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The Trouble With Negligence

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The Trouble With Negligence

*Kenneth S. Abraham**

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The concept of negligence dominates tort law. Most tort cases are about negligence. Much tort law scholarship over the past several decades has been about the meaning of negligence. The new draft *Restatement (Third) of Torts: General Principles* ("Discussion Draft") devotes the vast majority of its first volume to negligence.¹ And the idea of negligence as a liability standard is highly attractive to both the courts and commentators.²

All the attention that negligence receives is not surprising, given the unattractiveness of the alternatives. Imposing liability only when the injurer intended harm seems unduly limited, in that it absolves injurers of responsibility for harm caused by less blameworthy, but still wrongful conduct. Yet, under many circumstances, strict liability seems unduly broad, in that it risks imposing liability on innocent parties and depressing the level of desirable activities. Consequently, some form of negligence standard (however defined in particular) seems either to get it about right, or in any event to be a suitable compromise between the twin extremes of too little and too much liability.

The negligence standard is so much a focus of tort theory, however, and negligence cases occupy so large a proportion of all tort claims, that it is too easy to ignore how unusual negligence truly is among tort law's standards of conduct. Despite the extensive efforts of legal scholars to define negligence and to explore the relation between negligence and other standards of conduct, the character of negligence liability remains incompletely recognized. In my view, close examination of the negligence standard reveals that it is more troubled than its apparently central place in tort law implies. Far from being an appropriate default rule to be used when we are unsatisfied with the alternatives, the negligence standard is often flawed even in the ordinary cases involving liability for physical damage that are at its core. These same flaws render negligence an even less appropriate standard in most cases involving intangi-

1. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft Apr. 5, 1999).

2. Perhaps the most notable example of this attraction is the recognition and reconceptualization of products liability for design defects and failure to warn as based in negligence rather than strict liability. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 & cmt. a (1998).

ble loss, where at least until now it has been employed only in exceptional cases.

To pursue these points, I begin by examining the negligence standard as it is applied in cases involving physical harm. Twenty-five years ago, James Henderson, arguing in a powerful article that the courts were applying the negligence standard in a manner that constituted a "retreat from the rule of law,"³ began to uncover the distinctive character of negligence in such cases. Henderson relied heavily on the distinction between rules that are "polycentric," or open-endedly dependent on a variety of incommensurable factors, and those that are formal.⁴ I shall employ a distinction that looks at this problem in a somewhat different light. The cases readily divide, I think, into two categories: those in which the finder of fact must in effect create a norm in order to determine whether the defendant was negligent, and those governed by a pre-existing, independent norm. I contend that negligence is a far less satisfactory standard of conduct in the former set of cases than in the latter, precisely because of the problems associated with norm creation.⁵

Turning then to cases involving intangible loss, I argue that several of the well-known exceptions to the general rule that there is no liability in negligence for intangible loss reflect this principle of demarcation. In the exceptional cases in which there is negligence liability for "pure" intangible loss, there is often a pre-existing, independent norm that serves as the reference point for the negligence determination. And there is rarely liability in negligence for intangible loss in the absence of a pre-existing, independent norm that defines the applicable standard of conduct. In light of this principle, I conclude that there should be a restrained—and certainly not expanding—future for the negligence standard, whose flaws even in physical injury cases should be more clearly recognized, and whose application to new claims for pure intangible loss should be resisted.

3. See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 *IND. L. J.* 467 (1976).

4. *Id.* at 475-77.

5. By a "norm" I mean an informal social requirement that has some obligatory character to it. Of course, when juries decide negligence cases they apply norms formally, though implicitly, rather than informally. There is an increasing literature on the relation between "norms" and law, whose findings I do not wish in this Paper either to buy into or out of. See, e.g., Conference, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 *J. LEGAL STUD.* 537 (1998); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *MICH. L. REV.* 338 (1997); Cass R. Sunstein, *Social Norms and Social Rules*, 96 *COLUM. L. REV.* 903 (1996).

I. THE NORMATIVITY PROBLEM IN PHYSICAL INJURY CASES

A general standard of reasonable-care-under-the-circumstances defines negligence. But the level and nature of care that are reasonable in a given situation are not self-evident. In each case, the content of the norm of reasonable care must come from somewhere. The source of this content varies, depending on the case. In what I call "unbounded" cases, the source is the finder of fact's own general normative sense of the situation, informed by individual experience and by the evidence submitted by the parties. In contrast, in "bounded" cases, the source of this content is a pre-existing, concrete norm that exists independently of the finder of fact's individual sense of the situation. The distinction between these two types of cases is submerged in references to the negligence decision as a "mixed" question of fact and law.⁶ The differences between these categories are worth teasing out, for they reveal that unbounded negligence cases are in important respects more problematic than cases governed by a bounded standard of care.

A. Mixed Questions of Fact and Law in Unbounded Negligence Cases

It is commonplace to say that in tort cases the function of the decision-maker—the finder of fact—is to find the facts and then to apply the law to these facts. When the finder of fact is a jury, as it usually is, the court instructs the jury on the law and the jury then applies it. This description entails only two moves: fact-finding and law applying. The description is perfectly suitable when all the facts that the jury must find are empirical—that is, when the facts are out in the world, so to speak. In a battery case, for example, the jury may have to decide whether the defendant intended to punch the plaintiff in the nose, and then apply the law of battery to this fact.

When all the "facts" are not empirical, however, the task of the finder of fact involves three steps, not just two. In logical order, the finder of fact must (1) find the empirical facts, including what

6. The terminology has venerable roots. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 97; (Mark DeWolfe Howe ed., 1967); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924); James B. Thayer, "Law and Fact" in *Jury Trials*, 4 HARV. L. REV. 147, 169 (1890).

the defendant did; (2) determine how much and what kind of care was reasonable given these facts; and (3) apply the law of negligence to these findings, by deciding whether the defendant behaved in accordance with the norm identified in step (2). It has long been recognized that step (2) involves a very different function than step (1), because the former is entirely empirical, whereas the latter is evaluative. In recognition of this difference, steps (2) and (3) together have been referred to as deciding a "mixed question of fact and law."

Useful as this terminology is for distinguishing the empirical function of the finder of fact from the evaluative function, it conflates two very different forms of evaluation. In unbounded cases, the finder of fact performs the evaluative function in essentially unconstrained fashion. To describe this process as a mixture of fact-finding and law-applying is misleading, for in an important sense it involves a process that is neither. In cases where the finder of fact is constrained or bound by an independent norm, the evaluative function has already been performed by another agency or institution; in such cases the finder of fact does not (or at least is not supposed to) engage in evaluation at all.

1. The Negligence Decision as Norm Creation

The negligence decision in an unbounded tort case is neither a finding of empirical fact nor an application of law, and it is not really a mixture of the two either. Rather, the negligence decision is more typically an act of discretionary norm creation by the finder of fact. No matter how negligence is defined in instructions to the jury,⁷ or in the law applied by a judge in a bench trial, the negligence standard is abstract and general. Within wide bounds, the finder of fact does not identify a pre-existing norm, but simultaneously determines for itself what would constitute reasonable behavior under the circumstances and then applies this norm to the situation at hand.

This phenomenon occurs both in unique cases whose facts will never repeat themselves and in cases whose facts recur but are not governed by "per se" rules. Many contemporary torts teachers and scholars recognize the phenomenon in connection with recurring cases. The casebooks all address the problem, making obliga-

7. For analysis of the nature of these definitions in jury instructions, see generally Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994).

tory reference to Holmes's famous proposal that *per se* rules be developed to deal with recurring cases.⁸ But then the rejection of Holmes' proposal is explained on the ground that even recurring cases differ sufficiently in their details that development of *per se* rules to govern them has proved infeasible. In effect, the explanation typically goes, virtually all cases are unique and must be decided by the finder of fact.

This characterization of most negligence cases as unique tends to camouflage the norm-creation phenomenon. If each case is unique, we have no opportunity to see that it would be decided differently by a different finder of fact. Probably in part for this reason, the phenomenon is only dimly identified and infrequently discussed in the negligence literature of the last few decades.⁹ Nevertheless, the norm-creation feature of negligence is unlike virtually any other prominent feature of tort law. Of course, it has long been understood that whether to employ general "standards" or specific "rules" poses a classic choice for lawmakers.¹⁰ But negligence is the paradigm example of a general standard, not a merely random example; in any event, in contrast to negligence, many other legal "standards" are applied as a matter of law rather than by finders of fact.¹¹

I understand that my characterization of this process of decision in ordinary negligence cases as norm "creation" will be controversial. But if it is recognized that this process is not accurately

8. See HOLMES, *supra* note 6, at 98 ("But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever?").

9. Recent exceptions include Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 424-39 (1999), and Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 *MICH. L. REV.* 2348, 2386-90 (1990). In earlier generations the issue was more commonly discussed, though often merely in passing or in brief praise, rather than as a subject of extensive analysis. See, e.g., LEON GREEN, *JUDGE AND JURY* 67 (1930) (The very purpose of a jury trial in negligence cases "is to give a new deal in each case"); Bohlen, *supra* note 6, at 113 (arguing the most the law can do is to give "general directions for the construction of the standard to be applied to each specific case"). A brief but admirably analytical treatment can be found in ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 69 (1969).

