

William & Mary Law Review

Volume 48 (2006-2007)
Issue 5 *Law and Morality Symposium*

Article 20

4-1-2007

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Benjamin C. Zipursky, *Sleight of Hand*, 48 Wm. & Mary L. Rev. 1999 (2007),
<https://scholarship.law.wm.edu/wmlr/vol48/iss5/20>

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SLEIGHT OF HAND

BENJAMIN C. ZIPURSKY*

INTRODUCTION

Learned Hand was a titan of American law: incisive in his intelligence, capacious in his knowledge, decidedly pragmatic in his judgment, but intellectually sophisticated through and through.¹ Although unafraid of touching broader themes in his decisions and his writings, he was, at the end of the day, most comfortable as a judge. When pressed toward moral abstraction, Learned Hand dug in his heels as the hard-headed skeptic. Unsurprisingly, Learned Hand's opinions have cast a long intellectual shadow in a fundamental subject like tort law. Indeed, the "Hand Formula" of *United States v. Carroll Towing Co.*² is perhaps the most central idea of many first-year torts classes today.³ Students learn that the standard of care in negligence law is ideally—if somewhat abstractly—analyzed in terms of a formula comparing the costs of taking precautions, with the product of the likelihood of injury without those precautions, and the magnitude of such injury.⁴

There is more than a little irony, however, in the superstar status of the Hand Formula in torts. To begin with, *Carroll Towing* is not

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1. See generally GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

2. 159 F.2d 169 (2d Cir. 1947).

3. See Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 733 (2001).

4. See *id.*

a negligence case at all; indeed, it is not even a tort case, but an admiralty case.⁵ Beyond that, the allegedly unreasonable conduct in that case involved a plaintiff's carelessness, not a defendant's carelessness;⁶ even the very general idea of a wrongdoer being held responsible to those it has injured is not implicated in *Carroll Towing*, because the case is about a plaintiff's fault.⁷ And in *Carroll Towing* and the relatively few other decisions in which Hand commented on what is now termed the "Hand Formula," he took great pains to caution readers against elevating the idea to a magical formula and to warn them against the possibility of anything approaching precise application.⁸ Add to this that Hand was quite self-consciously a federal appellate judge operating largely in a state with its own well developed tort law in a post-*Erie* era,⁹ and one can easily see that Hand would not have claimed—and did not claim—for his algebraic formula anything like the centrality it is now claimed to have.

How could the Hand Formula have become elevated to the high status it now enjoys in tort theory? The obvious answer is "Richard Posner." The leading torts professor in the country for decades, and now the leading writer of torts opinions on the bench, Posner launched the most illustrious phase of his remarkable academic career by seizing upon the Hand Formula as the key to negligence law. And he has never let go. Posner's most famous article, *A Theory of Negligence*, used Hand's decision in *Carroll Towing* as the starting point for what he touted to be a clear-sighted and correct analysis of negligence law.¹⁰ Moreover, because a twinkling of

5. See *id.* at 171-73.

6. In the language of admiralty law at that time, the carelessness at issue was that of the "libellant," who sought compensation for damages, not the "respondent," from whom compensation was sought.

7. *Carroll Towing*, 159 F.2d at 172 ("[I]t was a failure in the Conner Company's proper care of its own barge.... For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.").

8. See Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145, 162-80 (2003) (giving an account of the other cases in which Judge Hand applied his balancing framework and highlighting Hand's reluctance to elevate the formula to a magical status).

9. See *id.*

10. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85-88 (1987).

algebra and efficiency lurks in *Carroll Towing*, Professor Posner used the case to energize his entire economic theory of tort law, which, in my view, remains the most celebrated within the legal academy.

Indeed, the Hand Formula as an interpretation of the standard of care in negligence law, in some ways, surpasses the celebrity of Posner's particular economic interpretation of it. Law professors and casebook authors who strive to take a pluralistic or middle-of-the-road approach toward tort theory are frequently happier to teach the Hand Formula as the core of negligence than they are to embrace any highly monetized form of it.¹¹ The *Third Restatement of Torts: Liability for Physical Harm* expressly embraces a version of the Hand Formula, but stops short of a fully economic interpretation of it.¹² Although Posner's selection of efficiency over utility remains highly controversial, he appears to have won over a large audience with his broader claim that the standard of care in negligence law should be understood in terms of the Hand Formula and that, moreover, the deterrence-based account of negligence law that flows from such an analysis provides a systematic account of the entirety of negligence doctrine. Although the Hand Formula analysis of negligence certainly has seen its share of detractors, it is an analytical doctrine that has tended to cut across political and ideological lines.¹³ As the work of Heidi Hurd, Michael Moore, and numerous philosophers of tort law illustrates, the Hand Formula has cut across divisions within the legal academy, too.¹⁴

The allure of the Hand Formula is, I am afraid, all smoke and mirrors; it is Posner's sleight of Hand. To be sure, there are many contexts in which it is intelligent and reasonable, in thinking about which precautions to take, to consider precaution costs, probabilities

11. See, e.g., MARC A. FRANKLIN, ROBERT L. RABIN, & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 45-49 (8th ed. 2006); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 31 (5th ed. 1984).

12. *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM* § 3 (Proposed Final Draft No. 1, 2005).

13. For example, contrast Posner's openly conservative approach with the Rawlsian approach of Keating. See, e.g., Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 311, 332-36 (1996) (adopting social contract interpretation of the Hand Formula).

14. See, e.g., Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 *THEORETICAL INQUIRIES L.* 333, 359-60 (2002).

of injuries, and magnitude of injuries. It is also true, all else being equal, that the reasons against taking the precaution tend to increase with its cost, whereas the reasons in favor of the precaution tend to increase with the reduction of injury likelihood or severity that the precaution would effect. Almost no one contests that. But this is a far cry from showing that the concept of negligence or due care in American negligence law means failing to take cost-justified precautions. There is plenty of content to the concept of negligence in our common law of negligence, and for the most part, it does not relate to cost-justified precautions. Over the past sixteen years, the weakness of the Hand Formula's account of the standard of care has been displayed by Patrick Kelley,¹⁵ Stephen Gilles,¹⁶ Gregory Keating,¹⁷ Richard Wright,¹⁸ Michael Green,¹⁹ Heidi Feldman,²⁰ and numerous others.²¹

In this Article, I shall try to push this case further, contending that the claim that the Hand Formula captures the meaning of negligence is belied by several fundamental features of negligence law. Beyond showing that the Hand Formula is, as Richard Wright

15. See Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 343-44 (1990); Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 591 (2002).

16. See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 816-21 (2001) [hereinafter Gilles, *On Determining Negligence*]; Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994).

17. See Keating, *supra* note 13, at 328-32.

18. See Wright, *supra* note 8, at 162-80; Richard W. Wright, *The Standards of Care in Negligence Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 250-55 (David G. Owen ed., 1995) [hereinafter Wright, *The Standards of Care*].

19. See Michael D. Green, *Negligence = Economic Efficiency: Doubts >*, 75 TEX. L. REV. 1605, 1642-43 (1997).

20. See Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000).

21. Other important contributions to this literature include those by Jules Coleman, John Goldberg, Steve Hetcher, Stephen Perry, Arthur Ripstein, Kenneth Simons, Martin Stone, Ernest Weinrib, and Catherine Pierce Wells. Unlike the other authors cited in the aforementioned list, Gilles and Green continue to believe that, so long as the Hand Formula is not interpreted in a Posnerian economic manner, it continues to have a central role in understanding breach. As will be made clear below, I believe that the evidence that has been mounted, in part by these scholars themselves, points toward a far more skeptical conclusion on the role of the Hand Formula.

has called it, a "myth,"²² I shall begin to sketch an affirmative theory of the concept of ordinary care in American negligence law.

Needless to say, the sleight of hand I am attributing to Posner is not duplicitous or dishonest, because the magician himself was tricked. I have no doubt that Posner believed that reasonable care must be understood in terms of the Hand Formula. The problem is that Posner's contempt for morally tinged accounts of legal language is so profound that he cannot see the moral language as a real option.²³ This is presumably what Posner came to realize when he began talking about "overcoming law."²⁴ He began to recognize, more clearly, that he is in a bind, wondering whether there is really law for him to see, because his reductive accounts of what the law says are implausible, and he refuses to countenance those versions of the law that take its surface language seriously. Posner's radical philosophical skepticism about the normative language of the law blinds him to what the law says. He is, to this extent, taken in by his own sleight of hand. If I am right that Posner's philosophical skepticism about moral language and robust concepts in the law is indefensible, a position that I have argued at length elsewhere,²⁵ then neither he nor others should be taken in. Breach in negligence law is to be judged by the ordinary care standard, and no evidence exists that either our system or the jurors who make these decisions are led to, or do, understand this standard in terms of the Hand Formula.

