided verdicts.

F. The Restatement (First)*'s Agenda for Changing Negligence Law*

As we have seen, the *Restatement (First)* broke new ground in making cost-benefit analysis an important and explicit part of determining negligence. For that very reason, some would deny that the *Restatement* faithfully reflects the character of American negligence law at the time of its adoption. Michael Green has documented the paucity of negligence case law explicitly endorsing cost-benefit or risk-utility balancing as of the adoption of the *Restatement (First)* in 1934.[93] Bohlen anticipated that objection in his 1929 Reporter's Commentary. His reply was that "[w]hile the comparison between the utility of an act and the risk involved therein is rarely stated by courts as the basis of their decisions, in reality it is the underlying basis of substantially all of them."[94] (Compare Posner's famous claim for the Hand Formula: "it never purported to be original but was an attempt to make explicit the standard that the courts had long applied.")[95]

93. Green, *supra* note 4, at 1611.
94. *Id.* at 1625.
95. Posner, *supra* note 11, at 32.

Now, making explicit what is implicit in the case law means changing the reasons that courts relying on the *Restatement* will give in the future, and therefore calls for a judgment about how far a *Restatement* should go in reforming the law. Unquestionably, most torts scholars—and most judges—would agree that making the law clearer and more explicit is an entirely appropriate goal for a *Restatement* of torts. What is more controversial is whether Bohlen was correct in claiming that risk-utility balancing is the best (most explanatory, most predictive, most coherent) account of the decisions. At its most general, Bohlen's claim was simply that courts usually decide negligence on the basis of pragmatic, all-things-considered, consequentialist judgments. Although some would reject even that "big tent" formulation, it seems fairly clear that most torts scholars today subscribe to it.

But what about the objection that the subsequent decisions employing risk-utility language in reliance on the *Restatements* should be given relatively little weight because they mostly reflect the ideas of certain legal academics rather than the real traditions of the common law?[96] The first response is that academic ideas have always been part of the spectrum of legal opinion on which *Restatements* draw, and appropriately so. Beyond that, the subsequent acceptance of risk-utility analysis in appellate decisions suggests that Bohlen was correct in claiming that the risk-utility gloss on the reasonable person standard merely made explicit what courts were already thinking and doing.[97]

It also bears emphasizing that the *Restatement (First)* did not purport to *replace* the reasonable person standard with risk-utility analysis. That would have been a radically revisionist move, clearly inconsistent with the ALI's conception of its *Restatements* as primarily rationalizing the law rather than reforming it. Far from discarding the reasonable person standard, the *Restatement* used it to tie together the various strands of substantive negligence doctrine. This was plainly an effort to make negligence law more systematic and coherent, while remaining consistent with the case law. The *Restatement*'s incorporation of risk-utility balancing into its

96. Interestingly, almost no one makes that argument about Section 402 of the *Restatement (Second)*, even though the main impetus for Section 402 was the ALI rather than the courts, and even though Section 402 surely was instrumental in the development of modern products liability law.

97. The ALI's endorsement carries some weight as well, because it suggests widespread agreement among academics, judges, and practitioners that the reasonable person standard includes a balancing test.

account of the reasonable person's decisionmaking should be seen as cut from the same incrementalist cloth. Risk-utility analysis, tied to prevailing social values and to the ideal of equal consideration for the interests of others, and presented as part of a reasonable person's decisionmaking, was an attempt to rationalize negligence law, not revolutionize it.

To be sure, by endorsing a pragmatic, balancing approach to evaluating reasonable care, the *Restatement (First)* was to some extent taking sides in a debate that torts theorists are still carrying on. Yet, it would be a vast overstatement to say that the *Restatement (First)*'s consequentialism is reductionist or monistic. As we have seen, Bohlen and Seavey believed negligence law should give individuals fair warning of the standards to which they were held, should be grounded in the social values and mores of the community, should express ethical norms of impartiality and consideration for others, and should employ standards that juries could and would competently and faithfully follow. The *Restatement (First)*'s approach to the meaning of negligence is at every turn influenced by awareness that negligence is an ethically charged common-law standard to be administered by courts and applied by juries in individual cases brought by injured plaintiffs against causally responsible defendants. As such, the *Restatement (First)* seems quite sensitive to the importance of many of the structural and institutional features of tort law that corrective justice theorists have stressed.[98]

Indeed, Michael Green has suggested that Bohlen's balancing approach can be seen as largely "divorced from welfare maximizing," and that it was on that understanding that the American Law Institute ultimately approved the *Restatement (First)*. Insofar as Professor Green means that the *Restatement (First)*'s risk-utility approach is not equivalent to Posner's wealth-maximization interpretation of the Hand Formula, I entirely agree. For Posner, unlike for the *Restatement*, the reasonable person is a superfluous and vestigial distraction from the real business at hand—determining who would have been willing to pay more, the victim (to avoid being injured) or the injurer (to avoid the burden of greater care). Cost-benefit analysis for Posner is not merely an aspect of the reasonable person's decisionmaking, as the *Restatement* would have it; it is the template that supplies the unifying structure to the entire negli-

98. *See, e.g.*, Jules Coleman, *The Structure of Tort Law*, YALE L.J. 1233 (1988); Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) (developing relational model of duty and breach and critiquing instrumentalist, corrective justice, and Prosserian accounts).

gence inquiry. And while both approaches go beyond simply calling for a factual focus on the Hand Formula factors and provide a metric for evaluating those factors, those metrics are very different: the values attached by law (and public opinion) to the interests of victims and injurers are not determined by asking what people are willing to pay to protect those interests.

On the other hand, if Green means that the *Restatement* is "divorced from welfare maximizing" in the welfare-economic sense,[99] I am inclined to disagree. Granted, the *Restatement* does not make the case for risk-utility balancing in overtly instrumentalist terms. There is no claim, for example, that risk-utility balancing will reliably give actors incentives to take welfare-maximizing precautions. The emphasis of the *Restatement* is rather on the proposition that a reasonable person is one whose deliberations and values lead him to take welfare-maximizing precautions. The *Restatement* seems to envision, then, that negligence law contributes to welfare-maximizing behavior by expressing and reinforcing a widely-held moral conception of how people ought to behave toward each other. But this focus on the good (reasonably prudent) person—rather than the Holmesian "bad man"—hardly amounts to rejection of the behaviorist proposition that fear of tort liability may induce some persons to behave in welfare-maximizing ways.