10. See, e.g., Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 *J. LEGAL STUD.* 257 (1974).

11. Elements of a few torts that are far less prominent than negligence occasionally also call for the jury to exercise normative discretion by applying standards rather than rules. These include, for example, in battery, whether a non-harmful touching was nonetheless "offensive;" in intentional infliction of emotional distress, whether an infliction was "highly offensive;" and in fraud, whether a plaintiff's reliance was "justifiable." Even these concepts probably involve reliance on the notion of reasonable behavior as a reference point. Arguably the finder of fact sometimes also exercises normative discretion, though often only in a secondary role, in contract cases involving issues of "good faith." See generally Gergen, *supra* note 9, at 451-61.

characterized as norm "finding" or norm "identification," then the term norm "creation" seems apt, despite the fact that the norm that is created applies uniquely and only in the case at hand. Consider even the simplest of negligence cases. Suppose that a homeowner shovels off the steps leading to her front door after a snowstorm, but does not succeed in removing all remnants of the snow. As a result of foot traffic and inevitable daytime melting and nighttime freezing, these remnants turn to ice. Plaintiff (an invitee) slips on the steps, suffers bodily injury, and brings a negligence action against the homeowner.

In this case the finder of fact must decide, among other things, whether the homeowner exercised reasonable care to make her property safe for the plaintiff. Undoubtedly such matters as how much of the snow the defendant initially removed, whether she inspected the condition of the steps on subsequent days, how visible the ice was, how many steps there were and how steep they were, whether there was a railing, how many hours each day the steps could be expected to be in direct sunlight, and the snow removal practices of others in the neighborhood, would all be relevant and admissible.

Without question, each of these items of evidence is a potential predicate for the application of a norm to the facts of the case—for example, that a homeowner should remove all but the tiniest bits of snow from steps, that subsequent inspection is (or is not) necessary, or that greater care should be exercised if the steps are not in strong sunlight for several hours each day. But unless one or more of these precautions is mandated by statute or ordinance (my own definition would take these statutory cases out of the category of unbounded cases), the failure of the defendant to employ the precaution is simply an optional basis for the negligence decision by the finder of fact. In ordinary, unbounded cases such as this, the finder of fact is simply directed to weigh all the evidence in deciding whether the defendant was or was not negligent.¹²

Admittedly, whatever norm the finder of fact decides to apply is not created out of whole cloth; there is likely to be some basis for it in the practices and expectations of typical homeowners and

12. Indeed, many of the standard cases repeatedly found in the leading torts casebooks present precisely this profile. See, e.g., *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (reasonableness of failure to stop, look, and listen); *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947) (reasonableness of failing to keep personnel on barge that was in tow); *Brown v. Kendall*, 60 Mass. 292 (1850) (reasonableness of manner of separating fighting dogs); *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871) (reasonableness of rescue attempt); *Osborne v. Montgomery*, 234 N.W. 372 (Wis. 1931) (reasonableness of opening a car door under the circumstances).

their invitees. But the decision whether the defendant negligently maintained her steps in the case at hand does not involve identifying an already applicable norm that resolves this question. Rather, the negligence decision is precisely and entirely the selection of a decisive norm or norms from among a variety of possibilities. In my view, this is an act of norm creation, in the same sense that the enactment of a statute requiring that motor vehicles be equipped with air bags is an act of norm creation. What is true of the simple slip-and-fall case is even truer of factually more complex but still unbounded cases, such as those involving alleged design defects in products or misuse of dangerous chemicals. When there is no "law," no specific pre-existing norm, that can be identified and applied, then the finder of fact must create a norm to fit the situation.¹³

This kind of unbounded norm-creation rarely occurs in areas of tort law governed by other standards of care. For example, the law governing battery and false imprisonment specifies the governing standard: intent. In actions for fraud, and in certain defamation cases affected by constitutional concerns, the requisite state of mind is knowledge of falsity or reckless indifference to truth or falsity. In common law defamation cases, liability often depends only on the defamatory character of the statement at issue and on its falsity. Other causes of action follow this same pattern: liability usually hinges on the defendant's state of mind, on actual empirical facts, or on both. When this is not the case, and something like simultaneous norm creation-and-application occurs (as in strict liability for abnormally dangerous activities), this process is understood to be law-making. For this reason, the norm-creation decision is a question for the court, and the decision is subject to review as a question of law.¹⁴

It is true that questions involving states of mind in battery, fraud, and defamation cases are factually difficult and sometimes vague at their border; and it is also true that finders of fact can therefore pour their own content into a vague definition, or directly

13. This is true whether negligence is understood in ordinary parlance as reasonable behavior, or in cost-benefit terms under the Learned Hand calculus. In either situation, the finder of fact must invoke values that are by no means uniformly accepted in order to make the negligence determination. Moreover, whether this norm-creation takes place only under the rubric of negligence, or also in "foreseeability" determinations under the rubric of proximate cause, the norm creation in which the finder of fact engages is essentially the same. For discussion of the sense in which negligence and proximate determinations by the finder of fact overlap, see KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW: AN ANALYTICAL PRIMER ON CASES AND CONCEPTS* 118-19 (1997).

14. See RESTATEMENT (SECOND) OF TORTS, §520 cmt. 1.

nullify the law in virtually any case, thus engaging in norm creation. When nullification occurs, a norm that is not legally approved may actually be applied. But this occurs, when it does occur, out of view and without legal permission. Only in negligence is there open and permissible norm-creation by the finder of fact.

2. The Conscience-of-the-Community Justification

A natural response to my characterization might be to argue that, even when there is no concrete, discrete norm for the finder of fact to apply, such a norm typically is inchoate in common experience and values. Negligence decisions, it might be thought, discover such norms rather than create them. This is in essence the notion that the finder of fact represents and reflects the conscience of the community, simply serving as the vehicle through which norms implicit in everyday behavior are identified and applied.¹⁵

Although I cannot definitively disprove this notion, I contend that at the level of fine detail that is at stake in ordinary unbounded negligence cases, there is usually no single conscience of the community. The values of contemporary society are too diverse for that.¹⁶ We have too many different ways of behaving, and too many different conceptions of how people ought to behave, to expect widespread agreement about which individual behaviors count as reasonable and which as negligent. In factually more complex but still unbounded cases—for example, products liability cases involving design defects or the failure to warn—it is even less likely that there is any kind of single community conscience about how safe a particular product design should be, or how much detail should be included in a warning about the side effects of a prescription drug.¹⁷

Moreover, I doubt that there ever was a single, identifiable conscience of the community in this sense, even in earlier periods when there was more cultural homogeneity than at present. Take even the simplest of ordinary negligence cases involving an activity

15. See Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483 (1956); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 380-81 (1996); Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 380 (1990); Wells, *supra* note 9, at 2408-10.

16. See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 11 (2000) (arguing peoples' judgments about fault are shaped by their life experiences, attitudes, habits of mind, and intuitions about how the world works).

17. See Henderson, *supra* note 3, at 490 (criticizing courts for permitting determinations in design defect cases to be based on test of reasonableness under all the circumstances).

with which the finder of fact can be assumed to be wholly familiar. The accepted view of such cases is that the finder of fact, being native to the activity, so to speak, needs little or no educating in order to determine whether the defendant behaved negligently, but can simply invoke its own conscience and thereby serve as an accurate representative of the community. The classic case is *Vaughan v. Menlove*,¹⁸ in which jurors were asked to determine whether one of their neighbors negligently constructed a haystack (or "rick"). The modern analog is of course the slip-and-fall or motor vehicle accident. In both cases, the finder of fact is presumably so acquainted with and inclined to automatically apply the community norm that the case could go to the jury almost without any instruction beyond asking whether the defendant "did the right thing."

