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## Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law

Patrick J. Kelley

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# Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law

*Patrick J. Kelley\**

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\* Professor of Law, Southern Illinois University School of Law. Each participant in this outstanding conference built on his or her prior work. This Article builds on two articles published ten years ago: Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315 (1991) [hereinafter Kelley, *Who Decides?*], and Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49 (1991) [hereinafter Kelley, *Proximate Cause*]. The analysis in section three of this Article reworks and restates portions of those two articles.

## I. THE OBJECT AND FORM OF A RESTATEMENT

The American Law Institute ("ALI") set out to restate the general common law in the United States in order to promote clarity and certainty in the common law, which were threatened by "the ever increasing volume of the decisions of the [different state] courts, establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable."<sup>1</sup> Clarity and certainty in the common law across the United States, of course, requires uniformity. Naturally enough, then, the Institute recognized that a *Restatement* would promote clarity and certainty in the law only insofar as "the legal profession accepts the *Restatement* as prima facie a correct statement of the general law of the United States."<sup>2</sup>

The *Second* and *Third Restatements* recognized additional objects: to correct errors in earlier restatements, to reflect changes in the common law since earlier restatements, and, in limited circumstances, to promote clearly desirable reform.<sup>3</sup> None of these additional objects can be secured without first achieving uniformity, certainty, and clarity. The original object, therefore, remains of primary importance.

This primary object seems to have clear implications for the form of a restatement. Uniformity, clarity, and certainty in the law would be enhanced by a "black-letter" restatement of the law. The black-letter law could be in the form of specific rules applicable directly to a set of facts, or in the form of standards, with enough specificity to give understandable guidance to the decision-maker called upon to apply the standard to a specific set of facts. The American Law Institute has taken these implications to heart; each restatement is in the form of a set of black-letter rules or standards, with commentary. When there are conflicting specific rules in different states, each restatement adopts one of the rules<sup>4</sup> rather than formulating a legal directive at a higher level of generality that could plausibly describe both of the conflicting rules.

In an important sense, then, the primary object of the *Restatement* project limits the form that any restatement can take, because the goals of uniformity, clarity, and certainty can be

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1. RESTATEMENT (FIRST) OF TORTS vol. II introductory cmt., at ix (1934).

2. *Id.*

3. *E.g.*, RESTATEMENT (SECOND) OF TORTS vol. I introductory cmt., at ix (1965).

4. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 892C cmt. b (1979) (adopting the minority rule on whether consent to defendant's criminal conduct bars plaintiff from recovering in tort).

achieved only if the law is restated with clarity in a form that can be applied uniformly to yield predictable, certain results.

## II. THE PROBLEM WITH RESTATING NEGLIGENCE LAW

### A. *The Form of Negligence Law*

State courts across the United States, with perhaps two exceptions,<sup>5</sup> state the prima facie case for negligence as follows:

- 1) A duty owed by the defendant to exercise ordinary reasonable care for the safety of the plaintiff or those in plaintiff's class.
- 2) Breach of that duty by defendant's failure to act as an ordinary reasonable person would act under the circumstances.
- 3) Defendant's breach was a cause-in-fact of an injury to the plaintiff, and
- 4) Defendant's breach was a proximate cause of that injury, which resulted in
- 5) Legally-cognizable damages.<sup>6</sup>

This prima facie case differs remarkably from other prima facie cases, such as that for battery,<sup>7</sup> which provides a clear recipe for its application because each element of the prima facie case identifies a fact or a well-defined judgment about facts. In contrast, for negligence, "duty," a question for decision by the court, seems like a description of a conclusion the court reaches by a decisional process unguided by the prima facie formulation itself. The element simply states there is a duty to exercise due care; it doesn't tell the courts how to determine whether there is such a duty.

Breach, on the other hand, seems to provide guidance to the decision-maker in the form of a standard—the conduct of the ordinary, reasonable person. But that standard seems to invoke a very general judgment about whether the defendant's conduct was "reasonable," without specifying the factors to be taken into account in determining reasonableness. Moreover, the standard is ordinarily

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5. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657-58 nn.1-2 (2001).

6. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

7. The prima facie case for battery is (1) a volitional act (2) done with the intent to cause a harmful or offensive contact to the plaintiff, or the apprehension by the plaintiff of an imminent harmful or offensive contact (3) that causes (4) a harmful or offensive contact to the plaintiff. *Id.* § 9.

applied by a jury, a one-shot decision-maker without prior experience in applying the standard.

The proximate cause determination seems equally unbounded. Formally, the question is separate from the cause-in-fact question and it is decided by the jury. But the ordinary jury instructions do not clearly separate the cause-in-fact question from the proximate cause question and give little guidance on how either question is to be resolved.<sup>8</sup> Moreover, when judges decide whether there is sufficient evidence to send the proximate cause question to a jury, they use a bewildering assortment of tests for proximate cause—including the “foreseeable consequences” test, the “direct consequences” test, the “foreseeable risk” test, the “hazard-class” test, and straight judicial policy judgments.<sup>9</sup> None of these tests seems to give the judge much understandable, alternative-foreclosing guidance in deciding proximate cause questions.

On the face of it, then, three of the five elements of the negligence prima facie case seem to pose serious problems for any re-statement of negligence law. The form of negligence law, in three out of five of its elements, seems to make it incapable of uniform

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8. ALA. PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS-CIVIL No. 33.00 (1974); PATTERN CIVIL JURY INSTRUCTION COMM., ALASKA PATTERN CIVIL JURY INSTRUCTIONS Nos. 3.05, 3.06 (1984); ARK. SUPREME COURT COMM. ON JURY INSTRUCTIONS, ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL No. 501 (1989); COMM. ON STANDARD JURY INSTRUCTIONS, CIVIL, CAL. JURY INSTRUCTIONS, CIVIL Nos. 3.76, 3.79 (8th ed. 1994); COLO. SUPREME COURT COMM. ON CIVIL JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS, CIVIL Nos. 9.26, 9.28, 9.30 (1989); COUNCIL OF SUPERIOR COURT JUDGES OF GA., SUGGESTED PATTERN JURY INSTRUCTIONS Nos. 1, 2, 6 (3d ed. 1991); IDAHO PATTERN JURY INSTRUCTION COMM., IDAHO JURY INSTRUCTIONS No. 230 (1982); ILL. SUPREME COURT COMM. ON JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL No. 15.01 (1995); IOWA STATE BAR ASS'N: SPECIAL COMM. ON UNIF. COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTIONS, ANNOTATED No. 2.6 (1982); COMM. ON CIVIL PATTERN JURY INSTRUCTIONS OF THE MD. STATE BAR ASS'N, MARYLAND CIVIL PATTERN JURY INSTRUCTIONS No. 19:8 (2d ed. 1984); MICH. SUPREME COURT COMM. ON STANDARD JURY INSTRUCTIONS, MICHIGAN STANDARD JURY INSTRUCTIONS, CIVIL Nos. 15.01, 15.05m, 15.06 (2d ed. 1981); MISS. JUDICIAL COLL. MODEL JURY INSTRUCTIONS COMM., MISSISSIPPI MODEL JURY INSTRUCTIONS: CIVIL Nos. 36.02, 36.03 36.04, 36.06 (1992); STATE BAR OF NEV., NEVADA PATTERN CIVIL JURY INSTRUCTIONS Nos. 9.1, 9.1A (1966); N. H. CIVIL JURY INSTRUCTIONS Nos. 6.3, 7.1, 7.4, 7.5 (1992); ASS'N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N. Y. COMM. ON PATTERN JURY INSTRUCTIONS, NEW YORK PATTERN JURY INSTRUCTIONS-CIVIL Nos. 2:70, 2:72 (1996); N. C. CONFERENCE OF SUPERIOR COURT JUDGES COMM. ON PATTERN JURY INSTRUCTIONS, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES No. 102.20 (1975); OHIO JUDICIAL CONFERENCE JURY INSTRUCTION COMM., OHIO JURY INSTRUCTIONS Nos. 7.13, 11.10, 11.20, 11.30 (1983); OR. STATE BAR COMM. ON UNIF. JURY INSTRUCTIONS Nos. 10.01, 10.01A (1974); VA. MODEL JURY INSTRUCTIONS, CIVIL No. 5.000 (1998); WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS-CIVIL No. 15.01 (3d ed. 1989); WIS. JUDICIAL CONFERENCE CIVIL JURY INSTRUCTIONS COMM., WISCONSIN JURY INSTRUCTIONS, CIVIL No. 1500 (1981).