One more irony. Looking back at *A Theory of Negligence*, Posner apparently was attacking an academic program that made him deeply suspicious. Posner saw in what he called the "orthodox view of the negligence concept" a fashionable if deeply rooted trend in the legal academy that was getting in the way of clear thinking about negligence law.²⁶ He sought to look at the body of actual tort cases

22. Wright, *supra* note 8, at 145.

23. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1693-98 (arguing that moral legal language does not justify an account of law based on morality).

24. RICHARD A. POSNER, *OVERCOMING LAW* (1995).

25. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 93-94 (1998).

26. Posner, *supra* note 10, at 29-32, 30 nn.1-2. Calabresi's critique of negligence law is a major antagonist of Posner's in this article. See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

to undermine this way of thinking.²⁷ He particularly thought taking the concept of “negligence” seriously critical, because the idea of holding defendants to a standard of conduct was, in his view, plainly essential to what was happening in American tort law, notwithstanding an academic attitude of dismissiveness toward it.²⁸ And he identified as a cause of the problem legal scholars’ concerns that the language of negligence was too “moralistic.”²⁹ Posner thought it critical for law professors to get over the embarrassment, if you will, of the moralizing language of negligence law, and to realize that the language is not just verbiage or judgmentalism; it was really doing work in the law. Of course, that is just my point here, and in what follows.

Part I begins with the two pieces of writing I have already mentioned: Hand’s famous opinion in *Carroll Towing*, and Posner’s seminal article, *A Theory of Negligence*. The central point of Part I is to contrast the difference between the relatively modest role the Hand Formula plays in *Carroll Towing*, and the tremendous analytical and theoretical significance attributed to it by Posner. More particularly, Part II shows that Posner relies on the Hand Formula as an analysis of the meaning of the standard of care in negligence law.

Part II.A offers the central critical argument of the Article: the Hand Formula simply fails to capture an abundance of evidence law in the concept of negligence. The evidence consists in the jury instructions given across the country, namely, the commonality of words and concepts in those jury instructions, and their tendency to refer to particular, overlapping concepts—that of ordinary care and reasonable prudence or carefulness—that do not bear any particular conceptual connection to the Hand Formula;³⁰ the existence of a wide and important range of cases that pertain to inadvertent negligence, in a manner that makes little room for the applicability of the Hand Formula;³¹ the existence of a spectrum of care levels in

27. Posner, *supra* note 10, at 34-36.

28. *Id.* at 29-32.

29. *Id.* at 31.

30. See Kelley & Wendt, *supra* note 15, at 618-22.

31. See, e.g., Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 931-33 (2001) (discussing the Draft Restatement’s “endorsement of the reasonable person test for

negligence law that are of a similar kind, but different stringency, than ordinary care, but make little sense as contrasted with the Hand Formula;³² the continuity between breach standards in nonprofessional negligence law and standards in a variety of other corners of negligence law, including professional malpractice, and the anomalousness of those standards relative to the Hand Formula;³³ and the conceptual interdependence of breach and duty, in a manner that the Hand Formula cannot explain. Although many of these pieces of the picture have been brought out in prior work, both that of others and of my own, they have not, to my knowledge, been adequately integrated into a sustained critique of the Hand Formula as an interpretation of the standard of care. Part II.B explains why, notwithstanding the evidence that the Hand Formula does not at all capture the standard of care in negligence law, one nevertheless finds some courts using the Hand Formula to think about negligence and doing so appropriately. Together, Parts II.A and II.B establish that, although the Hand Formula is sometimes helpful in thinking about breach, the statement that the Hand Formula captures the meaning of negligence in tort law is false.

Part III explains why it matters that the Hand Formula fails to capture the meaning of negligence. First, it has been the centerpiece of the most important positive theory of negligence law; if the centerpiece is gone, that casts serious doubt on the whole project. Second, many policy debates about the appropriateness of a negligence scheme versus a strict liability scheme presume that a negligence scheme proceeds in accordance with the Hand Formula. Because the presumption is false, the soundness of the evaluations is undercut. Third, law professors and the American Law Institute have frequently advocated various sorts of structural changes in negligence law, on the ground that certain aspects of the law are incoherent in light of the centrality of the Hand Formula.³⁴ These critical and revisionary arguments are also unsound, at least on that ground, if the Hand Formula does not in fact occupy a central

cases of inadvertent negligence").

32. See Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 *FORDHAM L. REV.* 649, 659 (1998).

33. See *id.* at 684-88.

34. See, e.g., Simons, *supra* note 31, at 925-39.

role. Finally, the allegedly entrenched place of the Hand Formula in American negligence law has led many lawyers to assert the proper place of cost-benefit analysis in individual and governmental decisionmaking. Perhaps the Hand Formula is normatively laudable, but one cannot adopt it because of its special place in negligence law; it has no such special place.

Parts IV and V indulge, if only briefly, the quip that “you need a theory to beat a theory.” I do not believe that the refutation of the assertion that the Hand Formula captures the meaning of “negligence” requires some other theory. The common law contains many ideas that are understood but not deeply theorized. On the other hand, I realize that readers are inevitably looking for something to fill the void. For this reason, Part IV reviews many of the most important non-Hand theories of negligence: rights-based and corrective-justice accounts, conventionalist accounts, and accounts based on virtue theory. All have significant strengths and weaknesses as interpretations of the concept of negligence or due care in negligence law.

Part V sketches a theory called the “civil competency” theory of negligence. This theory aims to combine the strengths of rights-based, conventionalistic, and virtue-based theories, while avoiding their weaknesses. Its basic idea is that the ordinary care standard relies upon a conception of a person with a certain attribute—that of being reasonably prudent—in terms of which what is negligent is to be judged. The attribute of reasonable prudence is not, however, a virtue or an excellence; negligence law does not shoot so high. Reasonable prudence is more like a basic competency than a virtue, more like being a competent driver than an excellent driver. Because negligence law covers an extraordinarily broad range of conduct, not simply one activity, the competency demanded of persons in society is more amorphous and difficult to characterize. It involves having the capacity and disposition to conduct oneself in a manner that is not likely to cause injury to others, and, more broadly, in a manner that takes seriously the security of others. That is why it may be thought of as a civil (or civic) competency; it is part of an ability to operate as part of a civil society.

I. *CARROLL TOWING*, THE HAND FACTORS, AND POSNER'S
CONTENTION

The central contention of this Article is that it is false that the standard of care in negligence law *means* failing to take *B* when *B* is less than *P* times *L*.³⁵ In asserting this, I do not mean to say that *B*, *P*, and *L* could never have any relevance to thinking about whether a breach has occurred. I am happy to recognize that *B*, *P*, and *L* are frequently relevant to deciding breach, and that when they are relevant, breach is more likely as *B* diminishes and less likely as *P* and *L* diminish. Indeed, insofar as *Carroll Towing* genuinely relied on an analysis of the role of *B*, *P*, and *L* in reasonableness analysis, it is a point about variability, and nothing more. That is, in a way, the point of Hand's own discussion, as the following brief analysis indicates.

Carroll Towing was an appeal of a lower court's determination that (1) the owner of the *Anna C*, the Conners Company, may recover the costs of damages from the owner and charterer of the tug that caused the barge to break loose,³⁶ and (2) the Conners Company's recovery should not be diminished on account of its alleged failure to have the bargee on board at the time the barge broke loose.³⁷ Judge Hand's focus was on (2). The owner of the tug, Carroll Towing Company, and the charterer of the tug, Grace Lines, from whom the Conners Company sought recovery, argued in return that the Conners Company's failure to keep a bargee on board was fault; consequently, they argued (under a precursor of today's comparative negligence, which existed even then in admiralty law), the Conners Company could not recover fully from them even if,

35. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called *P*; the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i. e., whether $B < PL$.").