III. THE *RESTATEMENT (FIRST)* AND THE HAND FORMULA

The *Restatement (First)*'s approach to negligence has met with uneven success. At the trial level, the jury is instructed to determine negligence by deciding how a reasonable person would have behaved under the circumstances, but is typically given no further instructions about how to approach that task.[100] Thus, the jury is neither told to focus on the Hand Factors nor to evaluate those factors in any particular way. Insofar as one of Bohlen's objectives was to change jury instructions so that they called the jury's attention to the Hand Factors and the need for evaluating them, the *Restatement (First)* must be accounted a failure.

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99. For an extended defense of social welfare as the criterion for public policy evaluation, see LOUIS KAPLOW & STEVEN SHAVELL, PRINCIPLES OF FAIRNESS VERSUS HUMAN WELFARE: ON THE EVALUATION OF LEGAL POLICY (HLS Law-Economics Disc. Paper No. 277, 2000), *available at* Social Science Research Network Electronic Database, www.ssrn.com.

100. *See* Gilles, *supra* note 7, at 1016-19. The practice is otherwise in product liability design defect cases, where courts routinely give risk-utility instructions. *See id.*

At the doctrinal level, it is a different story. Many state courts have used or adapted the *Restatement*'s risk-utility provisions, and many others have employed some other version of cost-benefit balancing. And, as Michael Green suggests, the *Restatement (First)* may have influenced Hand's decision to propose the Hand Formula for the first time in *Gunnarson* in 1938.[101] The Hand Formula's influence on appellate decisions, of course, has been considerable—though not nearly as great as its influence on torts scholarship.

But are the *Restatement (First)* and Hand Formula approaches virtual twins or distant relatives? Did Learned Hand mean to endorse the *Restatement*'s approach, or to propose a Posnerian alternative to it? The Learned Hand opinions I shall now discuss strongly suggest that (1) the Hand Formula was a reworking and clarification of (not a break with) the *Restatement*'s risk-utility analysis; (2) that Hand (like Bohlen) thought the evaluation of the Hand Factors involved a kind of lawmaking that was nevertheless for the jury in the first instance; and (3) that Hand would have thought it clear that juries should receive Hand Formula instructions.

That leaves one nagging question unanswered: what did Hand envision as the role of the reasonable person standard, and what was its relationship to the Hand Formula? There is no indication that Hand was hostile to the reasonable person standard. The fact remains that the Hand Formula, as stated, stands on its own in the sense that it is not presented as part of the reasonable person standard. In that respect, the Hand Formula diverges sharply from the *Restatement* approach. The apparent self-sufficiency of the Hand Formula, I shall suggest, may be one reason why Richard Posner chose the Hand Formula—and not the *Restatement* approach—as the linchpin of his economic interpretation of negligence.[102]

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101. Green, *supra* note 4, at 1629. ("Bohlen's articulation of a risk-benefit test in the *Restatement* not only provides support for the positive economic theory of negligence, but it also appears to have provided the impetus for Learned Hand to state his version of a risk-benefit test, first *in Gunnarson v. Robert Jacob, Inc.*, four years after the *Restatement (First) of Torts* was published, and then again nine years after Gunnarson in *Carroll Towing*."). As Green points out, Hand was deeply involved in the ALI's work as a member of its Council and actively reviewed drafts of the various *Restatements*. Apparently, however, Hand had a policy against citing *Restatements* in his opinions. *Id.*

102. The greater clarity and simplicity of the Hand Formula is another.

A. The Hand Formula and the Risk-Utility Test

We saw in Part II that Terry's five-factor test, the *Restatement (First)*'s risk-utility factors, and the Hand Formula are equivalent in the sense that they all direct attention to the same potential advantages and disadvantages of an actor's conduct: the probability it will cause harm, the seriousness of that harm, and, weighed against these, the advantages of acting in this way. In another respect, however, the Hand Formula marks an important practical improvement on the *Restatement*'s risk-utility analysis. To see this, consider the Hand Formula and the risk-utility test in isolation (that is, ignoring the other features of the *Restatement* approach). The question under the *Restatement* is whether the accident risk associated with the challenged conduct is greater than the utility of running it. The question under the Hand Formula approach is whether the burden of precautions is greater than the expected accident loss. These formulations are consistent with each other, but they implicitly work off different paradigms for consequentialist balancing in negligence law. For the *Restatement (First)*, the paradigm involves *activity-level* choices: an actor engages in a useful activity that might harm others, and the question for decision is whether this conduct—even if carefully carried on—is negligent. For the Hand Formula, the paradigm involves *care-level* choices: an actor omits a precaution that might avoid harm to others, and the question for decision is whether this omission is negligent. Both approaches can, without undue difficulty, be extended to the other dimension of decisionmaking: someone applying the *Restatement* approach can ask how much utility would have been lost, and how much risk avoided, had the activity been modified by taking an additional precaution,[103] and someone applying the Hand Formula approach can treat "refraining from the activity" as the relevant precaution to be evaluated. Nevertheless, it is clear that (for a variety of reasons) that care-level choices are litigated far more often than activity-level choices.[104] In that respect, the Hand

103. Fleming James, for example, wrote: "Outside the fields of illegal enterprise and of strict liability, the interest whose sacrifice is in question on the issue of negligence is the *value of the particular act or omission which is challenged as negligent.* Looked at another way, it is the burden of refraining from that particular act or of taking an effective precaution to cover that particular omission. It is not the value of the enterprise or activity as a whole, or the detriment that would flow from its abandonment." Fleming James, Jr., *Nature of Negligence*, 3 UTAH L. REV. 275, 284 (1953).