9. For an analysis of the development of each of these different tests, see Patrick J. Kelley, *Proximate Cause*, *supra* note \*, at 90-105.

application from day to day in the same state, let alone across different states. And the form of these three elements of negligence law seems to frustrate rather than facilitate the clarity and certainty aimed at by the restatement.

### *B. Prevailing Descriptive Theories of Negligence Law*

Perhaps there is a solution to the restater's problem with negligence law in descriptive theory, which might be able to interpret or explain negligence law in a way that would make it clear, certain, and capable of uniform application. Do we find anything in the prevailing descriptive theories of negligence law that might give a restater any help? The answer seems to be a resounding "no."

The prevailing theories describing the troublesome elements in negligence law are permutations or combinations of the components in Oliver Wendell Holmes' theory of negligence.<sup>10</sup> Consistent with his commitment to the mid-nineteenth century philosophical positivism of August Comte and John Stuart Mill,<sup>11</sup> Holmes tried to formulate a scientific description of the common law of torts.<sup>12</sup> In this enterprise, Holmes attempted to reduce the law to scientific laws of antecedence and consequence, where the antecedents are the facts of the case and the consequence is the judicial order concluding the case.<sup>13</sup> Legal rules of the form "If these facts, then this judicial consequence" are, then, just a certain subset of the scientific laws of antecedence and consequence.<sup>14</sup> Moreover, for Holmes,

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10. Holmes' theory of negligence is part of his broader theory of torts, set out in Lectures III and IV of O.W. HOLMES, JR., *THE COMMON LAW* 63-129 (M.D. Howe ed., 1963) (1881) [hereinafter HOLMES, *THE COMMON LAW*]. Holmes amplified his tort theory in O.W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894). For an analysis of Holmes' theory of torts, see generally Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L.Q. 681 (1983) [hereinafter Kelley, *Holmes's Theory of Torts*]. For an analysis of Holmes' application of his tort theory as a judge on the Massachusetts Supreme Judicial Court, see generally Patrick J. Kelley, *Holmes on the Supreme Judicial Court: The Theorist as Judge*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS* 275, 288-351 (Russell K. Osgood ed., 1992).

11. See generally John Stuart Mill, *Auguste Comte and Positivism*, in 10 *COLLECTED WORKS OF JOHN STUART MILL* 261 (J.M. Robson ed., 1969). For a brief argument that Holmes was committed to the positivism of Mill and Comte, see Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1684-94 (2000).

12. For an argument that Holmes attempted to give the study of torts its final scientific constitution in order to make it a positive science, see Kelley, *Holmes's Theory of Torts*, *supra* note 10, at 700-08.

13. O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457-462 (1897) [hereinafter Holmes, *The Path of the Law*]; see also HOLMES, *THE COMMON LAW*, *supra* note 10, at 44-50.

14. O.W. Holmes, Jr., *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1, 4-5 (1870), reprinted in 44 HARV. L. REV. 725, 727-28 (1931); Holmes, *The Path of the Law*, *supra* note 13, at 458.

the only possible justification for adopting one legal rule rather than another is public policy—the consequences for the community from the adopted rule.<sup>15</sup> Legal rules achieve their justifying consequence by influencing people's conduct by threatening them with certain judicial consequences if they act in certain ways.<sup>16</sup> The more the law is fixed, definite, and certain, the more effective it is in achieving those consequences.<sup>17</sup>

The policy underlying both the law of torts and the criminal law, according to Holmes, is maximum deterrence of dangerous conduct consistent with preserving undeterred the freedom to engage in beneficial conduct that is not known to be dangerous.<sup>18</sup> Consistent with this understanding, Holmes explained in the following way the jury's role in applying the negligence standard. In asking the jury to determine whether the defendant was negligent, the judge asks it whether a reasonable man in defendant's position would have foreseen danger to others from his course of conduct.<sup>19</sup> Asking the jury that question, then, is a way to determine what the common experience of mankind tells us about the danger of certain conduct under particular circumstances.<sup>20</sup> That is, it is a way of eliciting the scientific laws of antecedence and consequence relevant to the defendant's conduct.

To Holmes, the problem was that when the law uses the standard of the ordinary reasonable man's conduct, or even the test of the dangers foreseeable by the ordinary reasonable man, the law is not fixed, definite, or certain enough to guide individual's decisions so as to avoid dangerous conduct.<sup>21</sup> The threat posed by the law using that standard is too vague: "If you fail to act as an ordinary reasonable person and harm results from your conduct, a judge will order you to pay money to those injured by your conduct." A law that specifies more clearly the conduct that would subject the actor to legal liability, if that conduct causes harm, would be more effective in deterring dangerous conduct.<sup>22</sup> Holmes therefore urged that the law should be continually translated from the vague negli-

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15. HOLMES, THE COMMON LAW, *supra* note 10, at 31-33; Holmes, *The Path of the Law*, *supra* note 13, at 466-68.

16. HOLMES, THE COMMON LAW, *supra* 10, at 42-43, 88-89.

17. *Id.* at 89-90.

18. *Id.* at 115.

19. *Id.* at 76-77, 86-88.

20. *Id.* at 119-20.

21. *Id.* at 88-89.

22. *Id.*

gence standard into specific legal rules.<sup>23</sup> This could happen in two ways. The legislature could adopt a specific rule of conduct that the courts would then apply in a tort case, replacing the vague negligence standard.<sup>24</sup> Or the trial court, after taking the verdicts of a number of juries on similar facts, could adopt as the law the specific rule that juries had applied, leaving thereafter to juries in like cases only the role of determining the facts.<sup>25</sup>

In *The Common Law*, Holmes dealt directly only with the negligence standard, but his reductive explanation of that troublesome standard in terms of foreseeability and implicit policy judgments provided the building blocks for the prevailing descriptive theories of duty and proximate cause as well. Thus, the modern descriptive theory explaining judicial "duty" determinations in negligence cases is that there is broad universal duty to exercise reasonable care to avoid conduct threatening foreseeable harm to others.<sup>26</sup> When judges refuse to recognize a duty in the teeth of foreseeable harm to others, they are making an exception, on public policy grounds, to the broad duty to avoid conduct threatening foreseeable harm to others.<sup>27</sup>

The two opposing theories of proximate cause emphasize different tools in Holmes' theoretical toolbox. The hard-line legal realists led by Leon Green<sup>28</sup> suggested that the proximate cause limitation on liability for negligence was a cover for a number of definite but inarticulate legislative policies unrelated to the central two policies reconciled by the basic negligence standard of conduct.<sup>29</sup> The other approach was to suggest that the proximate cause limitation invoked the same basic legislative policies reconciled in the negligence standard, but with the emphasis on preserving freedom of action by protecting defendants from crushing and unlimited liability for all the results of a wrongful act.<sup>30</sup> This approach again made use of the foreseeability concept, but this time to limit liability, rather than to impose it. If the plaintiff's injury did not come about from the unreasonable foreseeable risk that made defendant's

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23. *Id.* at 89-103.

24. *Id.* at 90-91.

25. *Id.* at 91-103.

26. See, e.g., KEETON ET AL., *supra* note 6, at 356-59; 3 FOWLER HARPER ET AL., *THE LAW OF TORTS* § 18.1 (2d ed. 1986).

27. HOLMES, *THE COMMON LAW*, *supra* note 10, at 91-103.

28. See generally LEON GREEN, *RATIONALE OF PROXIMATE CAUSE (1927)*, discussed in Kelley, *Proximate Cause*, *supra* note \*, at 94-96.