36. See *Conners Marine Co. v. Pa. R. Co.*, 66 F. Supp. 396, 400 (E.D.N.Y. 1946).

37. *Id.* at 398.

arguendo, it could recover at all.³⁸ Insofar as *Carroll Towing* relates to the topic of “negligence” at all, it is because it addresses the question of whether the Conners Company’s failure to have a bargee on board was faulty so as to diminish their recovery in an admiralty proceeding.³⁹ Hand recognized that this decision was not really about the care owed to others, but rather about whether “it was a failure in the Conner [sic] Company’s proper care of its own barge.”⁴⁰ Hand reasoned, however, that if a bargee’s absence could be a ground for liability to others in these circumstances, it could be a ground for finding a failure in the Company’s care for its own barge.⁴¹ Hand then proceeded to analyze the issue in terms of whether it could be a ground for liability to others.⁴²

The Conners Company argued to District Judge Moscowitz that many Second Circuit precedents had addressed the question of whether it is a ground for liability not to have a bargee on board.⁴³ And it asserted that the Second Circuit had decided the issue: the bargee’s absence is *not* a ground for liability.⁴⁴ On the strength of these precedents, the District Judge sided with the Conners Company, and held that the bargee’s absence could not count as negligence.⁴⁵ That determination by the District Judge was one of the principal points of appeal against the Conners Company.

Judge Hand decided, as predecision memoranda reveal, that he would reject the Conners Company’s argument and reverse on this point.⁴⁶ Judge Chase apparently was inclined to affirm, in significant part, because of reluctance to disturb the District Court’s determination, which he did not regard as sufficiently erroneous to merit disruption.⁴⁷ As Professor Gilles has observed, Hand seemed interested in establishing that the District Court made an error of

38. *Carroll Towing*, 159 F.2d at 171.

39. *Id.* at 172-73.

40. *Id.* at 172.

41. *Id.* at 173.

42. *Id.*

43. See Stephen G. Gilles, *United States v. Carroll Towing Co., The Hand Formula’s Home Port*, in *TORT STORIES* 11, 18 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

44. *Id.*

45. *Conners Marine Co. v. Pa. R. Co.*, 66 F. Supp. 396, 398 (E.D.N.Y. 1946).

46. In this Article, I rely on Gilles’s accounts of the Hand documents from the Hand archives. See Gilles, *supra* note 43, at 19-21.

47. *Id.* at 21.

law by supposing a general rule existed against using the bargee's absence as a reason for imposing liability.⁴⁸ Hand therefore thought it very important to recognize that the kind of issue in question was not of the right sort for a bright-line rule.⁴⁹ "It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability.... [T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables"⁵⁰ Hand thus reasoned that, because the grounds varied with *B*, *P*, and *L*, and *B*, *P*, and *L* varied depending on the factual circumstances of each case, no hard and fast rule could work for every case.⁵¹ He therefore rejected the conclusion by the lower court judge that Second Circuit precedent determining no fault for absence of the bargee in prior cases in other circumstances could settle the issue here. Holding the barge fast with an absent bargee was not sufficient as a matter of law: "it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her."⁵² When addressing the question, on these facts, he determined that it was fault for the bargee to be absent in this case.⁵³ Notably, his decision that it was fault for the bargee to be absent did not emerge from any consideration of *B*, *P*, and *L*; it related instead to his suspicions based on the bargee's lying.⁵⁴

Thus, in his own clever (though nonmisleading) legerdemain, Hand used the variability of circumstances as a reason not to defer to the lower court's decision that no basis existed for diminishing the plaintiff's recovery in this admiralty case. He ascertained that the lower court had ruled based on the misconception that there was a general rule about the bargee's absence.⁵⁵ Hand used the Hand Formula to illustrate the point that whether a bargee's absence was

48. *Id.* at 22-23.

49. *See Carroll Towing*, 159 F.2d at 173.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 174.

54. *See id.* at 173-74 ("In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence.").

55. Gilles, *supra* note 43, at 22-23.

a ground of liability would vary with (or inversely with) these three factors, and therefore could not be a fixed rule. But in this case, the question was not liability; it was not what care was due to others; it was not even contributory negligence. The issue was actually whether there was any basis of fault that the defendants could use, under the doctrine of both-to-blame reductions in maritime law, to diminish the plaintiff's recovery.⁵⁶ There is thus no particular reason to believe that this decision should be probative of the standard of care in the common law of negligence. And quite plainly, there is no reason to think that it captures, or was intended to capture, the meaning of "negligence" or the content of the concept of negligence.

Now the question to ask about Posner in *A Theory of Negligence*⁵⁷ is whether he intended to use the Hand Formula as an illustration of a particular way to decide whether there was negligent conduct in particular cases, or whether he was, more ambitiously, asserting that this is what the negligence standard really means. The answer is the latter. Posner describes Learned Hand's "famous formulation of the negligence standard" as "one of the few attempts to give content to the deceptively simple concept of ordinary care."⁵⁸ Judge Hand, Posner suggests, "was adumbrating, perhaps unwittingly, an economic meaning of negligence."⁵⁹ Moreover, he goes out of his way to make clear that he is offering not only an account of negligence, but an account of the term "negligent":

Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the

56. See NICHOLAS J. HEALY & JOSEPH C. SWEENEY, *THE LAW OF MARINE COLLISION* 303-05 (1998). At the time *Carroll Towing* was decided, the rule in force was the federal maritime common law rule of the U.S. Supreme Court in *The Schooner Catharine v. Dickinson*, 58 U.S. 170, 177-78 (1854), which divided damages equally if the plaintiff and the defendant were both to blame. In the context of *Carroll Towing*, in which the plaintiff had sought a 50/50 split between two responsible defendants, the determination of some form of fault or blame on the plaintiff's own part led to an equal three-way split of responsibility.

57. Posner, *supra* note 10.

58. *Id.* at 32 (emphasis added).

59. *Id.* (emphasis added).

accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.⁶⁰

Here, Posner is clearly pointing out that an advantage of understanding “negligence” or “failure to use reasonable care” as failure to take cost-justified precautions is that it explains why these terms have negative moral overtones: because we do have negative judgments of wastefulness.

Carroll Towing is thus remarkably weak support for the claim that Posner wants to draw from the Hand Formula: that negligence means the failure to take cost-justified precautions. Richard Wright and others have demonstrated that Hand’s sprinkling of other opinions mentioning or using the Hand Formula by no means make up for this weakness.⁶¹ Though perhaps a bit dismissive to say so, whether Posner’s comments here on the moral connotations of “negligence” are persuasive is not worth debating; as John Goldberg has pointed out, they plainly are not.⁶² If there really is a kind of moral indignation typically found behind the claim that someone negligently injured another, the resentment of economic wastefulness does not explain that indignation; it is much more a resentment of persons who do not take others’ needs seriously.⁶³

So what supports the Hand Formula? Of course, as a rights-based philosopher of law, I am tempted to say that rampant utilitarianism and reductionistic thinking is the cause of this misconception. Though there is more than a grain of truth in this, it is much too facile an answer. A far more plausible view is that the Hand Formula owes its popularity to a combination of two forces: one is the impressiveness and broad doctrinal ambitions of Posner’s framework, and its capacity to retain some form of fault without embracing the sort of moralism that Calabresi and others rejected;⁶⁴

60. *Id.* at 33.

61. Wright’s analysis of Hand’s eleven opinions undercuts the possibility of rehabilitating a central place for the Hand Formula in negligence law by reference to Hand’s other work. See Wright, *supra* note 8, at 162-80. Some of these cases, however, are negligence cases, and some do involve claims that the defendant breached a duty of care. Yet none provides anything but a hand-waving reference to the balancing metaphor. *Id.*

62. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 553 (2003).

63. *See id.*

64. *See generally* CALABRESI, *supra* note 26.

a second is the judgment, firmly implanted in American legal thought long prior to Posner, that the standard of care in negligence law is captured by a balancing of risk, probability of loss, and magnitude of loss. This idea was probably first derived from Henry Terry's well known *Harvard Law Review* article on "Negligence,"⁶⁵ and then placed by the American Law Institute into the *First Restatement of Torts*,⁶⁶ Hand was a cofounder of the American Law Institute, and he quite deliberately incorporated an algebraic variation of this idea in *Carroll Towing*. The balancing in some form also recurs in the *Second Restatement of Torts*.⁶⁷ Posner's move was to use the recognition of this way of thinking about negligence and turn it into an account of the meaning of negligence, building upon what was already quite a fashionable way of thinking about negligence in the legal academy. And pluralists, deterrence-compensation thinkers, and many others who reject an economic version of the Hand Formula continue to think of a $B < PL$ conception of negligence law as capturing the core idea of what the standard of care is in negligence law.⁶⁸

The central claim of the next Part—and really the central claim of this Article—is that the very idea of the Hand Formula, economic or noneconomic, is fundamentally ill-suited to capturing the meaning of negligence in American tort law.