104. The salience of activity-level negligence in Bohlen's account of the law's implicit reliance on risk-utility analysis may have stemmed from the then-existing state of precedent. In his commentary on the 1929 Tentative Draft, Bohlen argued that "courts have from the earliest

Formula has the advantage of being adapted to analysis of what is practically the more important type of negligence claim.[105]

B. Applying the Negligence Standard: Legislation Writ Small

Obviously, the Hand Formula did not purport to change the jury's historic factfinding role. In negligence cases, the jury finds P, L, and B. Beyond that, however, Learned Hand's opinions affirm that the *evaluation* of the Hand Factors is for the jury, not the judge. In *Conway v. O'Brien*, for example, he wrote of the Hand Formula that "a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied."[106]

Hand also agreed with Bohlen that the jury's role in determining negligence involved a form of law-making, and with Seavey that this law-making would be unfair unless grounded in community standards accessible to all. In *Stornelli v. United States Gypsum*, he wrote:

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times considered the comparison between the utility of the defendant's structure or use as compared with the harm that it does his neighbor as decisive." RESTATEMENT (FIRST) OF TORTS, Commentary on Section 172, at 5. By contrast, he acknowledged that "[t]he comparison between the social utility of the act and the magnitude of the risk involved in it is occasionally, but only occasionally, stated as the basis of decision in negligence cases." *Id.* To be sure, Bohlen went on to discuss several such decisions. But his main argument that the courts implicitly balance risk and utility was an inference from the legal proposition that "it is not negligence to carry on [risky] activities so long as reasonable care is taken to keep the risk within the irreducible minimum inherent thereto." *Id.* at 7. In other words, Bohlen reasoned that courts must be balancing the risk and utility of particular activities, because otherwise actors would routinely be held liable for engaging in activities that involved foreseeable risks of injury to others.

105. The shift from balancing the risk and utility of conduct to balancing the costs and benefits of precautions may have another implication that leads us back to the role of the jury. Bohlen claimed that in the common law of torts, "[c]onsciously or unconsciously account is taken of every individual's interest in free choice of his activities." *Id.* This interest is not as conspicuous when the issue is framed as whether the expense and inconvenience of taking a precaution justifies omitting it. I am well aware that conventional economic analysis would regard this as a distinction without a difference. But I am talking now about the rhetoric of the negligence standard and about how that standard is communicated to the jury. Risk-utility analysis invites us to picture the actor engaging in some useful, worthwhile activity that involves a risk to others, and then to ask whether a reasonable person would have acted more carefully—or whether doing so would have interfered unduly with that valuable activity. Hand Formula analysis invites us to focus on some precaution that promises to reduce risks to others, and to ask whether a reasonable person would have found the costs of taking this precaution excessive despite its safety benefits. If I were a plaintiff's lawyer forced to choose between jury instructions setting forth these two instructions, I would take the Hand Formula, because it casts the defendant in the role of penny-pincher, whereas risk-utility analysis presents the defendant in context—as doing something good that might be seriously hindered were too much in the way of precautions demanded.

106. Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

> It is true that we think of that common-law duty as though it were imposed before the event, because it demands only 'reasonable' care; but that does not specify the conduct required and creates a duty incapable of being known in advance, and it is ascertained and imposed only retroactively. Our excuse is that it is fair to exact conformity to such a standard because it should be the inherited portion of the actor; although never formulated before—being measured by a unique occasion—he will divine it by intuition. Nor is it derived alone from forecasting the probable course of events, though that enters into it. It involves a matching of human interests: it is 'legislation' in parvo [in little].[107]

Beyond that, Hand saw the jury's function in determining negligence as paradigmatic of a general tendency in the law. Whenever the legal test turns on *what conduct is reasonable*, Hand thought a "mixed question" was presented—a question of balancing interests that was typically left to juries or to administrative agencies. Hand's clearest expression of this view came in an opinion reviewing an NLRB decision:

> The question is what is often called a 'mixed question of law and fact'; and it is true that it comprises, or should comprise, two quite different determinations: (1.) what in fact will be the prejudice to the interests of the employer in allowing electioneering to go on during lunch hours, and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it; (2.) whether the benefits shall prevail over the prejudice, or vice versa. The language of § 8 is too indefinite to allow the tribunal which enforces it to avoid the second of these inquiries; it is the same question that often arises in the law of torts: e.g. negligence, trade-marks, unfair trade, indeed all questions which depend upon what conduct is 'reasonable.' In all these the court balances the interests against each other, and awards priority as seems to it just.[108]

In short, Hand's theory seems strikingly similar to the *Restatement*'s: the question of reasonable conduct requires the tribunal to balance conflicting interests as it thinks just, in light of "commonly accepted standards."[109] This is legislation writ small—Bohlen's "administrative" lawmaking—and in negligence cases this function belongs to the jury.[110]

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107. Stornelli v. United States Gypsum Co., 134 F.2d 461, 462-63 (2d Cir. 1943).

108. Republic Aviation Corp. v. N.L.R.B., 142 F.2d 193, 196 (2d Cir. 1944).

109. Hand's position may be overstated. Mark Gergen argues that there are many other places in the law (e.g., in contract law) where similar ideas involving reasonableness are *not* given to the jury for case-by-case specification, but instead basically treated as questions of law. Mark Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407 (1999).

110. *See also* LEARNED HAND, THE SPIRIT OF LIBERTY 105-06 (3d ed. 1960) ("There is no way of saying beforehand exactly what each driver should do or should not, until all the circumstances of the particular case are known. The law leaves this open with the vague command to each that he shall be careful. What being careful means, it does not try to say; it leaves that to the judge, who happens in this case to be a jury of twelve persons, untrained in the law.").

C. Should Juries Receive Hand Formula Instructions?

Should the jury be given a Hand Formula instruction? To my knowledge, Hand never directly addressed this question. His statement in *Moisan* that attempts to quantify the Hand Formula "are illusory; and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation,"[111] however, hints that the court should instruct the jury that it must find P, L, and B, so that it can decide which factor or factors is "determinative."