29. See KEETON ET AL., *supra* note 6, at 273.

30. See 3 HARPER ET AL., *supra* note 26, at 137-47.



conduct negligent in the first place, defendant's negligence was not a proximate cause of plaintiff's injury.<sup>31</sup>

Neither "foreseeability" nor "public policy" provides the certainty and clarity missing from the three troublesome elements in negligence. "Foreseeability" is notoriously open-ended. As the California Supreme Court said in *Thing v. LaChusa*, "there are clear judicial days on which a court can foresee forever."<sup>32</sup> Conversely, on a cloudy judicial day you can't foresee for schmatz. Similarly, since "public policy" neither identifies any particular public policy nor places any limits on, nor provides any guidelines for, the pursuit of any public policy, it, too is an open-ended formula. Both "foreseeability" and "public policy" work beautifully as explanations of judicial decisions because they are both so open-ended they can be used to explain any decision, even decisions directly opposed to each other. For the same reason, neither gives decision-makers much direct guidance. Both formulations, therefore, undermine clarity and certainty in the law whenever they are embedded in a legal standard.

The prevailing descriptive theories of negligence, then, do not seem to provide any tools a restater could use to avoid the problems of uncertainty, lack of clarity, and non-uniform application that seem to infect three of the five elements of a negligence claim.

Given the open-ended form of the duty, breach, and proximate cause elements of negligence, and the lack of any well-accepted descriptive theory that would give greater certainty and clarity, the most attractive option to any restater would be to try to do what Holmes suggested for the breach of duty element: dissolve each of the open-ended elements into a set of specific sub-rules that all together provide clarity and certainty. Within the confines of Holmes' descriptive theory, there seems to be only one alternative to this approach. One might restate the law of negligence in a different form than other law, thus simply accepting the irreducible open-endedness of much of the law of negligence, while perhaps achieving greater certainty and clarity in those parts of negligence law that can be reduced to specific rules.

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31. See *id.* at 137-47, 466-69.

32. *Thing v. LaChusa*, 771 P.2d 814, 830 (Cal. 1989).

C. *The Problem with Negligence and the Third Restatement:  
Proposal and Commentators*

Anyone attempting to restate the law of negligence must face the problem posed by the open-ended form of duty, breach of duty, and proximate cause. It makes sense, then, to examine Professor Schwartz's proposed *Restatement (Third) of Torts: General Principles*,<sup>33</sup> and the three excellent articles by John Goldberg and Ben Zipursky,<sup>34</sup> Kenneth Abraham,<sup>35</sup> and Jane Stapleton<sup>36</sup> to see how the different authors deal with this problem.

Gary Schwartz's thoughtful and exhaustively-researched proposal, if adopted by the ALI, would be its third restatement of *The General Principles of Negligence*, replacing the *Second Restatement*, adopted in 1963,<sup>37</sup> which had, in turn, replaced the *First Restatement*, adopted in 1934.<sup>38</sup> One way to discern the basic object of this *Third Restatement of General Principles* is to compare the proposed *Third Restatement* with the *Second*. When we do so, we can identify one major purpose: to identify truly basic principles and limit this part of the *Restatement* to those. Thus, the *Second Restatement's General Principles of Negligence* had nine topics as subheadings and sixty-five sections under those nine topics;<sup>39</sup> Professor Schwartz has just seventeen sections, with no topic subheadings in his *General Principles of Negligence*.<sup>40</sup> Professor Schwartz's introductory note confirms this revised approach to *The General Principles* section,<sup>41</sup> but with a twist. He says the purpose is to work through the basic or general principles of just the core of tort law.<sup>42</sup> He identifies the core of tort law as liability for accidental personal injury and property damage.<sup>43</sup> Given this focus of *The General Principles* on just the core of tort law, Professor Schwartz excludes from his discussion liability for emotional distress and economic loss, as well as liability for unintended personal injuries

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33. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].

34. Goldberg & Zipursky, *supra* note 5.

35. Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187 (2001).

36. Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001).

37. RESTATEMENT (SECOND) OF TORTS div. 2, chs. 12-19 (1965).

38. RESTATEMENT (FIRST) OF TORTS vol. II, chs. 12-19 (1934).

39. RESTATEMENT (SECOND) OF TORTS §§ 281-328D.

40. Discussion Draft, *supra* note 33, §§ 3-17.

41. *Id.* Reporter's Introductory Note, at xxi.

42. *Id.* Reporter's Introductory Note, at xxi.

43. *Id.* § 14 Scope Note.

caused by misrepresentations,<sup>44</sup> and leaves for other parts of *The General Principles* "affirmative duty doctrines, doctrines of actual and proximate causation, and the common law rules of strict liability."<sup>45</sup>

Within this intriguingly limited definition of the scope of *The General Principles of Negligence*, Professor Schwartz makes three judgments directly related to our concern with the open-ended form of three out of the five traditional elements in the prima facie case for negligence.

First, Professor Schwartz refuses to include in his proposed *Restatement* either the traditional prima facie case for negligence, which had been inserted in the *Second Restatement's* general principles under the heading "Burden of Proof,"<sup>46</sup> or the *First Restatement's* idiosyncratic statement of the elements of negligence,<sup>47</sup> which had been retained but modified in the *Second Restatement*.<sup>48</sup> Instead, Professor Schwartz states a more limited prima facie case involving (1) negligent conduct, that is (2) a legal cause of (3) physical harm.<sup>49</sup> Professor Schwartz achieves greater clarity and certainty in his statement of the elements of a negligence claim, then, by simply eliminating altogether the troublesome open-ended element of duty.

Second, Professor Schwartz attempts to tame the notion of duty in negligence law by two moves. Within the "core" of negligence law for which Professor Schwartz attempts to identify general principles (i.e., cases in which defendant's conduct causes plaintiff personal injury or property damage), he sees that findings of no duty are "unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability."<sup>50</sup> The limited number of cases that give rise to those special problems are, therefore, presumably subject to reduction to specific no-duty rules. The larger group of cases involving no-duty rules—negligent infliction of emotional distress, negligent causation of economic loss, and failure to act affirmatively to protect plaintiff from harm threatened by something other than defendant's conduct—are excluded by definition from the scope of Professor

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44. *Id.* § 14 Scope Note.

45. *Id.* Reporter's Introductory Note, at xxi.

46. RESTATEMENT (SECOND) OF TORTS § 328A (1965).

47. RESTATEMENT (FIRST) OF TORTS § 281 (1934).

48. RESTATEMENT (SECOND) OF TORTS § 281.

49. Discussion Draft, *supra* note 33, § 3.

50. *Id.* § 6.

Schwartz's *Restatement*, although he promises to cover the "affirmative duty" set of cases later in the project by a restatement in the form of a general rule and exceptions that themselves take the form of rules.<sup>51</sup>

Third, Professor Schwartz carries forward the *First* and *Second Restatements'* attempts to reduce the seemingly open-ended ordinary, reasonable person standard to a more manageable and understandable risk-benefit standard: "Primary factors to consider in ascertaining whether conduct lacks reasonable care 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."<sup>52</sup> In his comments to this section, Professor Schwartz recognizes that even this formulation is still to a certain extent irreducibly open-ended:

[T]he approach to negligence described in this section is not one that can be rendered operational in a way that generates certain results. Rather, the 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.<sup>53</sup>

John Goldberg and Ben Zipursky, in a brilliant article, take dead aim at Professor Schwartz's treatment of duty in negligence law. Their attack proceeds on three fronts. First, they attack Professor Schwartz's artificial limitation of the scope of a restatement of *The General Principles of Negligence* as inaccurate and unhelpful.<sup>54</sup> Second, they argue that, in omitting duty from the prima facie case of negligence, Professor Schwartz ignores the formulation of negligence law adopted in at least forty-eight states.<sup>55</sup> Third, they argue that Professor Schwartz's section on duty is not, in form, a restatement of law that meets the general restatement form or one that could guide courts in deciding negligence cases.<sup>56</sup> Goldberg and Zipursky propose an alternative restatement of part of *The General Principles of Negligence* that embodies the traditional prima facie case for negligence, including duty, and that goes on to restate *The General Principles* of duty in negligence law.<sup>57</sup>

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51. *Id.* § 6 cmt. b.

52. *Id.* § 4.

53. *Id.* § 4 cmt. g.

54. Goldberg & Zipursky, *supra* note 5, at 664-65.

55. *Id.* at 658-59, 668-69.

56. *Id.*

57. *Id.* app. at 737-50.