In *Vaughan* the defendant's hayrick caught fire, apparently through spontaneous combustion, and the fire spread to the plaintiff's property. The principal issue was whether an aperture should or should not have been built in the stack. One would think that if there were such a thing as a community norm regarding haystack construction, it would encompass whether and when to build apertures. But right at this seminal moment in the development of negligence law, the report of the decision in *Vaughan*—apparently recounting the evidence—makes a deeply revealing statement. The defendant ". . . made an aperture or chimney through the rick; but *in spite, or perhaps in consequence of this precaution*, the rick at length burst into flames from the spontaneous heating of its materials."¹⁹ Just as in my hypothetical slip-and-fall case, the community norm in *Vaughan*, if there was one, did not come all the way down to the ground. The conscience of the community in *Vaughan* apparently was divided about apertures.

In short, the notion that the finder of fact can identify, rather than create, a norm applicable to injuries involving everyday activities is problematic. Often we do not have norms capable of self-application even to everyday activities. I have argued that what finders of fact must therefore do in unbounded negligence cases is norm "creation." Others would insist that this is what we understand to be norm "application." Whatever name is given to the process, it is a lot more like discretionary law-making than the traditional reference to the finder of fact's decision of "mixed questions" of law and fact implies. Just as importantly, as I argue next, be-

18. *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

19. *Id.* at 491 (emphasis added).

cause this law-making is conducted under the guise of deciding a question of fact, it is likely not to be done the same way by different juries, and is not subject to meaningful review.

3. The Significance of Case-by-Case Decision

Given this norm creation in unbounded cases, instead of having a law of negligence that applies in such cases, we merely have (as Leon Green put it long ago) a process for deciding negligence cases.²⁰ The key to that process is not simply that it involves simultaneous norm creation-and-application, though that is an important feature. What makes the process go is the fact that each such act is freestanding. That is, for purposes of review (realistically, of non-review) by a court, the decision of a so-called "mixed" question of law and fact is treated the same way as a "pure" question of fact. The question is left to the finder of fact so long as reasonable people could disagree about its resolution. A decision for or against negligence is equally acceptable.

This is true in both factually unique and recurring cases. If, hypothetically, four juries were impaneled to hear the same unique case brought by four plaintiffs injured in the same accident by a single defendant, a decision by two juries that the defendant was negligent and by two juries that it was not negligent would have to be acceptable. Similarly, in cases whose facts recur, the finder of fact in a subsequent case, addressing precisely the same relevant facts as in a prior case, may decide the "mixed" question of whether the defendant was negligent differently from the prior finder of fact.

In this respect, the relation between the finder of fact in a negligence case and the courts—trial and appellate—parallels the relation between the modern administrative agency and the courts. In pursuing their rulemaking function, administrative agencies create norms, subject to judicial reversal only if their decisions are arbitrary, capricious, or not in accord with law. The finder of fact in a negligence case also engages in rulemaking that is subject only to deferential judicial review. But unlike administrative rulemaking, in negligence cases, a new rule is made again for each case, and the rule may differ from case to case even when the facts do not.²¹

20. GREEN, *supra* note 9, at 185. For discussion of Green's relation to the realist movement and the significance of his scholarship, see G. EDWARD WHITE, *TORT LAW IN AMERICA* 75-83 (1980).

21. After developing this analogy myself, I found to my chagrin that Bohlen had beaten me to the punch seventy-five years ago. Bohlen, *supra* note 6, at 115.

Observing this process in its early stages of development, Holmes argued that over time, trial judges would be able to discern the existence of governing community norms or, in the event that a consistent norm did not emerge, impose one as a matter of law in commonly recurring fact situations.²² As every first-year law student learns, however, neither occurs. The world of accidents is too diverse to have permitted the emergence of a series of independent, pre-existing norms concrete enough to decide individual cases. As I put it earlier, most negligence cases are "unique" in this sense. The judiciary has declined Holmes's invitation to take the case-by-case norm-creation function away from the finder of fact by creating rigid *per se* rules that would apply notwithstanding the factual diversity of most negligence cases.

It would be wrong to conclude, however, that my quarrel here is with the institution of civil trial by jury. Though the use of juries as finders of fact exacerbates the problem I have identified, it does not cause it. Even if we had no juries in negligence cases, treating the negligence decision in each case as a question of fact would lead to the same phenomenon. The results in unique cases would still depend heavily on which judge heard the cases. And recurring cases still would not necessarily be decided alike. The same trial judge deciding a later case involving the same relevant facts as an earlier case would not necessarily decide it in the same way; and different trial judges deciding cases involving the same relevant facts also certainly would not necessarily decide them the same way. Each judge, in each instance, would be engaging in an act of norm-creation.

Nonetheless, I doubt that the process of norm creation, which I submit is at the core of unbounded negligence cases, could have survived if we did not have juries.²³ We would not long have tolerated having individual judges assess the quality of everyday conduct in order to decide whether to impose civil liability for the consequences of that conduct. The increasing tendency of trial judges, as the twentieth century proceeded, to submit issues for jury decision rather than to decide them as a matter of law is a tes-

22. HOLMES, *supra* note 6, at 98-99.

23. The very distinction between questions of fact and questions of law reflects the long-standing struggle within tort law over the respective roles of judge and jury—a struggle with political as much as doctrinal implications. Had this struggle not persisted during the formative era of negligence law, not only the norm-creation in which juries engage, but many of the other doctrines and practices that characterize tort cases—presumptions, *per se* rules, directed verdicts—might well have developed very differently. See generally GREEN, *supra* note 9 (discussing the development of restrictions on jury discretion); Thayer, *supra* note 6 (same).

tament to the growing influence of the democratic ethos as negligence law has developed. Nor could trial judges have easily avoided revealing that norm creation was at the heart of the negligence decision. Judges typically must make explicit findings of fact and conclusions of law; the basis for their decisions is reflected in these findings and conclusions. In contrast, juries do not need to explain their decisions, and rarely do. Their norm creation has long been masked by the "featureless generality" of the jury verdict.²⁴ In short, although the civil jury is not the cause of norm creation, the continued existence of the civil jury probably is necessary to it.

B. Bounded Cases: Independent, Pre-Existing Norms

There is a second class of cases in which several of the subsidiary doctrines of the law of negligence are in fact directed at eliminating, or at least ameliorating, the norm-creation phenomenon. These are cases in which the familiar rules governing custom, statutes, and professional standards figure prominently. One view of these rules is that they are designed to address the problem of jury unfamiliarity with the technically complex activities that often generate modern negligence cases. The way in which these doctrines achieve this goal, however, is by identifying pre-existing, independent norms whose use by the finder of fact tends to render the negligence decision an act of norm application rather than norm creation.

1. Custom

A custom is little more than the law's term for a norm. The hornbook rule is that evidence of compliance with, or violation of, a customary way of doing things is admissible but not dispositive on the issue of the actor's negligence.²⁵ This is more than just a rule of evidence, however, precisely because of the way in which designating a practice as "custom" tends to cut down the degree of rule-making discretion exercised by the finder of fact.

In fact, consider how little evidentiary admissibility turns on whether a practice qualifies as a custom. Suppose that some tugboats carry global positioning system ("GPS") equipment and some do not. As a consequence, some tugs can more precisely navigate

24. HOLMES, *supra* note 6, at 89.

25. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 193 (1984).

than others. Even though the practice is not uniformly followed and therefore does not qualify as a custom, evidence of a particular tugboat-defendant's failure to carry GPS equipment would be admissible on behalf of the plaintiff in a case involving allegedly negligent navigation. Carrying GPS equipment is an untaken precaution whose availability the plaintiff is entitled to have the jury consider in assessing the defendant's negligence. Conversely, if a particular tugboat-defendant did carry GPS equipment, the defendant would be entitled to have the jury assessing its negligence consider the fact that this precaution was taken, even if the precaution was not customary.

So the evidence in question is admissible regardless of whether it goes to a practice having the status of custom, or simply to a precaution that only some actors would have taken.²⁶ Consequently, either the law has been mistaken all these years in supposing that anything turns on whether a practice is designated as a custom, or something more than mere evidentiary admissibility turns on the designation.

In fact, something more than admissibility does turn on the designation. The court's instructions to the jury are likely to make reference to the rule regarding custom.²⁷ For this reason the parties are entitled to make reference to what is customary in anticipation of such an instruction. An instruction highlighting the significance of custom, even while expressly giving the jury discretion to disregard it, will focus the jury's attention on the normal way of doing things. Evidence of a practice followed by some but not all actors is likely to be less persuasive than evidence of a custom followed by all or most actors.

Customs also have a second important characteristic. Not only are customs norms that are ordinarily followed by most actors engaged in the activity at issue, they have the additional significance—at least where the fact that a practice is a custom has any operational significance—of being concrete and specific enough to govern individual cases. If it is a custom for tugboats to carry GPS equipment, then the finder of fact need only "apply" this customary norm to the facts in order to determine whether a tugboat was negligent. This specificity is precisely what is lacking in the general norm of reasonable care, and precisely what necessitates norm

26. See, e.g., *The T.J. Hooper*, 60 F.2d 737, 739-40 (2d Cir. 1932) (Although carrying radios was not a custom among New York tug boats, evidence of failure to carry a radio was admitted.).