This reasoning is confirmed by Hand's discussion of interest balancing in *United States v. Levine*,[112] a 1936 obscenity case. In a remarkable passage that foreshadows both the Hand Formula's resort to the mathematical language of "variables" and "functions"[113] and Hand's concern with "incommensurable" interests in negligence cases, he wrote:

> As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury, because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors. We mentioned some of these in United States v. One Book Entitled Ulysses . . . ; the work must be taken as a whole, its merits weighed against its defects; if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is *a function of many variables*, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc, like the standard of care.[114]

This passage leaves little doubt that Hand thought juries in obscenity cases should receive instructions setting out the "cautions" and "variables" he mentions. What sense would it make to turn the jury loose to legislate obscenity ad hoc without this guidance? The same reasoning would seem to apply in negligence cases: jurors in negligence cases should receive Hand Formula instruc-

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111. Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949).

112. United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936).

113. United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947) ("Possibly it brings this notion into relief to state it in algebraic terms").

114. *Levine*, 83 F.2d at 157 (internal citations omitted) (emphasis added). Hand expressed a similar idea as early as 1913, in another obscenity case. *See* United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913) ("If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence.").

tions so that they can know what the law is and legislate based on the law's criteria, rather than indulge their "personal aberrations."

D. Hand versus Posner

Levine also yields some insight into Hand's views on the evaluation of the Hand Factors. For Hand, the "relative importance" of the "opposing interests" in negligence cases is "incommensurable."[115] Hand agrees with the *Restatement* that balancing interests involves assessing the "social or personal values" of those interests.[116] But whereas the *Restatement* seems to present social value as the common metric for evaluating risk and utility, Hand asserts that "social or personal values" are no less incommensurable than "interests." [117] Moreover, Hand denies, in the strongest terms, that there are "constitutive principles for such judgments."[118] Yet he does not conclude that the whole business is therefore a matter of arbitrary will. Rather, he suggests that juries will fix an (unprincipled) standard that nevertheless supplies "an acceptable mesne" that "satisfies the moral demands of the community."[119]

It seems all but impossible to reconcile Hand's position in *Levine* with Richard Posner's wealth-maximization interpretation of the Hand Formula. Hand thinks the Hand Formula sets up an evaluation of interests by juries relying on their sense of incommensurable social values. Posner thinks the Hand formula sets up a comparison of monetized costs and benefits—and if actual monetization is not feasible, juries are supposed to use their intuitions concerning relative willingness-to-pay.

Of course, the Hand Formula isn't inherently dependent on Learned Hand's general views about the incommensurability of opposing interests. Nevertheless, Posner's choice of *Carroll Towing* (rather than *Moisan* or *Conway*) to epitomize the Hand Formula separated the Hand Formula from its roots in Hand's jurisprudence. *Carroll Towing* was an admiralty case—so there was no jury in the picture. Hand's formulation of the Hand Formula in *Carroll Towing* was algebraic, abstract, and devoid of any reference to the need for evaluation of the Hand Factors. We have seen ample evidence that Hand believed such an evaluation was necessary, and that it was to be carried out by reference to community standards of

115. *See Levine*, 83 F.2d at 157.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

justice. But in an admiralty case those standards would be supplied by the judges themselves, so there was no occasion to emphasize that aspect.[120] Nor did incommensurability loom large in Hand's *Carroll Towing* opinion, because the case involved only property damage.[121]

E. The Hand Formula and the Reasonable Person Standard

I have found no suggestion in Hand's opinions that the Hand Formula is meant to be a replacement for the reasonable person standard.[122] By the same token, though, Hand never states that the Hand Formula should be incorporated into the decisionmaking of the reasonable person.[123] Hand's view may well have been that the reasonable person standard was for juries, not for appellate courts, who could turn directly to the Hand Formula as the test for "reasonable care." Assuming (as argued above) that Hand would have favored giving juries Hand Formula instructions, it remains unclear how he would have squared those instructions with the reasonable person instructions juries have traditionally received.

IV. THE DISCUSSION DRAFT'S BALANCING APPROACH

We are now in a position to compare the Discussion Draft's approach to defining negligence with the *Restatement (First)*'s. As we have seen, the *Restatement (First)* approach (1) uses the reasonable person standard as the basic template, while incorporating the Hand Formula factors into the decisionmaking of the reasonable person, (2) specifies a general risk-utility approach to evaluating the Hand Formula factors, and (3) aims to encourage courts to instruct the jury concerning the Hand Formula factors, but contains no explicit admonition to that effect. As I read it, the Discussion Draft significantly changes features (1) and (2), but not (3). Under

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120. *See* Hardie v. New York Harbor Dry Dock Corp., 9 F.2d 545, 547 (2d Cir. 1925) (Hand, J.) ("Given the facts, it is true that [the jury has] a latitude in fixing the standard of care required. *We recognize that we must not substitute our own, as we do in causes in the admiralty.* But here, too, there are limits, unless the jury is to be all in all.") (emphasis added).

121. Thanks to Michael Green for this suggestion. In contrast to *Carroll Towing*, *Conway*, *Moisan*, and *Gunnarson* were all personal injury cases.

122. While I have done some computer-assisted searching, I have not attempted to read every negligence opinion Hand wrote (let alone every one he joined).

123. In the only negligence case I have found in which Hand applied the reasonable person standard on appeal, the question concerned whether a risk was too remote to demand anticipation, and Hand's discussion emphasized that this should have been left to the jury. Merchant v. Unity Real Estate Co., 286 F.2d 629 (2d Cir. 1961) (Hand, J.). Nothing was said about the calculus of risk.

the Discussion Draft, (1) the Hand Formula, not the reasonable person standard, constitutes the basic template for determining negligence, although the reasonable person standard (which is treated as consistent with, but independent of, the Hand Formula) continues to be used in categories of cases in which use of the Hand Formula would supposedly be awkward; (2) the *Restatement*'s "social value" approach to evaluating the Hand factors is replaced by an undefined "balancing" approach; and (3) in light of the Hand Formula's primary role in determining negligence, the Draft apparently envisions that courts will routinely instruct juries in the Hand Factors (but does not expressly advise them to do so). I now turn to a more detailed look at these key points of comparison.