The weighty evidence of daily practice supports Goldberg and Zipursky's argument that courts use the duty of care as a non-trivial element of the prima facie case over the whole range of negligence cases, including those that Schwartz identifies as the core of tort law.<sup>58</sup> In addition, the case law supports their identification of four different senses in which the courts use the element of duty in the prima facie case: A "primary sense," which raises the question of whether "the defendant [was legally] obligated to the plaintiff to be vigilant of the type of harm suffered by the plaintiff";<sup>59</sup> (2) An alternative sense, which raises the question of whether the "defendant's faulty conduct constitutes the breach of a duty to the plaintiff, rather than the breach of a duty owed to another";<sup>60</sup> (3) Another alternative sense in which the court finds no duty but simply expresses the judgment that, on the facts of the case, no reasonable jury could find that the defendant breached his duty to behave reasonably toward the plaintiff;<sup>61</sup> (4) Another alternative sense, in which courts, for policy reasons, exempt a defendant from liability even though the plaintiff has satisfied each of the elements of the prima facie case and the defendant has no previously specified affirmative defense.<sup>62</sup>

So far, so good. But on the next and most crucial step in their argument, Goldberg and Zipursky seem to stumble. For at this point, they claim that the doctrine of duty, as they have described it, is what solves the problem with the form of negligence law and makes the law of negligence law in the full sense. They argue as follows:

Duty in the primary sense is important because it links negligence and liability. The reason one person's negligence generates liability for the injuries it causes to another is that the negligent party has a duty of care toward the other, to avoid causing that sort of injury. The breach of the duty causing the injury generates liability. We put this forward as a point of principle, but not as a point of moral principle. It is a point of legal principle, for it is only *duties recognized by courts* that generate liability. Areas in which negligence causing injury are non-actionable are (at least at the level of basic doctrine) those in which the defendant did not have any duty to the plaintiff to be prudent with regard to the interests in question. It is because the common law of torts itself contains a cohesive doctrine of duty that negligence doctrine contains general principles and constitutes a body of law, not simply policy-generated pockets of rule-like decisions.<sup>63</sup>

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58. *Id.* at 670-72.

59. *Id.* app. § D cmt. a, at 739.

60. *Id.* app. § D cmt. d, at 741.

61. *Id.*

62. *Id.*

63. *Id.* at 731.

But this argument solves the problem of form in only a trivial sense, by showing a plausible logical relationship between duty, unreasonable conduct, and liability. And, since the duty is identified exclusively as a legal duty recognized by the courts in determining whether to recognize liability, the logical relationship is always established simply by the decision of the court itself. This, then, is a purely formal solution to the rule-of-law problem with duty, as it works whatever substantive content the courts give to "duty," for whatever reason. This analysis embodies a conceptual formalism that runs throughout Goldberg and Zipursky's paper.<sup>64</sup> That formalism can be seen most clearly, perhaps, in their unwillingness to judge or argue about which approach, rule, or decision is better. Instead, Goldberg and Zipursky often argue from the fact that a particular duty decision was made, "whether that decision was right or not," to a conclusion about the formal structure of duty questions.<sup>65</sup>

This refusal to evaluate affects their descriptive theory of the duty element, which adopts general formulations at the descriptive level that are so inescapably indeterminate that they can describe opposing decisions of the same issue. They recognize that a large number of duty questions are resolvable simply by reference to previously-announced specific judicial rules.<sup>66</sup> But there are cases not covered by the specific rules. In those, they say, the courts resolve duty questions by reference to a set of factors,<sup>67</sup> including foreseeable harm,<sup>68</sup> the relationship between the parties,<sup>69</sup> the professional or institutional setting,<sup>70</sup> "the extent to which recognition of an obligation to the plaintiff would impede the satisfaction of obligations already owed by the defendant to others,"<sup>71</sup> and "the extent to which social norms treat the conduct demanded of the defendant as required rather than merely advisable."<sup>72</sup> Foreseeable harm, of course, is an open-ended term, and the formulation of the third and fourth factors using the arbitrary formulation "the extent to which" makes each of those factors relatively indeterminate. Although the

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64. See *id.* at 716 (assumption that doctrinal categories of negligence law necessarily have distinct, different core meanings); *id.* at 712-13 (formalist justification of judge-jury allocation of functions).

65. See *id.* at 680; see also *id.* at 716.

66. *Id.* app. § D cmt. b, at 740.

67. *Id.* at 740.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

resulting description is more structured and determinate than the prevailing "public policy" explanation, in which particular public policies are not identified at all, still, this description does not make negligence law clear, certain, and capable of uniform application because it fails to give definite guidance to actors before the fact or to judges after the fact.

Finally, Goldberg and Zipursky include in their descriptive theory an almost completely open-ended "policy-based liability exemption."<sup>73</sup> This is limited to undefined "unusual circumstances,"<sup>74</sup> but the exemption in this form seems to make their description of the duty element in negligence law almost as open-ended and indeterminate as the prevailing theory that there is a general duty to those foreseeably endangered by defendant's conduct, subject to a set of no-duty rules based on undefined public policies. Goldberg and Zipursky seem to solve this problem by another formalist argument: These cases of policy-based exemptions from liability do not apply the duty concept in its primary sense, and hence do not affect the structure of the law dealing with duty in that sense.<sup>75</sup> This solution works only on the assumption that analytical distinctions in a descriptive theory are or can be translated into practically effective distinctions within the institution described. Here, it is difficult to see how this class of cases can be defined in a way that could give understandable guidance to actors and courts, without both a more specific description of the "unusual circumstances" triggering the policy-based exemption and an intelligible statement of the policies at work.

Professor Abraham carefully focuses directly on the rule-of-law problems with the breach of duty standard and its application by the jury.<sup>76</sup> In an article that could have been written by the ghost of Holmes, he laments the lawless nature of jury verdicts in "unbounded" negligence cases where there is no prior custom, statute, or professional standard of conduct to limit and guide the jury.<sup>77</sup> In those unbounded cases, juries create the norm that they then apply, retroactively, to defendant's conduct.<sup>78</sup> The effectiveness of the law is undermined by these unbounded cases, because the jury verdict is based on no knowable prior rule and does not become

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73. *Id.* app. § E, at 749.

74. *Id.*

75. *Id.* app. § D cmt. a, at 739-40.

76. Abraham, *supra* note 35, at 1189 & n.5.

77. *Id.* at 1191-94.

78. *Id.* at 1191.

a rule to be applied in the future.<sup>79</sup> The efficiency of the law in deterring unwanted conduct is undermined, since no one can know in advance what conduct will be sanctioned in an unbounded case.<sup>80</sup> The legitimacy of the law is, to a certain extent, also called into question.<sup>81</sup> Abraham concludes that we should do all we can to eliminate unbounded negligence cases. He encourages attempts to achieve greater certainty, stability, and clarity in the law by limiting, when possible, negligence claims to bounded negligence cases and, for other claims, adopting strict liability or strict no-liability rules that are fixed, definite, and certain.<sup>82</sup>

Professor Stapleton drew the seemingly impossible task of commenting on a part of the *Third Restatement* that has not been written yet—the part restating cause-in-fact and proximate cause. Her thoughtful paper attempts to solve rule-of-law problems with both duty and proximate cause.<sup>83</sup> For present purposes, I will focus just on her discussion of proximate cause.

Professor Stapleton proposes that we clarify the law related to proximate cause in two ways. First, we should clearly distinguish between the factual question of the causal relation between defendant's conduct and plaintiff's injury and the purely normative question, misleadingly labeled "proximate cause," of the proper limits on liability for harm actually caused by defendant's conduct.<sup>84</sup> Second, this normative question mimics or repeats the legal duty question, but it is decided in the United States by the jury rather than the judge.<sup>85</sup> We can clarify the law of proximate cause and make it more uniform in application by doing two things: first, we must identify the factors or "legal concerns" deemed relevant by the courts for resolving the normative question of the scope of liability for consequences of breach,<sup>86</sup> and, second, we must craft jury instructions that would tell the jury about these factors, when relevant to the particular negligence claim before the jury.<sup>87</sup>

Following the analytical approaches she used so brilliantly in an earlier work dealing with duty cases,<sup>88</sup> Professor Stapleton

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79. *Id.* at 1192, 1194.

80. *Id.* at 1202-03.

81. *Id.* at 1203-06.

82. *Id.* at 1221-23.

83. Stapleton, *supra* note 36, at 944.

84. *Id.* at 957-69.

85. *Id.* at 954-57.

86. *Id.* at 956-57.