27. E.g., 1 CALIFORNIA JURY INSTRUCTIONS: CIVIL §3.16 (7th ed. 1986); 4 MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES § 101.1 (3d ed. 1986) (amended as §26.15 (4th ed.)).

creation in unbounded cases. It is true that, as Learned Hand memorably said, "there are precautions so imperative that even their universal disregard will not excuse their omission."²⁸ But ordinarily the normative force of custom is likely to result in its application to the case at hand, rather than in the creation of an alternative norm.

2. Professional Standards and Statutes

Two other negligence-defining doctrines go even further, by more clearly removing the norm-creation function from the finder of fact. In most jurisdictions the unexcused violation of a statute is negligence per se.²⁹ In many jurisdictions, the compliance of a professional with the standard of care followed by at least a respectable minority within the profession is not malpractice.³⁰ In these instances discretion to create a norm is removed from the finder of fact because the legislature or a profession has already done that work. In cases such as these, the negligence decision involves the application of an independent, pre-existing norm to the empirical facts, rather than the creation of a norm. It may be that the act of applying the norm to the empirical facts involves the exercise of very low-level discretion—it is not always plain, for example, whether the minority of professionals subscribing to the standard followed by the defendant in a malpractice case qualifies as a "respectable" minority. But permitting the exercise of discretion in this fashion is a far cry from asking the finder of fact to determine whether, all things considered, the defendant practiced medicine in reasonable fashion.

The role that statutes and professional standards play in negligence cases is thus very similar to the role played by custom. In each instance, the finder of fact is encouraged or required to apply an independent norm that has developed through either experience (custom and professional standards) or legal authority (statutes). In contrast to the unbounded case in which the finder of fact has no independent norm to employ in adjudicating between the contentions of the parties regarding the reasonableness of particular precautions, in cases governed by these doctrines, external authority, professional expertise, or nearly uniform experience has already made this reasonableness determination.

28. *The T.J. Hooper*, 60 F.2d at 740.

29. *E.g.*, *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920).

30. *E.g.*, *Sinclair v. Block*, 633 A.2d 1137, 1142 (Pa. 1993).

Moreover, this difference between unbounded and bounded negligence cases does not disappear whenever there is a factual dispute about the applicable custom, statute, or professional standard. In cases where there is a "battle of experts" or other form of factual dispute as to the applicable independent norm, the function of the finder of fact is still empirical rather than normative. That is, the question is which custom, statute, or professional standard is applicable (or how it is applicable), not which of these norms the finder of fact prefers. No doubt the outcomes of cases in which the applicable independent norm is disputed are less predictable than cases in which there is no such dispute. But that is true of any case in which disputed facts are messy or complicated. Such cases are still bounded, in contrast to those in which no independent norm is even theoretically applicable.

C. The Deficiencies of Norm Creation

My focus thus far has been to identify and develop the distinction between negligence cases in which the finder of fact engages in norm-creation and cases governed by a pre-existing, independent norm. I now turn from description to evaluation. There are two major deficiencies inherent in negligence cases not governed by an independent, pre-existing norm that pours content into the negligence standard: greater unpredictability of result and less legitimacy.

1. Unpredictability of Result

A major advantage of negligence cases governed by independent norms is that there is likely to be much greater predictability of result in cases governed by such norms than in unbounded cases, in which the finder of fact engages in norm creation. When an independent, pre-existing norm governs, that norm is wholly or partially outcome-determinative. When no such norm governs, however, different finders of fact are much more likely to arrive at different conclusions as to the reasonableness of the same conduct. Greater variability of result means greater unpredictability of result.³¹

31. Concern with unpredictability of result has affected not only the structuring of fact-finding with which I am concerned here, but also law-making more generally. For example, my colleague G. Edward White has ascribed the founding of the American Law Institute and the

Unpredictability of result has two main negative consequences. First, when actors are unable to predict how their behavior will be judged if that behavior causes harm, the deterrent effect of the threat of liability is sub-optimal.³² Second, once harm has occurred and a negligence action has been instituted, settlement is likely to be impeded because of the greater likelihood that the parties' predictions of the result will diverge.³³

Both deterrence and the promotion of settlement are instrumental values. Other things being equal, rules and practices that further these values are desirable. But when other considerations are in tension with these values, some sacrifice of deterrence or in the promotion of settlement may be worthwhile. In the following section, I discuss a cluster of such non-instrumental considerations.

2. The Legitimacy Question

If I am correct that finders of fact in unbounded negligence cases engage in norm creation, then in a meaningful sense, the process of decision-making in such cases is the process of making law.³⁴ The norm that the finder of fact creates is a standard of behavior, a legal rule governing the specific case at hand. It is true that this rule lacks one important feature of law—generality of application. The rule applies only to the case at hand. But it has two other important characteristics of law: it is normative and authoritative.

The second dimension along which the negligence standard should be evaluated, therefore, is the legitimacy of law-making de-

resulting restatement movement in part to the desire during the nineteen-twenties to reduce jurisprudential "uncertainty" and "complexity." G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 *LAW & HIST. REV.* 1, 2 (1997).

32. Whether there is over- or underdeterrence depends on the interaction of a number of factors. See generally John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 *VA. L. REV.* 965 (1984) (discussing the relation between deterrence and the precision of legal rules).

33. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1, 10-11 (1984).

34. This was certainly the view of Chief Justice Traynor of the Supreme Court of California. See, e.g., *Mosley v. Arden Farms Co.*, 157 P.2d 372, 377 (Cal. 1945) ("The determination of the standard of reasonable conduct by which a defendant's conduct is to be measured involves a question of law, a determination whether or not liability should be imposed. This question is nevertheless commonly left to the jury.") (Traynor, J., concurring); *Toschi v. Christian*, 149 P.2d 848, 854 (Cal. 1944) ("It is a question of law what the rule or standard of conduct should be for adjudging the actions of men as lawful or unlawful and for determining the consequences of those actions.") (Traynor, J., dissenting in part and concurring in judgment). These passages are quoted in Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 *CAL. L. REV.* 1867, 1879 & n.57 (1966).

isions made pursuant to this standard. In one sense of the term, legitimacy is a formal characteristic of political institutions to which the polity has given necessary consent. Negligence decisions are certainly legitimate in this formal sense, given that they take place in accordance with duly adopted sources of law, such as the Seventh Amendment to the United States Constitution and its equivalents at the state level. I shall use the notion of legitimacy in an additional, substantive sense, however, to refer as well to the political and moral acceptability of employing negligence as a standard of liability in civil trials.

a. Unbounded Cases

The legitimacy of decision in unbounded negligence cases must rest heavily on the impartiality and good faith of the finder of fact. Jurors have nothing personally at stake in the outcome of negligence cases and therefore nothing at stake in their choice of a norm to govern outcomes. And because jurors are chosen at large from the community, there is no reason *a priori* to suppose that the pool of jurors has any systematic bias that would distinguish it from the body politic as a whole. The composition of jury pools may vary across jurisdictions and therefore result in actual biases, but this is essentially a matter of implementation rather than principle. In contrast, when trial judges serve as finders of fact, as occurs in a minority of cases, the risk of systematic bias is greater because of the political character of judicial appointment and election. But judges who serve as finders of fact in bench trials also bring juridical impartiality and good faith to negligence cases, even if they bring a political viewpoint as well.

The legitimacy of decision by finders of fact in unbounded negligence cases, however, is undermined by two factors related to the potential variability of result across decision-makers, whether the facts of the case are unique or recurring. First, as has long been observed, the negligence system is like a lottery.³⁵ Outcomes appear to be no more than the result of the flip of a coin. This analogy is overdrawn because a deliberative process rather than mere chance actually determines outcomes.³⁶ But since the values brought to

35. See, e.g., Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967) (arguing that the outcomes of negligence cases are uncertain).

36. For the argument that this process of deliberation generates "local objectivity" in jury decisions, see Wells, *supra* note 9, at 2408-10.

these deliberations by finders of fact is much like the flip of a coin by the parties, the process lacks the ingredients of uniformity and regularity that would be necessary to engender greater legitimacy.

Thus, the negligence determination in unique cases is heavily dependent on the particular finder of fact making that decision. And recurring cases, which are alike in relevant respects, may be decided differently by different finders of fact.³⁷ Basing decisions on law rather than on the values of the decision-maker as well as deciding like cases alike, however, are highly desirable at the very least, and arguably necessary as a matter of deep principle whenever feasible.³⁸ The prospect that the process as a whole may result in these two related forms of inequity therefore undermines its overall legitimacy.