A. The Roles of the Reasonable Person Standard and the Hand Formula

Proposed Section 4 makes "reasonable care under all the circumstances" the test for negligence. It then explains that the "[p]rimary factors to consider" in determining whether conduct was reasonably careful are "the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the actor and others if the actor takes precautions that eliminate or reduce the possibility of harm." This formulation explicitly adopts the Hand Formula factors, rather than the reasonable person, as the benchmark for determining reasonable care.[124]

Having disappeared from the "black letter" text of the Discussion Draft, however, the reasonable person standard promptly reappears in the comments to Section 4. Indeed, in one important category of cases, the reasonable person standard is to be used *instead of* the Hand Formula: according to Comment c, when the negligence alleged "consists mainly in the actor's inattentive failure to advert to the risk, explicit consideration of the primary factors [i.e., the Hand Factors] may be awkward, and the actor's conduct can best be evaluated by directly applying the standard of the reasonably careful person." As Comment k explains, this means that the

124. To be sure, Comment a to Section 4 claims that "the 'reasonable care' standard for negligence is basically the same as a standard expressed in terms of the 'reasonably careful person' (or the 'reasonably prudent person')," on the grounds that a reasonably careful person "acts with reasonable care." But because Section 4 defines reasonable care in terms of the Hand Factors, the real meaning of comment a is that the *behavior* of a reasonable person complies with the Hand Formula. Comment a does not incorporate the Hand Formula into the decisionmaking of the reasonable person, as the *Restatement (First)* did.

trier of fact can "simply consider whether the reasonably careful person would have been aware of the risk."[125]

The Discussion Draft's recognition that the Hand Formula is more useful in some cases—and less useful in others—is a welcome change from the *Restatement (First)*'s insistence that every case is to be analyzed using the same conceptual framework. But let us ask Seavey's question: what are the qualities—mental, physical, and moral—of the reasonable careful person to which the Draft turns when the Hand Formula seems unhelpful? Unlike the *Restatement (First)*, the Discussion Draft makes no attempt to sketch the portrait of the reasonably careful person. About all we can say is that this person always acts in accord with the Hand Formula. There must be more to it than that. For example, when the factfinder asks, in cases of inadvertence, whether a reasonably careful person would have recognized the risk, is the factfinder supposed to consider what an average person would do, or what a careful person would do? The Draft needs a thicker conception of the reasonable person.

The Discussion Draft also downplays—in my view, mistakenly—the idea that a reasonable person attends to the Hand Formula factors.[126] Whereas the *Restatement (First)* incorporates the Hand Formula into the reasonable person's decisionmaking, the Discussion Draft presents the Hand Formula as a way for the judge or jury to analyze alleged negligence. As I argued in Part II, judges and juries are likely to make more effective use of the Hand Formula if it is linked to intuitions and experiences about how reasonable people behave, rather than presented abstractly as a regula-

125. The Draft also adds a similar qualification to its treatment of the reasonably foreseeable risk requirement. Comment f to Section 4 endorses the settled rule that the risk of harm must be foreseeable at the time of the actor's conduct, but goes on to distinguish cases of inattentiveness to the risk from cases of conscious failure to investigate possible risk. Cases of inattentiveness are dealt with by direct application of the reasonable person standard. By contrast, "[i]n assessing whether the actor's failure to make that effort [to investigate] indicates that the actor should have known of danger, courts commonly consider the factors included in the negligence balancing approach." Discussion Draft, *supra* note 3, § 4 cmt. f.

126. For example, Comment g to Section 4 argues that "when the claim of negligence relates to how a party conducts an activity that most people themselves engage in and are familiar with, such as motoring, the jury's knowledge of the circumstances of the activity minimizes the need to evaluate the party's conduct in the formal terms of risk magnitude and risk-prevention burdens." *Id.* § 4 cmt. g. While the Discussion Draft is correct to stress the importance of the jury's knowledge about driving, it does not follow that the Hand Factors are unhelpful in structuring the jury's assessment of an actor's behavior. In everyday life, an activity like driving certainly provides occasions for calibrating how carefully one acts, and how much effort one puts into concentration and attentiveness.

tory template.[127] This point, however, plainly has more force as applied to jurors than to judges. For that reason, those who think the *Restatement*'s raison d'etre is confined to providing guidance to trial and appellate judges are likely to find my criticism unconvincing.

I do not share this narrow view of the *Restatement*'s role—though I wholly agree that the *Restatement* does an important service by spelling out the black letter law judges use to police and control the jury in directed verdict practice and on appeal. But why stop there? Because our tort system gives the jury the responsibility of applying the negligence standard in the first instance, the *Restatement* can make an important additional contribution by helping judges assist *juries* in understanding and applying the law, thereby reducing the frequency of jury errors. As I will shortly argue, Hand Formula instructions are one form this guidance should take. In addition, however, the Draft should make the balancing approach to negligence more jury-friendly by putting the Hand Formula "inside the head" of the reasonable person, as did the *Restatement (First)*.

B. How are the Hand Factors to be Evaluated?

Comment d to Section 4 states that the balancing approach rests on the "simple idea" that "conduct is negligent if its disadvantages exceed its advantages." This is the Hand Norm at its most general and inclusive:[128] anyone who thinks that accident avoidance ought to be governed by a consequentialist norm can agree to this much. But how are these disadvantages and advantages to be *evaluated*? The Discussion Draft not only fails to provide an evaluative standard, it fails to adequately acknowledge that this is even an issue. Rather than alert readers that the Hand Factors require evaluation—that is, value judgments—and that there are competing approaches to how that evaluation should be conducted, the Draft simply asserts that the balancing approach "identifies important variables for the jury to take into account" in coming to "an informed judgment."[129] This is not a matter that should be swept under the table.

Worse yet, the Discussion Draft can be read as denying that value judgments are necessary at all. Comment g, which deals with

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127. *See supra* notes 36-37 and accompanying text.

128. *See also* Discussion Draft, *supra* note 3, § 4 cmt. d (explaining that the risk-benefit test can also be termed a " 'cost-benefit test,' " or a " 'balancing approach' ").