65. See Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). For a brief discussion of Terry's largely undocumented identity and history, see Green, *supra* note 19, at 1627 n.104; see also Feldman, *supra* note 20, at 1441-43; Hurd & Moore, *supra* note 14 (indicating a significantly greater complexity in Terry's own balancing framework than the Hand Formula suggests).

66. RESTATEMENT (FIRST) OF TORTS § 291 (1934); see also *Chicago, B & Q.R. Co. v. Krayenbuhl*, 91 N.W. 880, 883 (Neb. 1902) (discussing negligence in terms of the balance of advantages and disadvantages of precaution while setting forth the reasonable and prudent person standard). Both Green, *supra* note 19, at 1627-28 & nn.104-06, and Gilles, *On Determining Negligence*, *supra* note 16, at 822-25, reached the conclusion that the Reporter for the *First Restatement of Torts*—Francis Bohlen—was influenced by Terry and Warren Seavey, and that he therefore implanted a roughly utilitarian unreasonableness of risk analysis into the *Restatement of Torts*, notwithstanding its ungroundedness in the case law at the time; *Krayenbuhl* was one of the few cases gesturing in this direction. See generally Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

67. RESTATEMENT (SECOND) OF TORTS § 291 (1965).

68. Cf. KEETON ET AL., *supra* note 11, § 31 (describing a "risk-benefit form of analysis" embodied by the Hand Formula as "fundamental" to the law of negligence and reflecting the widespread acceptance of the Hand Formula outside the law-and-economics movement).

II. THE HAND FORMULA AND THE MEANING OF "NEGLIGENCE" IN AMERICAN NEGLIGENCE LAW

The evidence on American law overwhelmingly fails to support the claim that the "ordinary care" standard in American law is generally applied by courts or jurors by application of the Hand Formula, in economic or noneconomic form. But that claim is not largely my concern in this Article. My aim is to scrutinize the claim that the Hand standard gives the meaning of negligence in American negligence law. As to that claim, too, I arrive at the conclusion that the Hand Formula *does not* give the meaning of negligence in American negligence law.

A. The Evidence Against the Claim that the Hand Formula Captures the Meaning of "Negligence"

1. Words and Synonyms

The first thing to notice about the negligence standard of American negligence law is that legal authority lies in the concept, not in the precise verbal formulation. This observation can be inferred in part from the fact that, although verbal formulations carry authority because of the body that passed them in statutory law, the opposite is generally true in the common law. It is the legal principle inhering in the decided cases that carry authority, not any particular utterance of a lawmaking authority. But in the case of the reasonable care standard, which in some sense is central to negligence law, the remarkable phenomenon is that courts switch around a bit on the precise words they use. Nevertheless, as we shall see, the various verbal formulations all look to be approximating to the same concept. That concept does not bear any obvious semantic relationship to the Hand standard.

Kelley and Wendt's work on jury instructions, covering those forty-eight states that have pattern jury instructions, provides powerful support for this view.⁶⁹ The following is a typical definition

69. Kelley & Wendt, *supra* note 15, at 594-95.

of negligence in jury instructions, taken from *New York Pattern Jury Instructions*:

Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.⁷⁰

The following is from the State of Washington:

Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.⁷¹

Preliminarily, note that these instructions have at least four aspects. The first is a linkage of “negligence” with some lack or failure of care. Second is a description of what sort of care is lacking, and relatedly, an expansion on how to think about that level of care. The third is a reference to the way that lack of care must be displayed: it must be roughly a failure to exercise the defined level of care, a failure that can be done through acting or through failing to act. Fourth is the relativization to the circumstances. All four structural features appear in virtually all of the instructions.⁷² Moreover, all four are roughly the same in content in all of the jurisdictions. First, negligence is about lack of care. Second, the care level is defined both with an initial adjective (or adjectives), and by reference to a type of person. Third, the instructions make clear that the failure to exercise care can be displayed through action or inaction. Fourth, they all particularize to circumstances.⁷³

70. NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 2:10 (3d ed. 1999). The canonical citation for the proposition that “negligence is lack of ordinary care” is *Vaughan v. Menlove*, 132 Eng. Rep. 490, 493 (C.P. 1837).

71. 6 WASHINGTON PATTERN INSTRUCTION—CIVIL 10.01 (5th ed. 2005).

72. See Kelley & Wendt, *supra* note 15, at 595-612.

73. See *id.*

Our interest for the moment—and the place where I wanted to call attention to the existence of similar words—was in the second aspect: the specification of care level through an adjective and by reference to a kind of person.

The New York instruction quite clearly defines the care level as “ordinary care”; note that the adjective is “ordinary,” not “reasonable.”⁷⁴ That is true in most states, such as California, Michigan, Illinois, and Virginia;⁷⁵ however, a few, like Alaska, Connecticut, and Florida, use “reasonable”;⁷⁶ and some, like Alabama, use “ordinary or reasonable care,” or give a trial judge an option to use either.⁷⁷

When New York’s instructions expound on what “ordinary care” is, they state that it is the care that a “reasonably prudent” person would use under the circumstances.⁷⁸ Washington, like many other states, uses the word “careful” instead of “prudent,” thereby asking jurors to think about the “reasonably careful” person.⁷⁹ Overwhelmingly, jurisdictions use “reasonably prudent person” or “reasonably careful person.”⁸⁰ Scattered around are phrases “reasonable person” or “ordinarily careful person” or “person of ordinary prudence” or “reasonable and prudent person.”⁸¹

What is interesting here is that slightly different words and phrases are used to circle around what the common law seems to regard as the same basic idea: an idea of “ordinary care” that is to be understood in terms of a person who exercises the care that a reasonably careful person would. “Reasonably prudent” and “reasonably careful” are meant to refer to a person who exercises “ordinary care”; the idea is that such a person is *quite* prudent and careful, at least *reasonably* so. “Reasonably” prudent or “reasonably” careful under the circumstances would seem to mean something less than an extremely high level of care, though still a responsible adult level of care. But remember, this is an expansion of “ordinary care.” And so the idea is that there is a kind of figure—the reasonably

74. NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 2:10 (4th ed. 2006).

75. Kelley & Wendt, *supra* note 15, at 595 & nn.23-24.

76. *Id.* at 596-97 & nn.30-34.

77. *Id.* at 625 app.

78. NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 2:10 (3d ed. 1999).

79. 6 WASHINGTON PATTERN INSTRUCTIONS—CIVIL 10.01 (2005).

80. Kelley & Wendt, *supra* note 15, at 596 & nn.25-29.

81. *Id.* at 597, 607, 609.

careful person—whom we regard as a standard, and this “standard”-setting person exemplifies a kind of norm, a norm of “ordinary care.”

Three points emerge from this discussion. First, there is a concept here: this is not just a shell; they would not be hovering with almost synonymous phrases around a shell. Second, the concept is one our system communicates—and apparently conceives of—as derivative of a prototypical figure. That our negligence standard is defined by reference to the reasonably prudent person is, of course, a well-known fact about the common law of negligence, although it is often ignored. Third, despite the fact that there is plenty of language and plenty of consistency in the language, and a particular concept is being referred to, there is no hint that this concept, as a concept, has anything whatsoever to do with the Hand Formula. Remember, my point is not to address whether a reasonably prudent person ought to employ the Hand standard, or even whether the courts think this about the reasonably prudent person. The point is that our law does not put the Hand standard into the concept of negligence itself, because the concept of negligence is defined by something concrete, and that something—the reasonably prudent person—simply does not contain the idea of risk/utility balancing.