87. *Id.*

88. See generally Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menus*, in *THE LAW OF OBLIGATIONS* 59 (Peter Cane & Jane Stapleton eds., 1998).



attempts to identify the set of "legal concerns" relevant to determining the scope of liability for the consequences of breach. Just as in her duty paper, she concludes that these factors are not all consequentialist policy judgments,<sup>89</sup> as the prevailing wisdom would have it. These legal concerns include, among others, the following:

- 1) Whether the consequence is wholly "disproportionate" to the degree of wrongfulness involved in the breach.
- 2) The role of compounded bad luck and coincidence in the interval between breach and outcome.
- 3) The social costs (including legal administration) of including such consequences within the scope of liability.
- 4) The dignity and integrity of the legal system.
- 5) The concern with the freedom of action of the plaintiff/defendant.
- 6) Any explicit or implicit undertakings by the defendant.
- 7) Whether the defendant was acting in pursuit of commercial profit.
- 8) The moral expectations of society of the defendant.<sup>90</sup>

Professor Stapleton denies the prevailing theory's claim that proximate cause decisions are nothing but policy-based judgments, but she accepts that theory's insistence that there is no single, intelligible judgment about the facts called for by the proximate cause inquiry.<sup>91</sup> She therefore attempts to derive from the cases a set of different normative judgments that seem to underlie judicial decisions in proximate cause cases. But clarifying the different normative grounds for judges' proximate cause decisions and incorporating those "legal concerns" in instructions to the jury would make negligence law less clear and less certain than it is today.

Today, although proximate cause is technically a question for the jury, in most states the jury is not given instructions that separate the proximate cause question from the cause-in-fact question.<sup>92</sup> These blank instructions effectively reserve to the court the decision of proximate cause questions.<sup>93</sup> Judges have to give intelligible reasons for their decisions, and their decisions are reviewable on appeal. This leads to a semblance of certainty about how proximate cause cases will be decided. To give these questions to juries, one-

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89. Stapleton, *supra* note 36, at 985-87.

90. *Id.* at 1007-09.

91. *Id.* at 948-49, 985-87, 1007-09.

92. *See supra* note 8 (citing various pattern jury instructions).

93. In practical effect, the proximate cause questions would be decided by the court at the directed verdict stage.

shot decision-makers, with instructions calling for them to make normative decisions under one or more of the relatively open-ended normative standards identified by Professor Stapleton, would seem to make the law less certain and less predictable.

Professor Stapleton, like Professors Goldberg and Zipursky, adopts a methodology that gives us a descriptive theory that explains judicial decisions in terms of the application in an individual case of one or more of a set of relevant factors. This laundry-list approach seems to reflect a methodology that accepts as equally valid and equally relevant all judicial decisions on the topic. Using this methodology in restating the law of the United States on any difficult topic precludes a single, clear statement of the law, for the methodology provides no basis for determining that some cases are right, or better-reasoned than other cases. The idea of objective, scientific legal scholarship thus seems to complicate our search for a clear and certain restatement of the law of negligence.<sup>94</sup>

Professor Schwartz and the four commentators discussed here all grappled conscientiously with the rule-of-law problems for a restatement of negligence posed by the open-ended form of duty, breach, and proximate cause as elements of the negligence cause of action. To my mind, none of these efforts succeeds, because each author attempts to resolve the problem largely within the conceptual structure and using the conceptual tools of the prevailing descriptive theory we have inherited from Oliver Wendell Holmes, Jr. Under that theory, duties are legal duties defined by the courts, and recognized or rejected on the basis of public policy. Under that theory, determinations of negligence are made by juries, after the injury, based either on the jury's unguided judgment about the "reasonableness" of defendant's conduct or the jury's relatively unguided judgments about foreseeable harm and a public policy that balances the social costs and the social benefits of defendant's conduct. Under that theory, proximate cause has nothing to do with causation, but simply masks a judgment, based on public policy or foreseeability, to limit liability for certain consequences of negligent conduct. Under these theoretical descriptions of the open-ended elements in negligence law, the law cannot achieve the rule-of-law goals of certainty, clarity, and uniform application. The only way to achieve those goals, as Professor Abraham and Oliver Wendell

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94. Compare John Finnis' proposed social science methodology. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3-22 (1980); see also Patrick J. Kelley, *Who Decides?*, *supra* note \* (applying Finnis' social science methodology to tort theory).

Holmes recognized, is to reduce each of these open-ended terms to a set of specific legal rules.

As long as we operate within the conceptual box Holmes has put us in, this is the best we can do. And, given the practical impossibility of reducing all of negligence law to a set of specific rules, our best does not seem to be possible, as the air of foredoomed failure hovering over Professor Abraham's proposed reform suggests. Are we forced to conclude that there is a fundamental incompatibility between our rule-of-law concerns and the modern law of negligence?

I suggest we start thinking outside the box. One of the ways we can do so is to look at negligence law prior to Holmes's descriptive theory of negligence. If we could find out why and how the open-ended concepts crept into negligence law, perhaps we could discover other ways to resolve our rule-of-law problems.

### III. ORIGINS OF MODERN NEGLIGENCE LAW

In 1881, in *The Common Law*,<sup>95</sup> Holmes constructed the theoretical box in which we find ourselves. It makes sense, then, if we want to think outside that box, to look at negligence law as it developed before Holmes re-described it in terms of foreseeable danger and public policy.

#### *A. The General Duty of Care and the Ordinary Reasonable Man Standard*

The combined efforts of two British scholars, S.F.C. Milsom<sup>96</sup> and M.J. Prichard,<sup>97</sup> have clarified the development of the modern law of negligence. They identified two elements as critically important in the emergence of early negligence law in the first half of the nineteenth century; first, the ordinary reasonable man standard of conduct, applied by the jury, and second, the technique of pleading a general duty of care. It makes sense, therefore, to begin a theoretical analysis of early negligence law by focusing on these two elements.

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95. HOLMES, *THE COMMON LAW*, *supra* note 10.

96. *See generally* S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (2d ed. 1981).

97. *See generally* M.J. PRICHARD, *SCOTT V. SHEPHERD AND THE EMERGENCE OF THE TORT OF NEGLIGENCE* (1976).

Milsom argues that, for centuries, the jury had the ultimate say in determining whether defendant's conduct was wrongful.<sup>98</sup> This was so because the defendant could deny plaintiff's claim of wrongfulness—a claim implicit in trespass and explicit in trespass on the case—by simply pleading the general issue: "Not guilty."<sup>99</sup> The case would then be sent out to the county for the jury to decide. The jury's decision was effectively insulated from review by the court back at Westminster. In the eighteenth century, procedures developed by which the litigants could bring back to the court at Westminster the facts developed at the jury trial.<sup>100</sup> This threatened the primacy of the jury in deciding whether defendant's conduct was wrongful. Further, it threatened to reduce the law of torts to a multitude of very specific legal rules of conduct, as the courts at Westminster ruled as a matter of law on individual cases brought back from the jury.

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

But what did the judges who developed the early law of negligence believe the ordinary reasonable man standard meant? We may be better able to answer that question when we return to it after exploring the judicial development of the duty of care pleading.

Prichard identifies the early common carrier cases of *Ansell v. Waterhouse*<sup>101</sup> in 1817 and *Bretherton v. Wood*<sup>102</sup> in 1821 as the

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98. MILSOM, *supra* note 96, at 296-300.

99. *Id.*

100. *Id.* at 397; PRICHARD, *supra* note 97, at 15-16.

101. *Ansell v. Waterhouse*, 105 Eng. Rep. 1286 (K.B. 1817).

key cases in developing the general duty of care pleading.<sup>103</sup> In both of those cases, the judges seemed to understand the pleaded general duty as equivalent to a pleaded custom of the realm, but without pleading the specific custom.<sup>104</sup> Pleading a general duty was obviously safer for the plaintiff's attorney than attempting at his client's peril to plead the proper specific custom of the realm. Given its attraction for plaintiff's attorneys, it is not surprising that the general duty allegation spread rapidly from the common carrier cases to other negligence cases in the early nineteenth century.