129. *Id.* § 4 cmt g.

problems of proof, notes that "[i]n most cases only limited information is available" as to the Hand Formula factors, and concludes that the Hand Formula approach cannot be "rendered operational in a way that generates certain results."[130] The implication is that if we had perfect information about the Hand Factors, we would have "certain results." Comment b to Section 5 seems to confirm that implication, asserting that "[i]f the information bearing on [the Hand] factors were fully available, there might frequently be an answer to the negligence question that all reasonable minds must accept."[131] The theory, in other words, appears to be that if all the Hand Formula facts were known, there would be no occasion for "an exercise of judgment by the jury."[132]

This "just the facts"[133] theory could be interpreted as a tacit endorsement of Posner's wealth-maximization interpretation of the Hand Formula. On the Posnerian view, full information about the Hand Factors would yield "certain results" because that information would consist of monetized values for PL and B. Those monetized amounts would speak for themselves, leaving no room for judgment. As Posner has explained, the "[c]onceptual as well as practical difficulties in monetizing personal injuries" mean that "[f]or many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula."[134] But Posner's pragmatic hope is plainly that such judgments will gradually be displaced as the obstacles to monetization are overcome.[135]

Now, if the Discussion Draft openly embraced Posner's wealth-maximization version of the Hand Formula, it would be vulnerable to the serious descriptive (and normative) objections that have been lodged against his approach.[136] On the other hand, Pos-

130. *See id.*

131. *Id.* § 5 cmt. b.

132. *Id.* ("[B]ecause the information presented at trial is commonly incomplete, reaching a decision on the negligence issue requires an exercise of judgment by the jury.").

133. *See* Linda Ross Meyer, *Just the Facts?*, 106 YALE L.J. 1269, 1269 (1996) (reviewing DEWEES, DUFF, & TREBILCOCK, EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY (1996)).

134. McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987) (Posner, J.).

135. Learned Hand's view was more pessimistic. He wrote that the problem with "the appraisal and balancing of human values" is that "there are no scales to weigh" them on; and he emphasized that "the difficulty here does not come from ignorance, but from absence of any standard, for values are incommensurable." LEARNED HAND, THE SPIRIT OF LIBERTY 161 (3d ed. 1960).

136. *See, e.g.*, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

ner has ably defended his view,[137] and the debate would be an intense and interesting one. Instead, the Draft seems to want to have it both ways: it creates the appearance of inclusiveness by not specifying how Hand Formula value judgments are to be made, but then turns around and denies (or at least ignores) the need to make value judgments, thereby inviting a reductionist approach to the entire enterprise.[138]

As I have already indicated, my preferred approach would keep the Hand Formula incorporated within the reasonable person standard, while directing courts and juries to make the necessary value judgments in terms of the prevailing values in the community. But if the Hand Formula is instead to be freestanding and value-neutral—that is, divorced from the reasonable person and silent on how value judgments are to be made—the Discussion Draft should at least make clear that courts face choices as to the method and metric for evaluating the Hand Factors. Some experimentation and competition to develop an appealing and workable version of Hand Formula evaluation might even be healthy.

C. The Jury's Role and the "Mixed Question" Issue

The Discussion Draft squarely affirms the prevailing view that the jury applies the negligence standard unless reasonable minds could not differ on that question, while signaling that this rule "permits a significant number of directed verdicts."[139] The Draft then goes on to acknowledge that applying the negligence standard could be regarded as a question of law for the court because it is "a matter of the law's evaluation of the legal significance of the actor's conduct," but acquiesces in "the longstanding American practice . . . to treat the question as one that is equivalent to a question of fact."[140] This concedes too much. Courts give this ques-

137. Most recently in Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99 (David Owen ed., 1995).

138. Alternatively, perhaps the Discussion Draft means to treat *facts about values* as facts, interprets the information called for by the Hand Formula as including facts about values, and assumes that the jury is familiar with these facts about values and will ordinarily base its judgments on them. *See* Gilles, *supra* note 7, at 1031-32. If this is what the Discussion Draft intends, it would be well to be more explicit about it. One does not normally think of the community's values, or the average individual's values, as "information bearing on" the Hand Formula factors. (On the other hand, there is precedent for that sort of usage: the *Restatement (First)* lumps the "social value" of the conflicting interests together with the Hand Factors, calling them all "factors" in its risk-utility analysis.)

139. Discussion Draft, *supra* note3, § 5 cmt. b.

140. *Id.*

tion to the jury *as if* it were a question of fact, but—following Holmes, Bohlen, and Hand—courts also understand that this question is, in actuality, a matter of law-making in the particular case. For that reason, "a significant number of directed verdicts" is entirely appropriate.[141]

The lurking question of moral and value judgments surfaces again in the Draft's explanations of *why* the jury is given the task of applying the negligence standard. Comment c to Section 5 suggests that the jury is given this responsibility partly "because of the desirability of taking advantage of the insight of the community, as embodied in the jury, rather than relying on the professional knowledge of the judge."[142] Community insight into what? The Draft, again reticent to discuss value judgments, offers no answer. There is, however, a suggestive passage in Comment d to Section 5, which argues that tort law has "accepted an ethics of particularism, which tends to doubt the viability of general rules capable of producing determinate results, and which requires that actual moral judgments be based on the circumstances of each individual situation. Tort law's affirmation of this requirement highlights the primary role necessarily fulfilled by the jury."[143] This passage suggests that the jury's evaluative role is tied to the need for "*moral judgments*," not factual ones. But what sorts of moral judgments? And how does morality enter into what the Draft treats as a question of fact?

If there is a morality at work in the Draft, Comment j to Section 4 may provide the best clues as to its character. Comment j argues that the balancing approach to negligence can be justified in terms of both deterrence and fairness: deterrence, because the threat of liability creates incentives to improve social welfare by taking "reasonable safety precautions;" fairness, because a person who imposes risks on others that exceed the burden that person would bear to avoid the risks "violates the ethical norm of equal consideration" by placing "personal interests or welfare ahead of the interests or welfare of others."[144] The reasonable person, on this view, is someone who—whether from morality, fear of liability, or both—complies with the norm of equal respect for the welfare of others by taking precautionary measures that improve overall social welfare. The Draft thereby invites us to conclude that the foun-

141. *Id.*
142. *Id.* § 5 cmt. c.
143. *Id.* § 5 cmt. d.
144. *Id.* § 4 cmt. j.

dation of negligence law is, broadly speaking, an ethic of social welfare. Does it then follow that the Hand Factors should be evaluated in terms of judgments about social welfare? Again, the Draft retreats into silence: we do not know whether the morality Comment j speaks of is merely part of the *justification* for Hand Formula balancing, or is meant to infuse the *evaluation* of the Hand Factors by courts and juries.