Curiously, American pattern jury instructions overwhelmingly use formulations that differ slightly from what torts casebooks and torts professors imagine is the prevailing, nonbalancing instruction: the “reasonable person” standard. As Kelley and Wendt point out, only five jurisdictions appear to use a “reasonable person” standard in their pattern instructions: Maryland, Minnesota, South Carolina, Virginia, and Hawaii.⁸² The overwhelming majority of those that use a derivative of “reasonableness” (which is itself the great majority), define “negligence” or “ordinary care,” as discussed above, in terms of the “reasonably prudent” or “reasonably careful” person, not the “reasonable” person.⁸³ An examination of *Blyth v. Birmingham Waterworks Co.*,⁸⁴ the Lord Alderson opinion famously introducing the “reasonable man” standard, strongly suggests that it would be a mistake to infer from this difference an intention to focus on “reasonableness” as a form of *rationality*, rather than as an effort to

82. Kelley & Wendt, *supra* note 15, at 597 & nn.33 & 35, apps. at 638, 648, 651, 671, 677.

83. See *supra* notes 77-81 and accompanying text.

84. 156 Eng. Rep. 1047 (Ex. 1856).

designate a mid-level, moderate form of sensible carefulness and caution. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."⁸⁵ And the factual context of *Blyth* again indicates that the whole point is that ordinary or reasonable prudence is needed, and not extraordinary prudence. In *Blyth* the court rejected plaintiff's effort to have liability imposed upon defendant waterworks company for failing to anticipate an extraordinarily cold winter, which caused its pipes to freeze; its guarding against weather in the usual range was sufficient prudence.⁸⁶

2. Kinds of Cases, Including Inadvertence

Second, negligence law contains many kinds of cases in which the question of whether the defendant was negligent is easily asked and answered, and yet the analytical framework of the Hand standard seems plainly inapplicable. The most obvious category, which a number of scholars have now recognized, is the category of inadvertent negligence. Two hypotheticals illustrate this category. First, in *Patron v. Waiter*, Waiter is in a restaurant and accidentally spills hot soup on Patron, burning him and ruining his suit. Second, in *Pedestrian v. Driver*, Driver rounds a corner awkwardly, skidding off the road and into Pedestrian.

In both of these hypotheticals, the plaintiff will assert that the defendant was negligent, and the judge will instruct the members of the jury that they need to decide whether the defendant used ordinary care. The jury will understand just what they are supposed to decide, and they will listen to all the facts and then make their decision. In thinking about whether the defendant used ordinary care, the jury will not be deciding whether the defendant took cost-justified precautions. The jury will be deciding whether the act of defendant that injured her—the spilling of the soup in one case and the skidding off the road in the other—was a careless act. And they will do it by asking themselves to compare the defendant's conduct

85. *Id.* at 1049 (Alderson, B.).

86. *Id.* at 1048.

to the reasonably prudent or careful person under the circumstances.

The general problem is that a great deal of negligence does not involve taking unreasonable risks. It simply involves acting in a manner that is careless. The negligence in these cases is in the execution of the course of conduct or the act, not in the taking of a risk. The Hand standard pertains only to unreasonable risk-taking.

It is tempting to suppose that the problem must be that the waiter was carrying too many plates, or failing to look where he was going; or perhaps he permitted himself to go to sleep too late the night before and therefore was too tired to perform optimally. The risk of carrying too many plates, of neglecting to look ahead in his path, or of being too tired to perform competently at work—these are truly the unreasonable risks taken, on such a view.⁸⁷

This response is wholly unpersuasive. Undoubtedly, a waiter's careless dropping of a plate is sometimes the product of unreasonable risk-taking, but there is no reason to believe it always is. There is no reason to believe that whenever someone injures another through careless conduct, like dropping a plate, it is the result of an unreasonable risk having been taken. If I trip walking down the sidewalk, or if I aspirate my Diet Coke somewhat and choke, these misperformances of mine are not necessarily products of risk-taking. The waiter's dropping the soup is no different.

If one focuses enough on a risk-taking criterion, one might end up thinking this cannot really be negligence.⁸⁸ Perhaps when we call the waiter careless, we are merely presuming he must have been taking some risk; and perhaps conduct warranting such a presumption counts as "careless" only by analogy to the presumed risk-taking version, and thus is not *really* negligent. But here we are letting the tail of the theory wag the dog of the phenomena. A waiter's clumsy dropping of a bowl of hot soup on a patron is paradigmatic of negligence. So too is a driver's skidding off the road into a pedestrian because the driver is failing to exercise his driving skill at that moment. Both of these scenarios are well described as accidents flowing from the defendant's carelessness.

87. See Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, U. PA. L. REV. 887, 896, 940-41 (1994).

88. See *id.*

3. *Spectrum of Care Levels*

There is another reason to take seriously the idea that a definition of negligence in terms of “ordinary care” really means something that links up with the concept of ordinariness, rather than being a shell that the Hand Formula is needed to fill. Actions based on defendant’s failure to take care toward plaintiff are not always judged by the “ordinary care” standard. Tort law has other levels of care, and coming to appreciate that these other levels exist, and appreciating their meaning, sheds light on what the standard of “ordinary care” means.

Recall that one of the seminal American negligence cases, *Brown v. Kendall*, involved an appeal of a verdict against a defendant who had waved a big stick in order to break up a dog fight but, in so doing, unintentionally blinded the plaintiff in one eye.⁸⁹ The jury verdict was rendered against defendant on the basis of an instruction that defendant must lose unless he proved that he was using extraordinary care. The Supreme Judicial Court of Massachusetts, per Chief Justice Shaw, reversed, holding that plaintiff must be required to bear the burden of proving lack of care; defendant may not be required to prove care as an affirmative defense; and, more importantly, the appropriate standard of care was “ordinary care,” not “extraordinary care.”⁹⁰

The lower court in *Brown* was not unusual or inventive in employing a standard of extraordinary care. Its theory was that plaintiff proved a trespass *vi et armis*—arguably the trial court’s principal error, from which all others derived—against him by defendant, and that defendant’s defense lay in arguing that his touching of plaintiff was done out of the necessity of breaking up the dog fight.⁹¹ This affirmative defense, under the trial judge’s plausible interpretation of the common law on this point, was very demanding and required proof that defendant was using extraordinary care.⁹²

Even today, however, some jurisdictions and parts of tort law permit plaintiff to win by demonstrating that defendant failed to

89. 60 Mass. (6 Cush.) 292, 293 (1850).

90. *Id.* at 294, 296.

91. *Id.* at 294.

92. *Id.*

live up to a quite stringently defined standard of care. A 1990 Pennsylvania case illustrates the point. In *Jones v. Port Authority of Allegheny County*,⁹³ plaintiff Jones fell and injured himself when boarding a bus. Jones claimed that the bus started and stopped before he could sit down, and that this caused him to be injured.⁹⁴ The court held that the jury should be instructed that, because the Port Authority was a common carrier, it is held to a different and higher standard of care than persons are generally held to. Rather than a standard of "ordinary care," the court explained, the standard to which the Port Authority should be held is one requiring "the highest degree of diligence and care in the (operation of its vehicle) and the (maintenance of its equipment and facilities)."⁹⁵ *Jones's* holding correctly characterizes the common law standard for common carriers. Heightened standards have also applied, under the common law, to bailors and to innkeepers and to certain other enterprises of a public nature, on which consumers depend heavily for their safety.⁹⁶ The idea is that it is not good enough to use ordinary care: they must exercise the highest degree of care.

Unsurprisingly, the law contains less demanding standards, too. Famously, landowners at the common law had a duty to licensees, but the duty was quite narrow, far less than the duty of care owed to invitees. As to licensees, landowners were obligated to refrain from intentionally injuring them—presumably a reference to intentional torts—and to inform them of hidden dangers that the landowner knew of or should have known of, and that would not be apparent to a reasonable licensee.⁹⁷ And, of course, in some common law contexts, and in a variety of statutory settings, the law creates

93. 583 A.2d 512, 513 (Pa. Commw. Ct. 1990).

94. *Id.*

95. *Id.* at 514 (quoting, with approval, PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS).

96. 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 945-54 (1956). At least by the second edition, the treatise indicates that courts were generally repudiating the differentiation of care levels and trying to squeeze these supposedly different roles under the rubric of the reasonably prudent person. *Id.* at 945. However, notwithstanding the treatise's evident preference for that route as a matter of theory and its reference to unanimity among commentators against such differentiation, *id.* at 946 & n.13, it does in fact indicate the continuing existence of this differentiation.

97. RESTATEMENT (SECOND) OF TORTS § 318 (1965).

privileges or immunities that can be overcome only by a showing of "gross negligence."⁹⁸

These different varieties of care levels indicate that "ordinary care" is an idea deliberately selected by our system. It refers to something, albeit vaguely, and through the image of the reasonably prudent person. It is not simply a shorthand way of connoting optimal precaution taking.