The judges who authorized this rapid spread may have seen a related advantage for the legal system as a whole, for the general duty of care allegation helped resolve a practical pleading problem in the common law. The general duty allegation provided a broad umbrella category under which all sorts of specific facts could be pleaded. Recognition of this broad category avoided the multiple categories that would have developed if customs of the realm had to be pleaded specifically under the new procedural conditions that encouraged accurate fact pleading. With this broad umbrella category, the courts avoided getting bogged down in the minutiae of specifically pleaded customs, with the attendant risk of transferring from the jury to the courts the responsibility for determining the standard of behavior. The general duty pleading, then, like the ordinary reasonable man standard, helped maintain the jury's historic role in determining whether defendant's conduct was wrongful.

The court's invocation of the custom of the realm in those early duty of care cases provides the basis for understanding the "duty of care" in negligence as not just a legal duty imposed by legislators or judges based on their views of desirable social policy. This, of course, is the modern view, but it ignores an earlier understanding of the appropriate bases for judicial decision—the understanding prevalent at the time the general duty of care pleading first appeared. Under that view, judges were to look to the preexisting customs and mores of the community to resolve disputes. The

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102. *Bretherton v. Wood*, 129 Eng. Rep. 1203 (Ex. Ch. 1821).

103. PRICHARD, *supra* note 97, at 28-29.

104. Lord Ellenborough in *Ansell* characterized the general duty pleading there as "tantamount" to pleading custom of the realm. *Ansell*, 105 Eng. Rep. at 1288. All the courts in the Exchequer Chamber accepted this reasoning in *Bretherton*, where Chief Justice Dallas argued, "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely . . ." *Bretherton*, 129 Eng. Rep. at 1206.

custom of the realm, they thought, was the common law.<sup>105</sup> This understanding guided the judges who first adopted the general duty of care pleading, for they recognized the historical continuity between the older custom of the realm pleading and this new duty of care pleading. From this, one may conclude that the early duty of care pleading was understood as a method of referring in a general way to the specific preexisting customs, conventions, and coordinating practices of the community.<sup>106</sup> Understood in that way, the duty terminology is not an empty formula. If tort liability is imposed to redress a private wrong, defined by reference to the practical coordination norms of the community, it seems only natural to characterize that wrong as breach of a duty owed by defendant to plaintiff. You wrong someone when you fail to give him what is "due" him, that is, when you fail to fulfill your "duty" to him. There is not circularity or judicial *ipse dixit* here, because the courts rea-

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

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

*Ansell*, 105 Eng. Rep. at 1288 (Lord Ellenborough, C.J.).

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

*Bretherton*, 129 Eng. Rep. at 1206 (Dallas, C.J.). See generally 1 WILLIAM BLACKSTONE, COMMENTARIES \*62-\*92.

106. See *Ansell*, 105 Eng. Rep. at 1289 (Abbott, J.) ("In the present case, however, the duty, as it seems to me, attaches entirely on the defendant, from the general obligation cast on him by the law as a common carrier . . . And it is clear, that a common carrier may be charged *ex delicto*.").

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

*Id.* at 1289-90 (Holroyd, J.); see also *Bretherton*, 129 Eng. Rep. at 1207 (Dallas, C.J.) ("In the present case, a duty was imposed on the Defendants which did not arise by the contract, but by the custom or common law of England."); *Readhead v. Midland Ry. Co.*, 2 L.R.-Q.B. 412, 421 (1867), *aff'd*, 4 L.R.-Q.B. 379, 382 (1869) (Montague Smith, J.).

son from pre-judicial community-defined obligations, based on the accepted coordination norms of the community, to a conclusion about legally redressing a wrong understood as a breach of that community-defined obligation.

This, in turn, provides a basis for understanding why the judges were so protective of the jury's role in negligence cases. If the basic test of wrongfulness is whether defendant's conduct was contrary to accepted, established patterns for coordinating activity in a particular community, selecting a group of people from that community and asking them whether defendant acted as an *ordinary* reasonable man (or a man of *ordinary* prudence) would have acted seems to be an excellent method for applying that test.

Furthermore, that procedure and that standard provide a solution to the basic problem of extending tort liability to cases in which the defendant intended no contact with the plaintiff. It may be impossible to reduce to legal rules the multitude of mores and patterns of conduct in particular communities concerning coordination of conduct not intended to cause contact with others. By adopting the jury-applied standard of the ordinary reasonable man's conduct, the judges did not need to know the patterns or mores themselves in any detail; they did not need to risk adopting as the law of England a pattern prevalent only in one geographical area; and they did not run the risk of stating the pattern of expected conduct too broadly in a formal rule that might include other situations governed by different expectations based on different social rules.

As negligence law originally developed, then, neither the general duty of care pleading nor the ordinary reasonable man standard were intended to be open-ended invitations to unguided after-the-fact normative judgments by judges and juries. Instead, both were what we might call covering generalities, like the older common-law pleading formulas, intended to elicit judgments about specific preexisting social safety conventions. The duty of care pleading called on the judge to determine whether, on the facts pleaded, there was any social convention applicable to defendant's conduct, intended to protect people like plaintiff, that required the defendant to avoid creating the hazard that resulted in harm to the plaintiff. The ordinary reasonable man standard called on the jury to determine whether, on the facts as they found them, the defendant had breached a social safety convention, causing harm to the plaintiff.

*B. Proximate Cause*

The courts developed a proximate cause doctrine shortly after they put in place the primary elements of a general duty of care and the ordinary reasonable man standard. It seemed to come about in the following way.

The general duty of care pleading in a negligence case was a brilliant solution to a pleading problem under the old common law, which was fundamentally a law of pleading. The same forces creating the problem that the duty of care pleading solved, however, were transforming the common law into substantive law. Almost as soon as the general duty of care pleading was adopted, judges lost sight of its function as a covering generality or pleading formula and treated it as a substantive legal concept—a reified general duty of care to others.<sup>107</sup> This left the judges with no way to make the specific judgments about particular social conventions and their purposes obviously called for under the original understanding of the duty of care pleading. The proximate cause doctrine was one of four doctrines that developed in response to this under-elaborated notion of duty. Proximate cause came in along with contributory negligence, privity, and the legislative purpose limitation on statutory negligence liability in the 1840s and 1850s, and proximate cause doctrine was developed by the courts over the remaining years of the nineteenth century.

Looking back on that development in 1909, Joseph W. Bingham, an early legal realist, brilliantly cut through the varied and confusing explanations given by the courts to the underlying core of the proximate cause doctrine.<sup>108</sup> He concluded, from an intensive analysis of a series of specific cases, that “in those cases decided against defendant, the prevention throughout of the concrete sequence which produced the damage was within the limits of the purposes for which the unperformed duty was imposed; in those decided in favor of defendant, it was not within those limits.”<sup>109</sup> If we combine Bingham’s analysis of proximate cause as dependent on the purposes of the specific duty of care in a negligence case with the original understanding of the nature of the specific duties re-

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107. See *Winterbottom v. Wright*, 152 Eng. Rep. 402, 404-06 (Ex. 1842) (finding that “duty” in tort must be a general duty to all, so it cannot be based on contract without privity).

108. Joseph W. Bingham, *Some Suggestions Concerning “Legal Cause” at Common Law*, 9 COLUM. L. REV. 16, 23-37 (1909).

109. *Id.* at 35.



ferred to by the general duty of care pleading, we can amplify Bingham's explanation of nineteenth century proximate cause cases.

One need only see the duties in the first instance, not as judicially-defined duties, but as social obligations derived from the community's accepted ways of doing things. Community standards of coordinating behavior may be developed so that certain goods can be achieved by some, or certain evils can be avoided by others, if everyone follows the practice. For example, if everyone drives on the left, collisions can be avoided and everyone can get where they are going more quickly and safely. Everyone engaged in the practice understands what those purposes are. For the practice to give rise to a claim of wrong, therefore, the plaintiff must be within the group of those whose interests the practice was developed to protect, and the hazard by which he was harmed must be one that the practice was developed to avoid.

Bingham's duty-purpose analysis applies without tautology to social duties associated with a community's coordinating conventions or practices. Plaintiff is wronged if she is harmed when defendant breaches a social convention whose purpose is to protect people like the plaintiff from that kind of harm. Thus, the hazard/class test applied by the courts to determine when breach of a criminal statute will be deemed to be negligence per se<sup>110</sup> is just one application of a more pervasive structure, embodied in "proximate cause" cases in negligence as well.