D. How Should the Jury be Instructed?

We come next to the vexing and important question of how the jury should be instructed to apply the negligence standard. The Discussion Draft never directly addresses this question. The Reporter's Notes to Section 4 mention that pattern jury instructions are generally phrased in terms of the reasonably prudent person, but point out that there is some authority approving Hand Formula instructions. Along the same lines, Comment g to Section 4 states that the Draft's Hand Formula or "balancing" approach "identifies important variables for the jury to take into account in determining whether the actor was negligent; the jury's responsibility is to render an informed judgment."[145] It's hard to resist drawing the inference that the jury should be told about the Hand Formula factors. After all, how can the jury possibly "render an informed judgment" if the trial court's instructions do not tell the jury what these variables are?

But one should not have to draw inferences on this point. For the better part of a century now, there has been a disconnect between the gradual accretion of appellate Hand Formula doctrine and the persistence of the undefined reasonable person instruction. Rather than coyly hoping courts will get the point, the Discussion Draft should confront this anomaly head-on. Why not simply tell judges that if the case is one in which use of the Hand Formula factors is appropriate, the jury's attention should normally be directed to those factors and to the need to balance them?

The Draft's failure to suggest that some kind of Hand Formula instructions should routinely be given is all the more puzzling in light of the extensive discussion of "inevitable accident" instructions in the commentary on Section 3 (arguing that such instructions generally should not be given), of "Act of God" instructions in the commentary on Section 4 (arguing that such instructions should sometimes be given), and of "emergency" instructions in Section 7

145. *Id.* § 4 cmt. g.

(noting reasons for and against giving such instructions). None of these jury-instruction issues is remotely as important as whether to give some sort of Hand Formula instruction.

Nor is it the case that the gap between negligence doctrine and negligence instructions is a settled feature of tort law that must be respected and incorporated into the Discussion Draft. Some appellate courts have approved Hand Formula instructions in particular cases; others use instructions that invoke the balancing of pros and cons by reasonable persons in taking care of their own persons and property. Most important, there is virtually no authority affirmatively *rejecting* Hand Formula instructions (though it may be that some trial judges would refuse to give them). For all their positive orientation, the *Restatements* have appropriately aimed to change the law by clarifying it, making it more certain, and choosing the better approach where there were two or more competing ones in the case law. We should add the goal of conveying the law more fully and more clearly to the factfinder to this list of desirable changes.

If the Discussion Draft were to recommend Hand Formula instructions, what form should they take? In previous work, I argued that the reasonable person standard could in fact function as an intuitive Hand Formula approach if courts instructed juries that reasonable care is the care a prudent person takes of his or her own person and property.[146] That still seems to me a promising approach because it is simple and non-technical (and because it has some support in the case law and in the jury instructions). But it is by no means the only approach worth considering. For example, juries could be told (1) that the question is whether the actor behaved as a reasonable person would have, (2) that reasonable persons give equal regard to the interests of others where risks of physical injury are concerned,[147] and (3) that reasonable people assess the pros and

146. Gilles, *supra* note 7; *see also* DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 198 (2000) ("A more intuitive way of putting [the Hand Formula] is that a party who imposes costs on others does so negligently if he has failed to take precautions that a reasonable person would have taken if he himself were the one bearing the cost of the accident.").

147. Some critics of economic analysis worry that giving jurors Hand Formula instructions might encourage them to undervalue the interests of accident victims. The fear is that, when people are told to do cost-benefit analysis, they will tend to adopt a selfish, non-altruistic outlook. The instruction in text should reduce this risk, because it specifies that the interests of others are to be given equal weight. In this connection, it should also be remembered that jurors engaged in cost-benefit analysis, are *not* balancing their own interests against the interests of others; they are balancing the interests of defendants against those of plaintiffs. Hence, the risk that jurors will take a selfish perspective would seem to be counterbalanced by the risk that

cons of taking additional precautions by attending to the Hand Factors and evaluating them in light of prevailing community values.

Instructions such as these, of course, prompt the familiar objection that juries just simply are not the right kind of decision-maker to do cost-benefit analysis. This objection comes in two main forms: that juries cannot handle cost-benefit analysis, and that juries will refuse to apply cost-benefit analysis. I will consider them in that order.

Certainly, many observers think that even if cost-benefit analysis is sometimes a sensible way for regulators to make decisions, it is not a sensible way to ask lay juries to decide. On this view, while Bohlen may have been right that the jury's role in determining negligence is in some sense "administrative," the fact remains that juries lack the institutional features of true administrative agencies. They are one-shot bodies of lay citizens, not permanent staffs that bring together economic and regulatory expertise. Just as some students panic whenever math rears its ugly quantitative head, so many jurors will be confused and disoriented by Hand Formula instructions. They will not learn anything—indeed, they will forget what they already know—and hence their judgments will degenerate, not improve. In sum, the argument goes, it is fine for courts to use the Hand Formula on appeal or in directed verdict practice, but giving juries Hand Formula instructions would be a recipe for disaster.

This is an empirical question about which neither side can reasonably be dogmatic. That said, I think there is reason for optimism. Compared to some of the antitrust, securities, or tax doctrines that juries are instructed to apply, Hand Formula instructions are much closer to ordinary experience. Moreover, if the Hand Formula is presented as part of the reasonable person standard, jurors who are baffled by the Formula can always fall back on their intuitions about how a reasonable person would have behaved. And while empirical uncertainty is good reason for caution, it is also the best of reasons for *experimentation.* Were the Discussion Draft to recommend Hand Formula instructions, the result might well be a natural experiment in which some state courts follow its advice, while others adhere to the undefined reasonable person instruction. Over time, we could expect more evidence on which to base an assessment of Hand Formula instructions.

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jurors will take an excessively altruistic perspective because they can compensate an injured person with somebody else's money.