Second, the factor that undermines the legitimacy of the process—the absence of a single, homogeneous community conscience as to what constitutes reasonable care in any particular instance—renders the decision in any given case politically and morally problematic. Suppose that we had a rule that negligence cases would always be decided by the defendant's next-door neighbor. Even setting aside the possibility of bias, most people would object to being judged in a negligence case by a single individual, on the ground that this individual's conception of reasonable behavior is a mere contingency—no better than one's own conception, and possibly worse.³⁹

The use of multi-person finders of fact who are required to engage in a deliberative process of decision may mitigate this objection, but it does not dissolve it. A negligence decision that reflects only the distinctive point of view of the particular individuals who

37. Unfortunately, experimental and survey studies on consistency of decision-making by different juries cannot shed much light on this issue, because (understandably) the studies do not distinguish between bounded and unbounded cases. See, e.g., Edith Greene et al., *The Effects of Injury Severity on Jury Negligence Decisions*, 23 LAW & HUM. BEHAVIOR 675, 687 (1999) (reporting range of agreement by experimental juries in hypothetical personal cases of between fifty-six and ninety-four percent); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964) (reporting agreement between trial judge and jury on proper outcome in seventy-nine percent of actually-litigated personal injury cases).

38. This is the kind of virtue that Lon Fuller once identified as part of the "inner morality" of the law. See LON L. FULLER, *THE MORALITY OF LAW* 42 (rev. ed. 1969); Gergen, *supra* note 9, 438.

39. The fact that such a process would be considered more objectionable if it were not camouflaged within the negligence system is confirmed by the controversy that erupted two decades ago over lack of uniformity in the decisions of disability claims by Administrative Law Judges. See JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS* 21 (1978) (presenting data demonstrating that the likelihood of a determination that the claimant was disabled was largely a function of which judge heard a claimant's appeal).

serve on the jury also is a mere contingency because the decision would not necessarily be the same if the same case were tried to a different jury. Such contingency lacks the legitimacy that uniformity of decision would provide.

Nor do most of the general arguments in favor of the use of juries justify the exercise of normative discretion by the finder of fact in unbounded cases. For example, using juries as counterweights to excessive rigidity in the law hardly is necessary when the fact-finder's discretion is unbounded by law.⁴⁰ And the greater drama that the jury trial brings to the administration of justice exists whether or not jury discretion is unbounded.⁴¹

The best argument in favor of tolerating the contingency entailed in unbounded negligence decisions has some strength, but not enough. If courts decided negligence cases, the argument goes, then their decisions would crystallize into rules of law through the operation of *stare decisis*. Social facts change quickly, however, and juries that are not bound by precedent can react instantaneously to social change, including changes in what constitutes reasonable care under particular circumstances. If courts made negligence decisions, they would be much slower to react to social change because of the binding effect of precedent and the difficulty of overruling it.⁴²

This capacity of juries to reflect social change in their judgments, however, is purchased at the high cost of potential variability of result.⁴³ In any given case, or in two different cases taking place without intervening social change, outcomes may vary depending entirely on the norm that the particular jury deciding the case considers appropriate. The ideal, therefore, is not judicial decision of negligence cases, but decision by finders of fact capable of taking changing social conditions instantaneously into account, yet constrained by independent norms in such a way that their decisions produce greater regularity of result.

40. Bohlen, *supra* note 6, at 116-17.

41. GREEN, *supra* note 9, at 395.

42. Bohlen, *supra* note 6, at 116-17.

43. *But see* JOHN G. FLEMING, THE LAW OF TORTS 282 (6th ed. 1983) (arguing that lack of uniformity is not too high a price to pay, because after-the-fact adjustment of losses rather than the deterrence of misconduct is the main concern of negligence liability).

b. Bounded Cases

The deficiencies in the legitimacy of decision in unbounded negligence cases are worth comparing with negligence cases influenced or governed by independent, pre-existing norms. The legitimacy of decision in this second type of case is greater in some respects, but not in others.

In cases governed by the rule that violation of a safety statute is negligence per se, the source of the applicable norm is a legislature. The standard of care is not created contingently by each finder of fact. Rather, the source of the standard is a politically accountable branch of government, whose dictates the law of torts has determined it is unreasonable to violate. Because the governing norm in such cases is independent of jury discretion, that norm will govern every case involving the same relevant facts. Cases governed by statute are therefore much more likely to be decided alike than unbounded cases to which a statute does not apply. That is, of course, the whole point of statutes and of the negligence per se doctrine.

On the other hand, in cases involving custom or professional standards, making the legitimacy assessment is more difficult. Here the sources of standards are not politically accountable. These sources, however, are to an uncertain but often significant extent economically accountable. When those conducting an activity threaten persons with whom they are directly or indirectly in contract, then the parties themselves have an incentive to set standards of care at an optimal level. The legitimacy of standards set by this "market" for safety derives from the explicit or implicit consent of potential victims to the standards themselves. When I buy a Yugo, I expect and have implicitly consented to receiving less protection in a collision than when I buy a Mercedes.

Nevertheless, this form of legitimacy is undermined in two ways. First, of course, various flaws in the market for safety may render the standards it generates sub-optimal. Potential victims may not have sufficient information about the risks and benefits associated with a particular product or service to make optimal decisions; potential injurers may be able to externalize some of the cost of injuries and therefore may behave sub-optimally. Second, some potential victims are not even indirectly in contract with potential injurers, but are instead unrelated third parties. The market will not cause the interests of these third parties to be reflected in the standards of care followed by potential injurers. Thus, when the market for safety is not functioning effectively or when the vic-

tim is an unrelated third party, the argument for legitimacy based on consent is weak. Interestingly, unrelated third parties are much more likely to be victims in cases where custom plays a role than in malpractice cases involving the application of professional standards. For this reason, there is some logic in the rules that make compliance with or violation of custom evidentiary only, but compliance with professional standards dispositive.⁴⁴ The arguably greater market legitimacy of the latter may help to explain the difference.

On the variability-of-result dimension, cases involving custom and professional standards fare better than unbounded negligence cases, but not as well as cases involving statutes. Because evidence of compliance with or violation of custom is admissible but not dispositive, customary norms will not automatically yield uniformity of result, although they will incline decisions in this direction. In contrast, professional standards are binding on finders of fact, and the respectable minority rule binds even where there is more than one potentially applicable standard. In theory, therefore, like cases involving professional liability should be decided alike as frequently as cases involving statutes. But the rule that violation of a statute is negligence per se is easily explained in an instruction to the jury and easily understood. The respectable minority rule is not only more complicated, but may also be counterintuitive to many finders of fact. As a practical matter, therefore, I suspect that professional standards do not as often exercise the same binding effect on finders of fact as statutes. Consequently, the rules regarding professional standards probably result in consistent decisions no more frequently than the rules regarding the role of custom.

* * *

To summarize, civil juries that create norms in unbounded negligence cases have greater formal legitimacy as sources of norms than industry customs and professional standards, but no greater, and arguably less, legitimacy than statutes. In contrast, custom and professional standards have a measure of market accountability that civil juries lack. In these respects, the legitimacy comparison between bounded and unbounded cases is inconclusive. Neither approach is clearly superior to the other.

44. See Richard A. Epstein, *The Path to T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4-5 (1992) (arguing on this basis that custom should be dispositive in cases involving consensual relations and irrelevant in stranger cases).

The difference that stands out in the comparison, however, involves the regularity of results that can be expected in the two kinds of cases. Those in which independent, pre-existing norms figure or govern are clearly superior in this respect. Outcomes are likely to be more predictable, unique cases are more likely to be decided the same way regardless of the values of the particular finder of fact making the decision, and recurring cases are more likely to be treated alike. These deficiencies in the negligence standard are worth recognizing as we contemplate the future of negligence, especially in connection with areas of liability to which the negligence standard traditionally has not been applied. Almost exclusively these involve liability for non-physical damage or loss.

II. BEYOND PHYSICAL DAMAGE

The core of negligence law involves liability for physical damage: bodily injury and property damage, plus the intangible economic and emotional losses that are the consequence of these two forms of tangible damage. Setting aside several exceptional categories of loss that I shall discuss below, the courts have traditionally been reluctant to extend liability for negligence beyond physical damage and its proximate consequences.

A conventional, and probably tenable, rationale for this limitation on liability is that there would be no realistic limit on the amount of liability that injurers would face if there were liability for negligently-caused pure economic or emotional loss.⁴⁵ I want to argue, however, that there is an additional reason for the tendency of negligence law to limit itself to liability for physical damage. The inevitable norm-creation that I have identified as characteristic of unbounded negligence cases would be even more objectionable if it routinely occurred in cases involving intangible loss.