This explains the relatively greater role of the judge vis-a-vis the jury in resolving proximate cause issues. Courts in the nineteenth century<sup>111</sup> (and courts today, to a great extent)<sup>112</sup> decided proximate cause questions, more often than not, as matters of law, leaving few proximate cause issues for the jury. At first glance, this seems puzzling even under the above theory. If the negligence issue, which involves the question of the existence and content of preexistent community norms, is ordinarily left to the jury as a representative cross-section of the community, why should not the proximate cause issue, which involves the purposes of preexistent community norms, also be left to the jury?

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110. For a description of the development of this test, see Kelley, *Who Decides?*, *supra* note \*, at 358-63.

111. See, e.g., *Carter v. Towne*, 98 Mass. 567, 568-69 (1868); *Denny v. N.Y. Cent. R.R. Co.*, 79 Mass. (13 Gray) 481, 485-87 (1859).

112. See, e.g., *Cargill, Inc. v. City of Buffalo*, (*In re Kinsman Transit Co.*), 388 F.2d 821, 824 (2d Cir. 1968); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928). See, e.g., CLARENCE MORRIS & C. ROBERT MORRIS, JR., *MORRIS ON TORTS* 198-99 (2d ed. 1980).

A closer analysis, however, may resolve the puzzle. Negligence issues often involve complex and difficult questions concerning the scope and application of community standards. It makes sense to ask the jury whether, under the specific circumstances of the case, defendant violated an applicable community norm of behavior. Furthermore, this normative question is so closely tied to a precise determination of all the facts of the case that separating the two questions will likely lead to confusion and error. The proximate cause issue is less closely tied to facts, since it focuses on the purpose, not the application, of the relevant community norm. Moreover, the purpose questions underlying proximate cause issues are ordinarily easy questions on which reasonable people would all agree. The apparently greater judicial deference to the jury on negligence issues, then, is not a real difference, since the different results stem from application of the usual standard for allocating decisions between the judge and the jury. The different results simply reflect differences in the nature of the two issues: the negligence issue involves simple questions with often complex, fact-specific answers; the proximate cause issue involves a complex question with simple answers. The differences further suggest that a jury decision may be less reliable on proximate cause issues than on negligence issues. It is one thing to ask the jury, as a cross-section of the community, whether the defendant's acts violate a community standard of conduct; it is quite another thing to ask that cross-section to delineate the purpose of that community standard. By living in the community, the jury would tend to know the community's standards and patterns of conduct. The jury might not be well-suited to answer the second question, however, because the answer requires an ability to reason and analyze—an ability to probe beneath the rules and patterns of conduct themselves to their function and purpose in a system of mutually coordinated, cooperative behavior.

### *C. Early Negligence Law and the Rule of Law*

The early history of negligence law before its theoretical re-interpretation by Holmes in 1880 shows us a legal structure that satisfies the rule-of-law concerns that individual cases be decided by the application of rules adopted prior to the incident giving rise to the claim, and that those rules be clear and certain. Negligence law was a way of incorporating into the law the set of specific rules and practices adopted and acted upon by a particular community in order to coordinate conduct within that community safely. Those

rules and practices were adopted prior to the incident and gave members of that community clear and certain guidance about how to act in situations governed by them. As practices and conventions may vary from community to community, those differing social rules will not be uniformly applied under the negligence formula, but the formula itself, when applied according to its original purposes, will achieve a more fundamental uniformity: each case will be decided based on the relevant pre-existing social convention in that particular community. Thus, applying the same negligence standard, a motorist driving in the left lane of a two-lane highway in the United States may be held to be negligent, while a motorist driving in the right lane of a two-lane highway in England may be held to be negligent.

#### IV. RESTATING MODERN NEGLIGENCE LAW TO RESOLVE RULE-OF-LAW PROBLEMS

The development of negligence law over the last 120 years has been influenced by Holmes' theoretical description in terms of foreseeable danger and public policy. Those terms have crept into judges' opinions. Moreover, the England of 1830 is a far cry from the United States of today, with its instantaneous communication, fast transportation, and concentration of millions of culturally diverse people in small urban areas. Given all these changes, is it possible or desirable to restate negligence law in terms of breach of pre-existing community safety conventions?

Most of the modern law of negligence can still be described in pre-Holmesian terms.<sup>113</sup> In the vast majority of states, the jury is instructed that the negligence standard is the conduct of the ordinary reasonable person, or some variant of that standard.<sup>114</sup> Although proximate cause is technically a question for the jury, in most states the jury is not given instructions that separate the proximate cause question from the cause-in-fact question.<sup>115</sup> These blank instructions effectively reserve the decision of difficult proximate cause questions for the court. Foreseeability, in all its technical open-endedness, is therefore reserved to the courts. And there is good reason to believe that most judicial decisions on fore-

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113. See generally Kelley, *Who Decides?*, *supra* note \*, at 351-63.

114. See *id.* at 382-83 & n.248.

115. See *supra* note 8 (collecting pattern jury instructions).

seeability are guided by the judge's knowledge of the relevant pre-existing social conventions.

Both foreseeable risk and foreseeable harm are seemingly irreducibly open-ended, for the harm or danger one can foresee from one's actions depends on one's incentives, intelligence, knowledge, and experience. In practice, however, courts seem to cut down the open-endedness of simple foreseeability by deciding foreseeability questions from the vantage point of one who knows the governing safety conventions and their purposes. In using foreseeable risk as one element of the *Carroll Towing Co.* test of negligence, for instance, most courts take seriously the idea that foreseeability must be determined from the standpoint of the ordinary reasonable person in defendant's position before the accident.<sup>116</sup> In deciding what an ordinary reasonable person in that position would foresee, judges often look to what people in that position would ordinarily do. If the defendant has breached a conventional practice intended to protect against this kind of harm, the judge can easily find that an ordinary person in defendant's position would have foreseen serious harm from that breach.<sup>117</sup> If the defendant has followed common, accepted practice, the judge can easily find that an ordinary person in defendant's position would not have foreseen an unreasonable risk of harm from that conduct.<sup>118</sup>

Similarly, the most common example used to explain the unreasonable foreseeable risk test in proximate cause depends for its persuasiveness on our situating it within known community safety conventions. The classic example is this. Defendant gives a loaded gun to a young child, who drops it on her foot. Because the injury was not within the unreasonable foreseeable risk of injury from dis-

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116. See generally WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 146 (4th ed. 1971).

117. See, e.g., *Alaska Freight Lines v. Harry*, 220 F.2d 272, 276-77 (9th Cir. 1955) (finding that a defendant reasonably could have foreseen that, over the course of a long trip and in weather conditions where ice accumulation was likely, ice might dangerously fall from the top of the truck); *Crane v. Smith*, 144 P.2d 356, 363-64 (Cal. 1944) (finding that defendant reasonably should have known that a young child unaware of the risk could insert her finger into the coffee grinder and thereby injure herself); *Schaut v. Borough of St. Mary's*, 14 A.2d 583, 585 (Pa. Super. Ct. 1940) (finding that defendant reasonably could have foreseen that stakes placed in property abutting a sidewalk might pose a danger to passersby).

118. See, e.g., *Clinton v. Commonwealth Edison Co.*, 344 N.E.2d 509, 515 (Ill. App. Ct. 1976) (finding no liability where defendant complied with safety regulations in installing wires and where it was not foreseeable that decedent would come in contact with a live wire); *Van Skike v. Zussman*, 318 N.E.2d 244, 247-48 (Ill. App. Ct. 1974) (finding no liability where flammable cigarette lighter fluid sold to a young child was not inherently dangerous and where it was not foreseeable that the child would attempt to ignite the fluid with a nonfunctional toy lighter); *Taylor v. Travelers Indemnity Co.*, 241 So. 2d 564, 566-67 (La. Ct. App. 1970) (finding no liability where defendant took reasonable precaution to prevent accidental rolling of car).

charge of the gun that made the defendant's conduct negligent in the first place, defendant's negligence is not a proximate cause of plaintiff's injured foot.<sup>119</sup> The persuasiveness of this example, however, is parasitic on our understanding of the existence and purpose of the social norm prohibiting giving loaded guns to children. As long as the judge applying the unreasonable foreseeable risk formula defers, consciously or unconsciously, to his understanding of preexistent social norms and their purposes, the formula is harmless enough, and, as so qualified, leads in a roundabout way to the right answer.