4. Care Levels for Special Types of Relationships and Professions

In professional malpractice and in torts involving children, the standard of care is no longer that of the reasonably prudent *person*. As for children, it is typically altered so as to refer to the reasonable child of a particular age with the knowledge, skills, and judgment of a child of that age.⁹⁹

For a physician, it is typically altered in two ways. First, as with children, the prototype is the reasonable and competent physician in that area. Second, the language is not simply "ordinary care"; a physician is held to the *standard of care* for those in her field and her community.¹⁰⁰ Again, in both instances, the breach standard in negligence refers to a community norm of some form. Its meaning does not contain anything whatsoever about balancing risks and benefits, even if its application might do so.

5. Pairing with Duty

Finally, and in some ways most basically, "negligence" is expressly attached to the breach element of the cause of action for negligence, along with three other elements: injury, duty, and causation. The breach must be a breach of the duty to act with due care. In most cases, "ordinary care" is the answer to a question: What duty of care is due from defendant to plaintiff? "Ordinary

98. See, e.g., *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 468-69 (Colo. 2004) (recognizing that plaintiff may only recover in tort for the gross negligence of defendant if plaintiff has signed an agreement waiving liability of defendant).

99. RESTATEMENT (SECOND) OF TORTS § 283A (1965).

100. *Id.* § 299A.

care” is the duty that is owed to plaintiff by defendant in the run of the mill case.

The central point is that a cause of action in negligence exists only where the negligent conduct was a breach of a duty of defendant not to act negligently to plaintiff or the class of persons to which plaintiff belongs. This means that negligence cannot simply be a failure to reject a risk that will lower total expected utility or wealth. If there were a duty to comply with the Hand Formula, this duty would not be relational: it would not be a duty to plaintiff or the class of persons to which she belongs. It would be simply a duty, without a relational quality.¹⁰¹ But negligence law in fact has rich relational duties. The form of breach that actually applies to negligence law, therefore, must be such that we can think of it as failing to use care toward plaintiff. The duty to use ordinary care can be conceived of relationally in this manner: it is a matter of taking ordinary care toward plaintiff.¹⁰²

B. What About Cases in Which the Hand Formula Is Used or Could Be Used or Should Be Used?

Readers will be wondering how I can explain the fact that the Hand Formula is used, that it seems to make some sense, that famous judges have used it, that lawyers often use it to think through what their legal theories will be and what to argue to courts, and that English courts also appear to use some version of balancing in many cases¹⁰³—Do these phenomena not cut against the outright denial of the claim that the Hand Formula captures the meaning of negligence law? Recall that this Article is not intended to show that the Hand Formula is never used, or even to deny that it is frequently used. Nor is it intended to show that the Hand Formula should not sometimes be used or that the Hand Formula is somehow immoral.

101. See Mark Geistfeld, *Negligence, Compensation and the Coherence of Tort Law*, 91 GEO. L.J. 585, 629-31 (2003) (noting the relational quality of tort law).

102. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 685 (2001).

103. See Stephen G. Gilles, *The Emergence of Cost-Benefit Balancing in English Negligence Law*, 77 CHI.-KENT L. REV. 489 (2002).

First and foremost, a fact-finder who is asked what a reasonably prudent person would have done under certain circumstances has the right to think through that question however she wants, assuming she is really thinking about that. Thus, if Richard Posner were on a jury, trying to decide whether a defendant's conduct was tortious, and he decided that a reasonably prudent person's conduct would conform to the Hand Formula, he would be entitled to decide breach questions by applying the Hand Formula. And of course, that is what Judge Posner, sitting on the bench and reviewing breach questions, sometimes does. Similarly, Judge Hand, in an admiralty case like *Carroll Towing*, found the Hand Formula helpful in deciding whether there was fault.¹⁰⁴ As Stephen Gilles has recently shown, many English judges use a similar balancing approach in deciding whether ordinary care was taken in negligence cases.¹⁰⁵

I have argued above that it would not follow from the choice of fact-finders to use the Hand Formula on some occasions that this is the meaning of the Hand Formula, but the question still arises why, if the meaning is something else, the Hand Formula is ever used. The answer requires us to notice that, although negligence law contains many cases like the Waiter and Driver hypotheticals,¹⁰⁶ it contains many other cases that are the opposite. These are cases with the following attributes: (1) the defendant makes a deliberative choice to act without taking some precaution, and (2) fact-finders do not come equipped with any solid judgments about whether a reasonably careful person under such circumstances would have behaved this way. At least under such circumstances—and perhaps under others, too—the fact-finder needs a way into thinking about what ordinary care would require.

My own inclination is to think that a widely shared but highly amorphous norm of ordinary care is that a person deliberating over what precautions to take in a practical scenario of first impression ought to consider many different factors. These factors might include what precautions are available; how feasible or time-consuming or expensive these precautions are; whether physical injury or property damage or some other kinds of loss are at risk for

104. See *supra* notes 40-42, 46-56 and accompanying text.

105. Gilles, *supra* note 103.

106. See *supra* Part II.A.2.

the failure to take such precautions; in whom, in how many people, and to what extent the degree of risks exists without precautions; what range of precautions ought to be considered; how each of those would diminish or alter the risks; and whether one can reframe the issue so the dangerous activity does not need to go forward, if it is dangerous. Of equal importance, I think our norms of ordinary care would look to whether law, regulation, or professional or institutional standards would require some precautions, whether doing so is the custom, and whether anything has been said about it or others have relied upon it. These norms would also look to whether an understanding exists that such precaution is not being taken, or whether there has been notice of or public awareness regarding the particular risks in question. Surely, there are other factors, too.

In some contexts, this latter group of factors will probably not have much weight to carry. Here, versions of feasibility and burden of precautions, magnitude, extent, and nature of potential losses; various ranges of probability and risk alterations garnered by each potential precaution; and the possibilities of replacing the activity altogether will certainly constitute a large part of the decision of what reasonable prudence requires. In this type of scenario, therefore, the Hand factors should, and probably will, play a substantial role in thinking about whether there has been negligence. *But that is not because it is what negligence means.* Rather it is a subsidiary norm of reasonable prudence in a certain kind of scenario that one ought to take these considerations into account.

Note also that, even in this scenario, the fact of utilizing the Hand factors does not bring us to the Hand Formula, let alone a Posnerian economic analysis, even as a matter of what is to be thought through (leaving apart meaning). At least three reasons explain why. First, everything does not clearly fall into burden, probability, or loss. Economists, Heidi Hurd, and Michael Moore have made this point; the three factors are too few to capture this.¹⁰⁷ My own inclination is that the norm of deliberation that reasonable prudence requires is probably even more complex. Second, the balancing metaphor can be interpreted in various ways; as the aggregative version, which approximates what an act utilitarian would use to

107. Hurd & Moore, *supra* note 14, at 360-65 (describing an expansion of Hand Formula into eight-factor analysis).

evaluate the rightness of action, there is no reason to believe it captures what our norms of ordinary care require. Arthur Ripstein and Gregory Keating have spelled out what a Rawlsian version might look like.¹⁰⁸ As Stephen Gilles and Heidi Feldman have shown, Henry Terry's classic article on negligence does not contemplate a utilitarian-style aggregation, but is in fact a more pluralistic value inquiry that is not quite aggregative.¹⁰⁹ Third, there is no suggestion here that there is a single metric of value that is being maximized.

In some scenarios again, it would arguably comply with a norm of being reasonably careful to adopt a single metric and to adopt an aggregative analysis. For example, in *Rhode Island Hospital Trust National Bank v. Zapata Corp.*,¹¹⁰ then-Judge Breyer used an economic version of the Hand Formula in a banking case. The question was whether a bank used ordinary care to ascertain customers' check forgeries. The bank argued that its policy of random checking was reasonable, and it showed that the policy was far cheaper and only marginally less effective than—or perhaps as effective as—a system that looked at every check.¹¹¹ Affirming a District Court judge, and using the Hand Formula and cost-benefit analysis, Judge Breyer agreed with the bank. The financial burden of examining each check's signature was not warranted by the reduction of risk of forgeries, under the Hand Formula.¹¹² But note that the choice of an economic metric here was appropriate because of the nature of the interests at stake. And the aggregative method was appropriate because the bank customers—like the plaintiff in the case—would bear much of the increased cost of forgery-detect-

108. Keating's and Ripstein's forms of Rawlsian tort theory have substantial differences. Though Ripstein apparently believes a Rawlsian framework will illuminate the standard of care, and will involve accommodations of liberty and security, he does not appear to believe that a Rawlsian version of the Hand Formula is an important heuristic for the fact-finder, which is central to Keating's view. Compare Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811, 1812 (2004), with Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *FORDHAM L. REV.* 1857, 1865 (2004).