I should emphasize that I am not opposed in principle to the expansion of liability for intangible loss, but only to the expansion of liability based on negligence. Where liability for negligence is ruled out, there are still two alternatives. The first involves less

45. See generally Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972) (examining the bases of limitation on liability for economic loss). The classic statement is Cardozo's, in a case seeking recovery for negligent misrepresentation by a plaintiff who was not in privity with the accountant who made the misrepresentation: "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche* 174 N.E. 441, 444 (N.Y. 1931).

liability than there would be if recovery for negligence were permitted: liability only where the injurer intended harm. But the second alternative involves more liability even than in negligence: strict liability or its first-party counterpart, no-fault. My argument is simply that, because of all the special flaws that inhere in a negligence standard, especially as applied to liability for intangible loss, the choice must be made between these other two forms of liability—between very narrow and very broad liability.

This was, in fact, the traditional approach of the common law of torts in connection with claims for intangible loss. In some settings, the common law limitations of liability to cases in which the defendant intended harm may have seemed unduly protective of injurers. At other times, the common law's imposition of strict liability seemed unduly harsh. The burden of my argument—extending Henderson's argument of twenty-five years ago—is that there was nevertheless a measure of wisdom in these approaches that we post-formalists have not sufficiently recognized.⁴⁶ The apparently easy and attractive compromise that negligence liability affords is in fact neither easy nor attractive.

A. Principles of Demarcation

Consider the kinds of losses that are made compensable by tort causes of action that do not sound in negligence. Typically, those having as a requisite element the defendant's intent to cause actual physical harm—battery, trespass, nuisance—have corresponding causes of action sounding in negligence. On the other hand, when there is a cause of action for intentionally causing intangible loss, usually there is no liability for negligently causing the same kind of loss. And only rarely is there strict liability for intangible loss. Thus, most of the torts that impose liability for intangible loss, including false imprisonment, malicious prosecution, fraud, invasion of privacy, and interference with contractual or prospective advantage, have no negligence equivalents.

It is striking that liability for intangible loss alone is so rarely based on negligence. Because the reasons these different causes of action cannot be based on negligence vary enormously, it is admittedly dangerous to generalize about the entire body of non-negligence-based tort law. But a common factor among them is that there are no independent, pre-existing standards of reasonableness

46. See Henderson, *supra* note 3, at 478-83.

applicable to the activities they address. Permitting the imposition of liability for negligence would therefore place the finder of fact in a trackless sea with nothing to do but create a norm to fit the situation. At least partly for this reason, the law of torts has sensibly refrained from doing so. When such norms do exist, however, imposing liability in negligence for intangible loss is more feasible. The existence of such norms is therefore a necessary, though not a sufficient condition of liability.

There are two reasons why there are often no independent, pre-existing norms regarding what constitutes unreasonable behavior in connection with the activities addressed by the torts which redress intangible loss. First, as to some of these activities, all that is normatively expected by those who engage in and are affected by them is that these parties refrain from intentionally causing harm. For example, commercial norms may require that one party not deliberately interfere with the performance of a contract between two other parties. But those in the business world do not expect that other parties exercise reasonable care to avoid unintentionally interfering with contract performance. Similarly, intentionally invading the private space of another person is generally regarded as egregiously improper. But as embarrassing as unintentional invasions may be, we do not expect others to exercise reasonable care to avoid overhearing or seeing other people's intimate conversations or interactions. The moral wrong of invading another's privacy is its deliberate character, not the fact of invasion alone, even when carelessly committed.

Second, even when it might be argued that there is a societal expectation that reasonable care be exercised to avoid causing certain kinds of intangible loss, there is nothing like a consensus regarding what constitutes reasonable care in these settings. For example, in my view, there would be broad disagreement about how much care should be exercised to avoid unintentionally locking someone in a department store overnight, or to ensure that the information given to the buyer of a used car by a private seller was accurate. Permitting the imposition of liability for the intangible losses caused by the failure to exercise reasonable care in these settings would result in enormous variability of result in different cases. Consequently, liability for negligence is not imposed. Rather, in effect, we rely on potential victims to exercise the self-protective care necessary to avoid harm that would result from unintentional injury-causing activity. Shoppers are expected to know when department stores close. Buyers of used cars are expected not to rely on the good faith representations of private sellers.

On the other hand, we go further and impose strict liability, instead of negligence liability, in the rarer settings when we expect more from potential injurers than merely refraining from intentionally causing intangible harm. This was, in essence, the approach taken by the common law of defamation. It is also the approach taken when there is liability for innocent misrepresentation, which in effect amounts to liability for breach of warranty.

In short, the middle ground between liability only for intent to cause intangible harm and strict liability for such harm is largely unoccupied with the exception of liability in negligence for a few relatively limited forms of intangible loss. Certain usually unrecognized characteristics of these exceptions, however, tell us at least as much about the reason the middle ground is largely unoccupied as more conventional explanations for these exceptions.

B. Exceptions

The list of exceptions to the general principle that there is no liability in negligence for intangible loss is reasonably short, but revealing. These exceptions are for the most part consistent with my argument, though certain features of defamation liability are not. These features of defamation, however, exhibit the very dangers that my argument has identified.

1. Pure Emotional Distress

The development of liability in negligence for pure emotional distress is the story of the progressive relaxation of restrictions on recovery. From the impact rule, to the zone-of-danger requirement, and eventually in some jurisdictions to the *Dillon* approach permitting recovery based on the proximity, visibility, and relationship of the plaintiff to an individual whose physical safety the defendant has negligently risked,⁴⁷ each rule has replaced narrower restrictions with new but nonetheless still restrictive rights of recovery.

However, the key to this form of liability—whatever its precise scope—is that the conception of negligence it employs is based entirely on the standard that would be applied in an action by the party whose physical safety was threatened by the defendant's actions. To take the classic example, the mother who witnesses her

47. *Dillon v. Legg*, 441 P.2d 912, 913 (Cal. 1968).

child suffer serious injury at the hands of the defendant must prove that the defendant was negligent toward the child before the mother may recover for her own emotional distress. The mother's claim is derivative of—or at least defined by—the child's cause of action. The court in *Dillon* was absolutely clear on this point:

In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tort-feasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma.⁴⁸

In short, once the finder of fact determines that the defendant's conduct was negligent in risking (or as *Dillon* seems to say, risking and then actually causing) physical harm to the child, the negligence decision has been made. If the defendant's conduct unreasonably risked physical harm to the child, evaluation of the defendant's conduct is at an end. That evaluation governs the mother's action as well. The finder of fact does not begin again and ask whether the defendant drove carefully enough with respect to the mother, employing different considerations because the risk to the mother involved emotional loss alone. Rather, negligent driving is negligent driving.

The point I want to make about this arrangement should be obvious. In making its negligence decision, the finder of fact in emotional distress cases such as *Dillon* does not do anything more than or different from what it would do in a case brought by the party whose physical safety the defendant risked or caused. If the defendant did not negligently risk causing physical harm, there is no liability for emotional distress. Otherwise the finder of fact would have to create a standard of care that does not exist, at least not in a form that can be "found" as an answer to a question of fact. To put it another way, there is no standard governing the care that must be exercised to avoid risking emotional distress alone.

For this reason, except in rare circumstances,⁴⁹ there is no cause of action for negligent infliction of emotional distress when the conduct causing such distress does not simultaneously and negligently risk causing physical injury. Negligent infliction of emotional distress is not simply a less blameworthy version of intentional infliction of emotional distress. It is a different animal en-

48. *Id.* at 916.

49. The principal examples are negligently incorrect reports of the death of a close relative and negligent mishandling of dead bodies. See KEETON ET AL., *supra* note 25, at 362.

tirely, wholly derivative of liability for negligently causing physical harm.

As I indicated earlier, I am far from satisfied that application of the negligence standard in cases involving physical harm is as defensible as the conventional view suggests. But understood the way I have contended it should be understood, at least we may say in favor of liability for negligent infliction of emotional distress that it is no less defensible on this score than liability for negligent infliction of physical harm. The extension of negligence liability for this form of harm involves no new form of negligence, no new work for finders of fact, no development of any standard of conduct that did not already exist. In fact, this form of liability is simply an example of liability imposed on precisely the same basis as liability for negligent infliction of physical harm.