It is possible, therefore, to restate modern negligence law in pre-Holmesian terms. It would also be desirable to restate negligence law in those terms, for four reasons. First, restatement in those terms solves the troubling rule-of-law problems with negligence law. The actor's conduct would be judged by a preexisting rule, which was clear, definite, and certain—the community's applicable safety convention. Second, the flexible capacity of negligence law to reflect different communities' different safety conventions would be restored, consistent with fairness and predictability. Freed from the idea of a standard of universal reasonableness, the judge and jury could focus on determining the relevant social norm in the relevant smaller community.

Third, the way would open up for needed reforms that would make application of negligence law more consistent, understandable, and fair. Jury instructions on the negligence standard are not as clear as they could be. Early in the development of negligence law, judges gave juries pointed advice on how to apply the negligence standard to the specific facts and, by implication, on what that standard meant. Without impairing the right to jury trial, we could make it clearer to the jury that the ordinary reasonable person question asks them to determine what plaintiff could legitimately expect defendant to do or refrain from doing, given the community's actual safety-coordinating convention and practices. Moreover, once we identify the *facts* on which the negligence judgment is to be made, we could recognize additional ways that plaintiffs and defendants could introduce evidence about social safety conventions and practices without invading the province of the jury.

A third restatement could show judges that questions of duty and proximate cause have definite, fact-based answers rooted in the

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119. See RESTATEMENT (SECOND) OF TORTS § 281(b) cmt. f, illus. 3 (1965); see generally 4 HARPER ET AL., *supra* note 26, § 20.5.

community's safety conventions and practices. Those judges, in turn, could reinvigorate the tests that are most likely to identify those answers. Simply asking judges or juries to decide questions of duty, breach, and proximate cause according to preexisting social safety conventions may not be enough, however, for a number of reasons: (1) our social conventions are many and subtle; (2) we are ordinarily not conscious of them, even when we act pursuant to them; (3) in order for a social convention to be usable as a basis for a negligence action, we must determine that it is a safety convention intended to prevent serious harm, and not just a rule of etiquette or manners. We may need to take an indirect route by elaborating tests that identify the psychological or social consequences of these conventions—their footprints, if you will. Luckily, we already have a number of these tests. Some familiar judicial tests can be understood as ways of identifying the footprints of community safety conventions. Consider, for example, the following reasoning by Judge Andrews of the New York Court of Appeals in recognizing a duty in a leading negligent misrepresentation case, *International Products Co. v. Erie R.R. Co.*:

Not every casual response, not every idle word, however damaging the result, gives rise to a cause of action . . . . Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care. An inquiry made of a stranger is one thing; of a person with whom the inquirer has entered, or is about to enter into a contract concerning the goods which are, or are to be, its subject, is another.<sup>120</sup>

If we put ourselves in the position of people acting pursuant to a community's accepted safety conventions, we can see that an actor protected by the convention would rely on others to follow the convention and would therefore coordinate her conduct with that of others, assuming they would follow the convention. An actor whose conduct is governed by the convention would know that those intended to be protected by the convention would rely on him to follow the convention. Both the actor protected by the convention and the actor governed by the convention would realize that the protected plaintiff would be subjected to a clearly identified hazard if the actor controlled by the convention fails to follow it. Thus, the combi-

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120. *Int'l Prods. Co. v. Erie R.R. Co.*, 155 N.E. 662, 664 (N.Y. 1927) (internal citation omitted).

nation of reliance by the plaintiff, knowledge of that reliance by the defendant, and a foreseeable hazard to plaintiff or those like him that can be avoided by defendant's proper conduct, are tell-tale signs—psychological footprints—of a community safety standard.

Given the basic nature of community safety conventions, the hazard/class test applied to statutes can also be applied to community safety conventions to resolve duty or proximate cause questions, but a test using those precise terms may not be the most effective way to get at this social reality. Those who follow the safety convention may neither be able to articulate the convention they follow nor be able to articulate the purpose of that convention. Here, too, it may be helpful to use an indirect approach that focuses attention on the psychological footprints of the safety convention. As we suggested above, the unreasonable foreseeable risk test<sup>121</sup> may be a good way to use the footprints of a convention to answer the hazard question.

This discussion may help us understand better the problems that courts and commentators have had with the ordinary reasonable person standard. If we look at it in historical context, it seems a sensible way of asking the jury to identify and apply the relevant preexisting social safety convention. But if that is what it is intended to do, it does it straight on, without using any of the psychological or social footprints of the safety convention to help the jury out. And it is not at all clear from the base form of the standard, taken out of historical context, that that is the question it asks the jury. This was not a problem early on in the history of negligence law, for perceptive trial judges like the estimable Chief Justice Tindal of the Court of Common Pleas could surround the bare-bones negligence formulation with additional helpful instructions to the jury.<sup>122</sup> By these instructions, they focused the jury's attention on the practical operation of a safety convention in the particular case and on the psychological and social footprints of that convention. In this way, they helped the jury identify the rele-

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121. See *supra* notes 116-19 and accompanying text.

122. See, e.g., *Proctor v. Harris*, 172 Eng. Rep. 729, 730 (C.P. 1830) (Tindal, C.J.). In that case, a pub-keeper had opened the flap door in the sidewalk over his cellar to let in a butt of beer, at night, with only the street lamps to light the opening. Plaintiff, a pedestrian, fell in and was injured. In instructing the jury, Chief Justice Tindal said:

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

*Id.* at 730.

vant preexisting social facts: the existence and content of that convention. If judges recover this understanding of the negligence standard, they could perhaps elaborate standard subsidiary instructions that could today help juries focus on the preexisting social facts invoked by the negligence standard as originally understood. One helpful addition might be an instruction relating the ordinary reasonable person standard to the conduct that someone in plaintiff's position could reasonably have expected from someone in defendant's position.

Finally, by understanding the open-ended forms in negligence law as different ways of referring to preexisting facts about social safety conventions and their purposes, we can also identify the initial purpose of negligence liability. That purpose seems to be to redress a private injustice, defined as an injury to plaintiff caused by defendant's breach of a duty owed to plaintiff to follow the community's coordinating conventions, which were intended to protect plaintiff and people like her from the hazards that the breach occasioned.<sup>123</sup> That purpose explains negligence law better than competing purposive explanations, such as deterrence or loss spreading.<sup>124</sup> That purpose makes sense out of the otherwise puzzling form of negligence law. Understanding that purpose gives us the insight we need to restate negligence law so that in its operation it will be clear, certain, capable of uniform application, and more effective at achieving its goal of corrective justice.

## V. CONCLUSION

The primary object of the restatement project is to promote clarity, certainty, and uniformity in the common law across the United States. That object limits the form of a restatement to that which can be applied uniformly to yield predictable, certain results. The traditional common law of negligence seems to defy restatement in that form, however, for duty, breach, and proximate cause—three of the five elements of the negligence *prima facie* case—seem to be irreducibly open-ended. The prevailing descriptive theories of negligence liability, derived from Holmes's tort theory, cannot seem to make these elements more certain, for they explain the open-ended terms by using the equally open-ended notions of foreseeability and public policy.

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123. See Kelley, *Who Decides?*, *supra* note \*, at 351-64.

124. See Patrick J. Kelley, *Tort Reform*, in *NATURAL LAW AND CONTEMPORARY PUBLIC POLICY* 298, 308-11 (David F. Forte ed., 1998).



An analysis of negligence law as it had developed prior to Holmes's theoretical description of it provides the basis for a different description, which may solve the rule-of-law problems raised by the seemingly open-ended elements of negligence. That analysis suggests that the duty, breach, and proximate cause formulations were adopted to focus on different aspects of preexisting social facts: the existence of a community safety convention, its purpose, and its applicability to the facts of the particular case. This understanding, in turn, provides a solution to the rule of law problems with those formulations, as the rules and practices to which they relate were adopted prior to the incident, gave clear guidance to members of that community, and can be identified and applied by courts and juries to resolve negligence claims. If we were to use this understanding in restating negligence law, we could achieve the restatement's basic goals of clarity, certainty, and uniform application of the common law across the United States.