109. See Feldman, *supra* note 20, at 1442-43; Gilles, *On Determining Negligence*, *supra* note 16, at 826-27.

110. 848 F.2d 291 (1st Cir. 1988).

111. *Id.* at 294.

112. *Id.* at 295.

tion. There was thus little tension between the interests of the defendant and of the plaintiff.

To review: the main point here is that considering the Hand factors is a permissible method for fact-finders, and in some cases, a norm of being reasonably careful may require us to do so. But this is a substantive normative claim for a subcategory of cases—and in any case, it is probably not the Hand Formula and certainly not the Posnerian version. And as such, even where it may be workable, it is not the meaning of the negligence standard.

III. WHY IT MATTERS WHETHER THE ANALYSIS OF NEGLIGENCE IS ACCEPTED

If the Posnerian account of what negligence means is indefensible, that is something important to know in tort law and tort theory. *A fortiori*, it would be important to know whether the Hand Formula, as conceived by Judge Hand and many legal academics today, fails to provide—indeed, fails to permit—an adequate account of negligence.

This is for several reasons. First, Posner's theory of negligence and the Hand Formula is probably the most widely understood aspect of Posner's entire economic theory of tort law; it is emblematic of that theory, and it is the aspect of his view most widely communicated to law students.¹¹³ Obviously, it matters if this centerpiece is indefensible. More generally, the contention that the Hand Formula captures the meaning of negligence is central to generally instrumentalist and utilitarian conceptions of tort law. Again, if this supposedly prime contention fails to be supportable, that is significant.

Second, and relatedly, many instances of evaluation of various aspects of tort law and tort policy tend to take as a theoretical framework either a Posnerian economic framework or, at least, an instrumentalist account of how negligence law works. Thus, for example, economists evaluating strict liability regimes against negligence regimes tend to assume that the Posnerian interpretation of the Hand Formula captures the liability regime of the tort of negligence, and they tend to believe this based on the Posner/Hand

113. See, e.g., FRANKLIN, RABIN & GREEN, *supra* note 11, at 45-47.

analysis.¹¹⁴ Because one has strong reason to believe this assumption is false, the soundness of the analysis based on it is undermined. A particularly striking example of permitting the tail of the Hand Formula to wag the dog of negligence law is seen in some well-known work of Professor Kip Viscusi's; Viscusi infers from empirical studies that demonstrate layperson non-Hand-like judgments about negligence that permitting jurors to decide negligence cases may be problematic.¹¹⁵

Third, both economic and noneconomic proponents of the Hand Formula interpretation of the meaning of negligence find incoherences at many points in tort law, and based on this interpretation they argue for the modification of tort law. If, as I have argued, these interpretations are unsound, then the normative argument for modification of these pieces of doctrine is unsound. Of course, there may be other reasons for the modifications, so the modifications may themselves be salutary. But if they are recommended based largely on the misunderstanding of negligence, then there is a problem; modification proposals will need serious reexamination.

A long list of proposed modifications fit this description. Indeed, many of the features of negligence law that showed the inappropriateness of the Hand Formula have been used by Posnerians and instrumentalists more generally as reasons for modification of the tort law. Thus, for example, some scholars recommend reformation of jury instructions to include the Hand Formula.¹¹⁶ Many scholars reject a description of the difference between plaintiff's negligence and defendant's negligence.¹¹⁷ The law defining standard of care applicable to common carriers, for example, has been different from ordinary care, but courts have not known what to do with it, and so have sought to eliminate these different standards.¹¹⁸ And, as Goldberg and I have argued at length, a Hand Formula conception of breach has led twentieth-century scholars to favor a

114. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 883 n.3 (1998).

115. W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001). This is not to say that Hand-based or economic accounts of tort law could not credit the role of juries. See, e.g., Geistfeld, *supra* note 101, at 606-08.

116. Gilles, *On Determining Negligence*, *supra* note 16, at 856.

117. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 (2000).

118. See *Bethel v. N.Y. City Transit Auth.*, 703 N.E.2d 1214 (N.Y. 1998).

nonrelational conception of duty and has, therefore, led to an abandonment of duty as carrying any weight.¹¹⁹ All of these features of negligence law, and many others too, are on the agenda of the *Third Restatement* and other scholars as places for basic modification of tort law.¹²⁰ To emphasize, my claim is not that these proposed changes must be rejected; it is rather that they are misconceived and unjustified insofar as they purport to derive from concerns about the cogency of negligence law.

Finally, the contention that reasonable prudence designates the Hand Formula in the history of American tort law is frequently used not only to defend various policy proposals and doctrinal and theoretical claims, but also to defend moral and legal claims about how various agents should act. A longstanding and important debate exists over how actors should figure harms and risks to others into their decisionmaking; the debate is particularly protracted as to large corporate actors. Economists and noneconomists alike have pointed to the putative fact that the law of negligence puts the Hand Formula at its epicenter as a justification in favor of a certain kind of approach.¹²¹ Typically, it is used as justification for the appropriateness of aggregative cost-benefit analysis in corporate decisionmaking. Again, whether such analysis ought to be used in corporate decisionmaking, and if so, how, are difficult normative questions that I am not addressing here. But it should be obvious that the meaning of negligence in negligence law provides no support for this claim. The idea that it does is yet another sleight of Hand.

119. Goldberg & Zipursky, *supra* note 102, at 708.

120. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Tentative Draft No. 1, 2001).

121. Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1037-38 (1991).

IV. CANVASSING ALTERNATIVE THEORIES OF THE CONTENT OF NEGLIGENCE

A. Methodological Preliminaries

If the economic theory of the meaning of negligence is false, and even the more general Hand standard theory of negligence is false, what theory is true?

First, why do we need a theory? We do need to describe what the law of negligence is, and we do need to be able to say enough about the meaning of negligence for lawyers and jurors and judges to work with, and for lawyers to advise clients on in counseling. It is not obvious that the law, without theory, is inadequate to these tasks. I am not so sure we do need a theory, but let us talk about why having one might be helpful. Law professors want to be able to explain negligence law to their students. Theory is helpful for that. Also, our courts sometimes have to extend parts of negligence law, and our courts—and legislatures—should often be evaluating parts of negligence law. Understanding tort law at a more theoretical level should help us in the justificatory and evaluative enterprise. And it should help us decide whether we think the law is sound. Notice, however, that thinking through these rationales for looking for a theory might well have implications for the sort of theory one wants and the urgency—or lack thereof—of producing one. Let us leave these questions to one side, and survey the possibilities for a theory going forward.

B. Right, Convention, and Virtue

Three alternative theories of the meaning of negligence have been offered by tort theorists in recent years: rights-based thinking, virtue ethics, and conventionalism. I shall suggest briefly in what follows that, although each has something important to add to thinking about the meaning of negligence, none provides a complete theoretical framework.

The most prominent alternative to utilitarian theories of normative ideas, within both moral theory generally and interpretive legal theories in particular, have been rights-based and deontological

theories in the spirit of Kant.¹²² Somewhat confusingly, rights-based notions in tort theories have been merged, variously, with Aristotelean corrective justice theories,¹²³ Rawlsian fairness-based contractarianism,¹²⁴ Strawsonian constructivist theories of responsibility,¹²⁵ and a variety of other views. Thankfully, we need not enter into this territory, because our question is not about the structure of an entire tort theory. It is about the theory of the meaning and content of the standard of care in negligence law. On this point, I believe, there is more harmony among rights-based theorists.

Rights theorists as diverse as Gregory Keating,¹²⁶ Arthur Ripstein,¹²⁷ Ernest Weinrib,¹²⁸ and Richard Wright¹²⁹ seem to agree upon the following, frankly Kantian, view: individuals are entitled, as a matter of political morality, to a substantial level of respect and vigilance for their physical integrity—as well as their property. The standard of care of negligence law is best understood as an effort to capture this moral idea. The standard requires that risks not be taken to someone's physical integrity that are inconsistent with that level of respect and vigilance. The fact that great benefits for others, or for oneself, might flow from taking substantial risks to a person or small group of persons cannot justify the taking of that risk. In this sense, the rights-based notion exemplifies the Kantian injunction against treating persons as means, the Rawlsian respect for the separateness of persons, and the Dworkinian notion of rights as "trumps."¹³⁰ That is, the rights-based analysis of the content of the standard of care in negligence law claims that this standard exemplifies these ideas, a claim that appears to be—and, I believe, is—inconsistent with the Hand standard analysis of reasonable care as interpreted by Posner.