2. Economic Loss

The traditional rule was that there is no liability in negligence for pure economic loss, apart from liability for negligent misrepresentation (which I address below).⁵⁰ In recent years, some inroads have been made on that limitation.⁵¹ Although both the circumstances under which the courts have permitted such liability and the justifications for doing so vary, all the cases permitting recovery, with very few exceptions, share one characteristic. In each case the determination that the defendant was (or could be found) negligent is derivative rather than primary. That is, the defendant's negligence is determined by reference to the reasonableness of risking some other kind of harm—usually physical harm—either to the plaintiff or to a third party. As in liability for negligent infliction of emotional distress, this new form of liability employs a negligence standard that is identical to and derivative of the standard employed by an established cause of action that applies, or could apply, to the same facts.

50. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-09 (1927).

51. For deft, though competing, analyses of this disparate class of cases, see Gary T. Schwartz, *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 103 (Efstathios K. Banakas ed., 1996) (emphasizing the importance of contract principles in explaining seemingly divergent results); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1514-15 (1985) (arguing that ensuring proportionality between the defendant's wrong and the scope of liability imposed helps explain seemingly contradictory application of rules limiting liability for pure economic loss).

Consider three leading cases permitting recovery in negligence for pure economic loss. First, in *Union Oil Co. v. Oppen*,⁵² commercial fishermen were permitted recovery for profits lost as result of a negligently caused oil spill. The defendant stipulated that it was negligent. But it is clear from the court's opinion that, had the issue been contested, the conduct of the defendant in risking physical damage to natural resources would have been the focus of the negligence decision. Throughout its opinion, the court's mention of a defendant's negligence is repeatedly followed by a reference to negligently caused physical harm that also risks other economic loss.

Similarly, in *People Express Airlines, Inc. v. Consolidated Rail Corp.*,⁵³ it was alleged that the defendant had negligently allowed a dangerous chemical to escape from a railway tank car. Individuals and businesses in the surrounding area were forced to evacuate because of the threat to their health and safety. Plaintiff was a commercial airline that suffered economic loss as a result of the interruption of its business. Though the court could have been clearer on the point, the opening sentence of the opinion denying defendant's motion for summary judgment reveals that the negligence of the defendant in risking physical harm to persons and property was the logical predicate for the decision. The question, said the court, was "whether a defendant's negligent conduct that interferes with a plaintiff's business resulting in purely economic losses . . . is compensable in tort."⁵⁴ Thus, the question was not whether the defendant was negligent in risking economic harm to the plaintiff, but whether a defendant who was in fact negligent in risking physical harm to others could be held liable to a plaintiff who suffered economic loss alone. The threshold negligence question apparently had either already been answered or assumed away.

Finally, in *J'Aire Corp. v. Gregory*,⁵⁵ the plaintiff lessee suffered economic loss resulting from a general contractor's delay in completing a project on the leased premises under a contract with the owner/lessor. The court reversed the trial court's dismissal of the complaint, holding that the defendant could be held liable to the plaintiff for negligently failing to complete the project with due diligence. Significantly, however, the plaintiff had alleged as a basis

52. *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

53. *People Express Airlines, Inc. v. Consolid. Rail Corp.*, 495 A.2d 107 (N.J. 1985).

54. *Id.* at 108.

55. *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979).

for recovery that the delay in completing the project constituted a breach of the defendant's contract with the owner, which required completion within a reasonable time.

In contrast to *Oppen* and *People Express*, in *J'Aire* the defendant had not negligently risked physical harm to others. But just as in those cases, there was a pre-existing, independent standard for determining whether the defendant had behaved negligently—the terms of the construction contract with the third party owner/lessor. As in *Oppen* and *People Express*, therefore, the finder of fact did not have to venture into unmapped territory and create a norm of conduct in order to determine whether the defendant was negligent. Rather, the negligence decision was derivative of an already-established and legally binding norm.

3. Misrepresentation

The rule that there is no liability for economic loss resulting from negligent misrepresentation is subject to an exception for cases in which a "special relationship" exists between the parties, or where the defendant is in such a relationship and its negligence risks harm to an actually foreseen and limited number of third parties. Virtually all of the cases in both categories involve professionals whose work-product contains the misrepresentation at issue: lawyers, accountants, public weighers, and title abstracters, for example.⁵⁶ In effect, these are malpractice cases.

Because of pre-existing professional standards in such cases, there is no need for the finder of fact to develop a norm for use in making the negligence decision. That norm—the professional standard governing the conduct in question—already exists independently. Consequently, these cases follow the same pattern as those involving negligent infliction of pure emotional distress and pure economic loss. The negligence decision is completely derivative of, or in fact identical to, a pre-existing standard. The threshold negligence question either has already been answered, or can be answered on a wholly conventional basis, without the need to enter normatively uncharted new ground.

56. See, e.g., *Williams v. Polgar*, 215 N.W.2d 149 (Mich. 1974) (involving a title abstracter); *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995) (involving a lawyer); *Ultramares Corp. v. Touche* 174 N.E. 441 (N.Y. 1931) (involving an accountant); *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922) (involving a public weigher).

4. Constitutional Torts

Damages actions for civil rights violations sometimes involve tangible physical damage, but they may also involve intangible injury. In §1983 actions against state officials for damages resulting from deprivation of constitutional rights⁵⁷ (and against federal officials under the *Bivens*⁵⁸ line of cases), defendants have available the defense of qualified immunity.⁵⁹ Under this defense, government officials performing discretionary functions lose this immunity from liability for civil damages if their conduct violates clearly established statutory or constitutional rights; a right is clearly established if the contours of the right are sufficiently clear that a reasonable official would understand that his conduct violates the right.⁶⁰ Combining the cause of action and the defense, the standard of liability that results is this: the official is liable for depriving the plaintiff of rights of which it was objectively unreasonable to be unaware.⁶¹

Some rights are so clearly established that it is negligent per se to be unaware of them. As to these rights, the standard of liability is entirely bounded because the test for liability is pre-existing and independent: what is clearly established by law. There may be a bit of play in the joints, however, with respect to particular applications of rights that are clearly but only generally established. As to these particular applications, in practice the standard may vary somewhat across categories of officials because different officials have different degrees of education, sophistication, and training in constitutional law.⁶²

For two reasons, administration of the qualified immunity standard in this sub-category of cases is probably less bounded

57. 42 U.S.C. § 1983 (1994).

58. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (permitting actions for damages against federal officials under the Fourth Amendment).

59. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

60. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987).

61. *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

62. "As recurring situations have been encountered, there has developed what amounts to a law of qualified immunity for police officers, a law of qualified immunity for school board officials, a law of qualified immunity for prison guards, and so forth." JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 86 (2000); John C. Jeffries, Jr., *The Right—Remedy Gap in Constitutional Law*, 109 *YALE L.J.* 87, 94 (1999) (citing 2 SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* §§ 8.09-8.21 (3d ed. 1991)). This variation may occur at least in part through determination of what is or is not a clearly established right under the particular circumstances of the case at hand.

than in cases where it is, in effect, negligent as a matter of law not to know of a clearly established right. First, although the test for qualified immunity is what an official should know rather than what a particular category of officials actually knows, the latter is arguably a factor to be taken into account in determining the former. Yet, it seems unlikely that there are well-developed concrete norms among different categories of officials as to the degree of knowledge one should have regarding the scope of constitutional rights possessed by those whose rights might be affected by these officials' actions. Only among law enforcement officers, such as police, does the existence of such a norm seem likely, and even here, its content is likely to vary from police department to police department. Consequently, legal decision-makers must create a norm without reference to what amounts to a "custom" within the "industry" of school boards or police officers regarding their knowledge of the law. Second, different decision-makers may therefore arrive at different conceptions of what different categories of officials should know about constitutional rights. For both reasons, there is a risk that employing what amounts to a negligence standard in this sub-category of cases will result in unbounded norm creation.

Several factors, however, serve to mitigate—and perhaps entirely to eliminate—this risk. Because the subject matter of the negligence determination involves awareness of constitutional law, the court is likely to be at least personally acquainted with and may well also have experience in the subject matter of the dispute. The impact of the norm-creation phenomenon also is softened in these cases by the fact that the qualified immunity determination is a question for the court. In contrast to unbounded tort cases, therefore, the trial courts' negligence determinations at both the summary judgment and trial stages are subject to appellate review and, presumably, the rules of *stare decisis*. The possibility of variation across similar or identical cases is probably thereby reduced. Finally, the fact that the party whose conduct is being assessed is a government official may enhance the legitimacy of the process, even though it may involve norm-creation rather than norm identification. That is, the adjudication of constitutional tort cases does not involve the judiciary's micro-management of private behavior; rather, it involves one branch of government policing the behavior of another branch, albeit sometimes across the federal-state divide.

In short, in the limited sub-category of qualified immunity cases in which the plaintiff's right was clearly but only generally established, this doctrine may pose a few of the problems entailed in using an unbounded negligence standard in common law cases.