The claim that Hand Formula instructions would provoke jury nullification is supported by considerable evidence: (1) recent work by W. Kip Viscusi documenting aversion to risk analysis and cost-benefit analysis among jurors;[148] (2) Gary Schwartz's report of conversations with product liability defense lawyers who are afraid to mount a costly-precautions defense (despite the availability of risk-utility instructions) because of the risk of jury backlash,[149] and (3) the skeptical-to-hostile reactions many law students have when they first encounter cost-benefit analysis in their study of tort law.[150] But this evidence cannot reasonably be taken to show that jury backlash would occur in all or most cases. Indeed, defense lawyers routinely make some types of cost-benefit arguments in design defect cases; for example, they argue that the plaintiff's suggested design would create more safety risks than it avoids, or would seriously compromise the product's utility to consumers. The Hand Formula serves as a platform for a wide range of arguments, only one of which—that the monetary costs of a precaution justify not taking it—seems to meet with serious popular resistance. And even that resistance may be lower in ordinary negligence cases than in product liability cases, because the latter are more likely to involve institutional defendants with deep pockets and precaution costs that are modest on a per-unit basis.[151]

Nevertheless, if courts gave Hand Formula instructions in negligence cases, it seems clear that juries would sometimes refuse to follow them, and that defendants would often be leery of arguing that the monetary costs of a precaution, standing alone, justified its omission. Yet why is this a decisive objection for the ALI's constituencies—law professors, judges, and lawyers—all of whom profess an unwavering commitment to the rule of law? Rebellious juries are a poor proxy for legitimate democratic lawmakers. Prudence may dictate that courts give some consideration to jury sensibilities in

148. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001).

149. *See* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1038 (1991).

150. *See* Kenneth Simons, *Rethinking Mental States*, 70 B.U. L. REV. 463, 512-13 (1992).

151. Contrary to conventional wisdom, the reasonable person standard, if applied by the jury with reference to how people ordinarily behave, may well involve *less* consideration for others than the Hand Formula, with its premise that everyone's interests are on a par. (Recall Dworkin's complaint that the Hand Formula is too demanding to be universalized to all other-regarding conduct.) This leads to the intriguing possibility that defendants may sometimes "waive" reliance on cost-benefit analysis not because they are afraid the jury will be antagonized by it, but because they will do better to invoke prevailing (and more forgiving) community norms.

framing Hand Formula instructions. But that can be done without abandoning the entire enterprise. I suspect that juries would find Hand Formula instructions more congenial if those instructions were linked to community values and the jury's sense of justice (and, conversely, least congenial if linked to a willingness-to-pay metric).[152] We should also bear in mind the social dynamic that could ensue: juries would be less likely to bridle if, over time, Hand Formula balancing became part of what "everybody knows" about the meaning of negligence. The bottom line, then, should be to recommend that courts adopt (at least on a trial basis) jury-friendly Hand Formula instructions that gloss the reasonable person standard.

The arguments I have offered in support of Hand Formula instructions will not persuade scholars such as Richard Wright, who think jury resistance to Hand Formula balancing in fact reflects a different and better conception of negligence. To them, the Hand Formula, risk-utility analysis, and "balancing" interests are just so many distortions of the true reasonable person standard. The courts' reluctance to give Hand Formula instructions, Wright suggests, is evidence that the Hand Formula really is not the prevailing conception of negligence.[153]

This argument is unpersuasive. The courts' failure to routinely give Hand Formula instructions certainly indicates some ambivalence about asking juries to engage in cost-benefit analysis. But the basis for that ambivalence is plainly the jury, not the black letter law—which in most states is couched in terms of Hand Formula balancing. The reasons courts would give—if they gave reasons, which with rare exceptions they have not—concern the jury's ability to understand and apply Hand Formula instructions,[154] the risk

152. For example, juries could be told that the reasonable person gives equal weight to the interests of others in matters of safety, and takes the same care with regard to others' safety that a reasonably careful person would take of his or her own person or property. Under this approach, a defendant could raise cost-benefit analysis comfortably by pointing out to the jury that we all make tradeoffs with regard to our own safety and that of our property, and arguing—with explicit support from the jury instruction—that making similar tradeoffs with regard to the safety of others does not constitute negligence.

153. Richard Wright, *The Standards of Care in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 263 (David Owen ed., 1995).

154. For example, the principal ground on which Leon Green attacked the *Restatement (First)* was that its formulations were not suitable for use as jury instructions. Green wrote:

> Cases come to the courts through formal pleadings cut to some pattern or patterns of legal theory. Evidential data are offered to support these and the opposing theories. There is no suggestion that the tenor of the *Restatement* is designed for these purposes. After the evidence is heard the theories insisted upon by the parties through their lawyers are translated to the jury by instruc-

that detailed instructions will somehow invade the jury's discretion, and the like.[155] As I have already argued, these reasons should not stand in the way of experimentation with Hand Formula instructions.

CONCLUSION

As we discuss and critique the Discussion Draft's provisions governing "breach" in the tort of negligence, we do well to remember the precedent set by the *Restatement (First)*, which situated the Hand Formula within negligence law, and within the reasonable person standard in particular, rather than using the Hand Formula to supplant the traditional schema. The Discussion Draft is surely not intended to replace the reasonable person standard with the Hand Formula. But in trying to be inclusive, the Reporter may have ended up with too thin a conception of both Hand Formula balancing and the reasonably careful person. The Discussion Draft should flesh out the former by addressing the need for value judgments in evaluating the Hand Factors, and the latter by specifying that the reasonable person gives equal weight to the interests of others. Finally, the Discussion Draft should urge courts to use Hand Formula instructions, not to the exclusion of reasonable person instructions, but as a gloss on how reasonable people make decisions about accident avoidance.

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tions in terms of formulas. Certainly the black letter statements are not intended to supplant the formulas already worked out and utilized by the courts in tort cases. They are too ponderous and elaborate for such a purpose. Assuming that a judge would know which ones to give, no jury would comprehend them.

Leon Green, *The Torts Restatement*, 29 U. ILL. L. REV. 582, 595 (1935).

155. For an example of this reasoning, see Gilles, *supra* note 7, at 1049 (discussing rejection of model cost-benefit instruction by Los Angeles trial judges on grounds it would invade the province of the jury).