But for the most part, constitutional tort cases avoid these problems by employing independent norms and by rendering the qualified immunity decision a question for the court that is subject to appellate review.

5. Defamation

The common law of defamation is a morass of sometimes technical rules, many of whose contours are not germane to my analysis. In oversimplified terms, there is often strict liability for intangible injury caused by a defamatory statement unless the defendant was privileged to make the statement. Privilege attaches in a variety of situations, but in most cases, it is qualified rather than absolute. In some states, a qualified privilege is defeated by a showing that the defendant actually knew the defamatory statement was false, or made the statement with reckless disregard of whether the statement was true or false. In many states, however, a qualified privilege can be overcome by a showing that the defendant was negligent in making the statement.⁶³

In a series of decisions, the United States Supreme Court has held that the First Amendment places certain limits on the scope of liability for defamation. In cases involving public officials and public figures who sue for defamation, there is something like a constitutional privilege to defame: the defendant may be held liable only if the defamatory statement was made with what the Court termed "actual malice" (knowledge that it was false or with reckless disregard of its truth or falsity).⁶⁴ In cases involving private figures but public issues (which are virtually always against media defendants), however, the states are free to impose liability under a lesser standard, as long as the defendant is required to have been at least negligent in making the defamatory statement.⁶⁵

Thus, in purely private cases, and in cases involving private plaintiffs but public issues, the states are free to and often do impose liability if the defendant was negligent in making a defamatory statement. A very few states require greater blame—actual

63. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 252-54 (1997).

64. *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964).

65. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-49 (1974); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (strongly implying that the *Gertz* requirements are inapplicable to claims not involving matters of public concern).

knowledge or reckless disregard—but most do not.⁶⁶ By this point, it will come as no surprise that I find the use of a negligence standard in such cases objectionable. It is useful in analyzing my objection to divide up the universe of possible defendants into two categories: purely private parties and “media” defendants. This is of course a simplification, but even that is part of my point.

Take first the purely private individual who is sued for defamation under circumstances where there is a qualified privilege to make the statement. If an actual malice standard applies, the question for the finder of fact is what the defendant knew. This may be a difficult inquiry, but it is a pure question of fact. In contrast, if the negligence standard applies, the question is what the defendant should have known. In this context, that standard translates into the question of whether the defendant exercised reasonable care to ascertain whether the statement was true or false.

But answering that question almost always requires norm creation. There certainly is no general social consensus regarding the amount of care that it is reasonable to exercise before making statements that reflect negatively on other individuals. Moreover, the settings in which purely private defamation is subject to a qualified privilege vary enormously, from the writing of letters of recommendation to the giving of advice about marriage and career choices. Since they must create norms as they go along, finders of fact, who are asked to determine whether defendants have been negligent in these settings, are highly likely to arrive at varying conclusions regarding the degree of care to be expected.

Changing focus from private individuals and businesses to “media” defendants alters the setting and the problem, but the predicament remains the same. Now the problem is not the absence of a norm, but the presence of too many norms. How much care the tabloids that are sold at supermarket checkout counters should exercise to ascertain the truth of what they assert undoubtedly varies enormously from the care the *New York Times* should exercise. As in the case of constitutional torts, the care that is exercised cannot define the care that should be exercised, but neither are these levels of care irrelevant to that determination. Unless the law of defamation requires precisely the same amount of care from all media defendants, notwithstanding their great variety, norm creation by the finder of fact is likely to be inevitable.

66. See RICHARD A. EPSTEIN, *CASES & MATERIALS ON TORTS* 1148 (7th ed. 2000); RODNEY SMOLLA, *LAW OF DEFAMATION* §§ 3.10-3.11 (2d. ed. 2000).

The alternative is to hold defendants strictly liable for failure to follow their own pre-expressed standards, whatever they may be. Unlike ordinary individuals, the organized media do have codified codes of conduct, as do some individual media enterprises. The problem with this approach, however, is that it identifies a sufficient, but not a necessary basis of liability. Making violation of voluntary codes of conduct the touchstone of liability will tend to encourage relaxation of these codes, since relaxation will tend to shrink the scope of liability. Consequently, while violation of applicable codes of conduct may be negligence, compliance with them should not automatically avoid liability.

There was a core of good sense in the traditional common law approach, which sometimes imposed strict liability (when no qualified privilege applied) and otherwise imposed liability only when a species of intent (knowledge or reckless disregard) was proved. In cases where the defendant may have been merely negligent but held a qualified privilege, it was sensible for the law to bite the bullet, so to speak, and refrain from engaging in the negligence inquiry.

III. THE FUTURE OF NEGLIGENCE

My examination of the negligence standard in cases involving physical injury or damage has been designed mainly to uncover weaknesses at the foundation of this standard. In the absence of a systematically superior alternative, I cannot argue for abolition of liability for negligence, despite the weaknesses of this standard. But my analysis does have certain programmatic implications. First, understanding the nature of what occurs in the ordinary negligence case should encourage strengthening and further development of doctrines that employ independent, pre-existing norms in cases involving the negligent infliction of physical harm. Rules governing custom, statute, and professional standards are models for this approach. Greater reliance on these and similar per se rules, when they are feasible, would result in more directed verdicts, thereby promoting the decision of like cases alike and enhancing the legitimacy of decisions in negligence cases.

Second, the inequity that results from the inconsistent decision of recurring cases can be ameliorated through greater use of various forms of aggregative valuation of the claims in such cases.⁶⁷

67. See, e.g., Bruce Hay & David Rosenberg, *The Individual Justice of Averaging*, at http://www.law.harvard.edu/programs/olin_center (June 2000) (Discussion Paper No. 285, John

Aggregative valuation or averaging can help to remove the lottery aspect of decisions in unbounded cases. Third, the flaws in the negligence standard should make us much more willing to consider proposals for no-fault alternatives to liability for negligence. Some such proposals, most notably medical no-fault, are in fact forms of strict liability. Others, such as auto no-fault, are forms of first-party, or no liability. But no liability on the part of the injurer is itself a form of strict liability by the victim. Thus, we can understand no-fault of both sorts as a strict liability alternative to negligence liability. Because so high a proportion of negligence cases involve motor vehicle accidents, auto no-fault, in virtually any of its versions, could go a long way toward avoiding the trouble with negligence.

My analysis also has strong implications for cases involving intangible loss. One of the great advantages of the general limitation of negligence liability to cases involving physical injury and its consequences is that this limitation avoids potentially unlimited legal intrusion into ordinary affairs. We have become accustomed to saying that, subject to certain limited exceptions, everyone owes a duty to exercise reasonable care to avoid foreseeable injury to everyone else in the world. But in fact that duty extends only to foreseeable physical injury. We owe no such general duty to avoid causing intangible loss.

If there were such a duty, every aspect of the way we conduct our lives could become the subject of assessment by the finder of fact in actions alleging negligent infliction of intangible loss. A regime permeated by this kind of after-the-fact micromanagement of behavior through law is the antithesis of a polity that values a private sphere into which government does not intrude. The law of torts has sensibly refrained, on the whole, from encouraging this kind of intrusion.

We should therefore be far less sanguine than is sometimes supposed about use of a negligence standard in cases involving intangible loss. The force of this suggestion, of course, is that we must instead make the choice between imposing liability only if the injurer intended to cause harm, and imposing strict liability. The great appeal of moving to a negligence standard is that it appears to be superior to both these alternatives. It does not relieve negli-

M. Olin Center, Harvard Law School) (discussing whether civil cases should be resolved based on individual justice or compulsory averaging across cases); Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, LAW & CONTEMP. PROBS., Autumn 1990, at 137 (analyzing approaches to the aggregative valuation of individual tort claims).

gent wrongdoers of liability, but neither does it impose liability in the absence of wrongdoing.

In light of my analysis, however, it is worth recognizing that often the superiority of this compromise will be more apparent than real. It simply will not do to assume that we can identify those who "negligently" inflict intangible harm, and then to conclude that imposing liability on such wrongdoers is desirable. My point is that this assumption will too often be unwarranted because the identification of negligent behavior is problematic. In the absence of independent, pre-existing norms of behavior, the very idea of negligence is shaky; the finder of fact will in effect create a conception of negligent behavior to fit the case at hand. And even if this conception of negligence were acceptable, there would be no reason to suppose that a subsequent finder of fact would create the same standard to fit a case posing the same facts. Consequently, the notion that by moving to a negligence standard we would be imposing liability on more wrongdoers, while simultaneously avoiding imposing liability without fault, is far more heroic than is justified. For this reason, the traditional common law barriers to recovery in negligence for intangible harm should be maintained.