122. See, e.g., CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* 207-36 (1970).

123. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 58-66, 114-44 (1995).

124. See, e.g., Keating, *supra* note 13, at 318-21.

125. See, e.g., Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 500-02 (1992).

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

127. Ripstein, *supra* note 108, at 1832-33.

128. WEINRIB, *supra* note 123, at 114-44.

129. Wright, *supra* note 8, at 145-46.

130. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977); JOHN RAWLS, *A THEORY OF JUSTICE* 175-82 (1971).

The rights-based theorists, of course, recognize that risks must be taken if life is to go on, and they take seriously the idea of *reasonable* care—as opposed to all possible care, for example. But rather than aggregate the benefits of the risk and weigh them against the probable losses, as a utilitarian or a Posnerian would, the rights-based theorists imagine that the reasonable care standard must respect the right to physical integrity while simultaneously respecting an adequate sphere of liberty of conduct: to overemphasize risk is to undercut the right to act. And so the standard of care, at least as a matter of principle, is an objective constraint that recognizes every person's equal right to have his or her bodily integrity respected without being foreclosed from a proper sphere of liberty of conduct. Although this resembles the Posnerian/Hand standard because it accommodates both the need for action and the need to be free of harm, it differs because it does not aggregate well-being. It recognizes the separateness of persons. It is not based on preferences, but on bodily integrity as a primary good; it is similarly based on basic but nonpreference-based notions of proper spheres of liberty and equal treatment of all. Weinrib, Wright, Ripstein, and Keating have each provocatively suggested doctrinal differences that the rights-based notion of negligence might make, both descriptively and prescriptively.¹³¹

Patrick Kelley's conventionalist account of the content of negligence law seizes on several features of negligence law that are clearly quite important to the institutional entrenchment of tort law.¹³² First and foremost, the language of negligence law and, as Kelley and Wendt have shown in the research that I referred to above, the language of jury instructions, use the word "ordinary" in setting out the standard of care.¹³³ "Ordinary" connotes "what is done" and what is "usual." Kelley asserts that negligence law envisions community standards of care, ones to which the relevant community conventionally adheres. The standard to which defendants are held is the care level that is conventional within the relevant community.¹³⁴ In American negligence law, Kelley suggests, the function of a jury, which is a cross-section of the community, is

131. See *supra* notes 126-29.

132. Kelley, *supra* note 15.

133. Kelley & Wendt, *supra* note 15, at 595.

134. Kelley, *supra* note 15, at 381.

to evaluate what the conventional community standard of care is and to ascertain whether the defendant has lived up to it.¹³⁵ Jurors are fact-finders on breach precisely because they are well equipped to tap into the conventions of care extant in the community.

Heidi Feldman's "prudence"-based account of the standard of care is different from both the rights-based and conventionalist accounts.¹³⁶ Though the conventionalist account seizes on the centrality of the social phenomenon of convention, and the language of "ordinary care," the prudence-based account focuses on the individual/moral concept of the virtue of the prudent person and the language of the "reasonably prudent" person.¹³⁷ Feldman suggests that negligence law envisions a person with the moral virtue of prudence and defines the standard of care by reference to that person.¹³⁸ Building on a rich literature in moral philosophy and moral psychology that revitalized virtue theorists of Aristotelean moral philosophy, Feldman offers a twist on the rights-theorists' use of moral theory. Like them, she suggests that an adequate interpretation of the duty of reasonable care cannot be obtained without drawing from moral theory; unlike them, she rejects deontology in favor of virtue theory, at least for the understanding of what the standard in care of negligence law requires.¹³⁹

Each of these kinds of theory merits greater attention than space permits. My point here is not to refute them but merely to suggest reasons to be concerned about their adequacy and reasons to look for an alternative. Rights-based theories are insufficiently attentive to extant social norms, poorly suited to explain jury competency, and unlikely able to explain why they should be able to illuminate the centrally important idea of what "ordinary care" requires and the pervasive normative incrementalism of negligence law. Conventionalism, by contrast, has the opposite problem: although well-suited to jury competency and attentive to social norms, it leaves juror normativity out of the picture, but leaves insufficient room for the *T.J. Hooper* rule that custom is not dispositive of standard of care.¹⁴⁰

135. *Id.* at 380.

136. Feldman, *supra* note 20.

137. *Id.* at 1432-33.

138. *Id.*

139. *Id.*

140. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

Of equal importance, conventionalist accounts do not adequately explain the central role of the prototype of the reasonably prudent person, and they do not explain how the reasonably prudent person standard can function if community convention does not offer any decisive answer.

In many respects, the virtue theory overcomes the problems of the prior two approaches. It is particularly promising because it gives a central role to the concept of a reasonably prudent person, and it selects for the standard of care concept one that relates to a family of concepts that puts an exemplar of some attribute in a position to provide content for the concept more generally. Moreover, although it builds in normativity, it leaves much more space for explaining the incrementalist judgments and circumstance-based evaluation than the rights-based approach does. A fundamental problem of the virtue approach, as Kelley and Wendt have anticipated, is that virtues are excellences, and the concept of ordinary care is something much less high-reaching than an excellence.¹⁴¹ It is also unclear whether jury competency and the relevance of social norms will be adequately handled by the virtue theory.

V. ORDINARY CARE: A CIVIL COMPETENCY THEORY

Can these diverse theoretical strands be woven together in a manner that captures the concept of negligence? Perhaps. I will leave to another occasion the effort to construct such a theory in any detail. Here I will simply try to suggest why I am optimistic about such a synthesis.

As the foregoing indicates, in certain respects Feldman's virtue-based view is remarkably well-suited to account for the idea of negligence, but in other respects it is the opposite. It is extremely promising insofar as it takes seriously the idea that negligence is to be understood in connection with a kind of exemplar of reasonable prudence; it is disappointing insofar as it tries to connect that exemplar with the excellences of virtue theory. Similarly, convention theories are promising insofar as they take seriously the connotation of "ordinariness," as well as the significance of social norms. They are disappointing insofar as they try to lock the

141. Kelley & Wendt, *supra* note 15, at 621-22.

meaning of negligence into a depiction of compliance with custom. Finally, rights-based theories are promising insofar as they take relational duties seriously, recognize that due care can sometimes have a kind of prioritization, and treat certain kinds of needs of others as demanding special attention. The theory is unpersuasive, however, because it depends too highly on the legal decision makers' exercise of moral judgment and leaves too little room for circumstance-bound, custom-bound judgments of degree.

A plausible synthesis of these would link the strengths of all three. Thinking about negligence, as Feldman indicates, involves reference to a certain kind of figure whom we imagine.¹⁴² This figure—the reasonably prudent person—has a quality of reasonable prudence, and exercises that quality both in deliberation and in execution. But the quality does not necessarily rise to the level of an excellence or a virtue. On the contrary, it is a quality we each expect of ourselves and of others. It is part of being well-socialized. It is a baseline, not a pinnacle. Although reasonable prudence is valuable for oneself, it is clearly a quality from a social point of view, too. And its absence—negligence, or the lack of reasonable prudence—is a shortcoming insofar as it is an enduring feature of someone. More to the point, however, when someone acts in a manner that does not display reasonable prudence, the action is to that degree criticizable. That is what we call negligence.

What does reasonable prudence consist in? In part, it consists in *diligence*. More broadly, the quality of being reasonably prudent is to a significant extent a form of social or civil *competency*. A society socializes its members to be honest and truthful and reliable. It also socializes its members to be careful. The reasonably prudent person is a reasonably careful person. As conventionalist theorists have pointed out, according to some social norms one is expected to constrain one's risky activities so as to diminish the risks to others. The quality of being a reasonably prudent person is the quality of being a person who competently negotiates and complies with those norms. But just as the virtue of honesty is not wholly captured by the idea of complying with norms of truth-telling, so the idea of reasonable prudence is not captured by compliance with these conventions. Just as honesty is an underlying character attribute

142. See generally Feldman, *supra* note 20.

that rises above compliance with some norm or another, so reasonable prudence is an underlying attribute that rises above one rule or another of being careful.

To some extent, the activity of driving illustrates the concept of competency I have in mind. Being a reasonably careful driver is certainly a kind of competency. The competency here combines skill, socialization, and compliance with certain conventions, as well as law. It is tenable to conceive of judgments of negligence in connection with the competent driver under the circumstances. Occasions of negligent driving certainly occur even with competent drivers; the question, in a negligence case involving a defendant's driving, is not whether the driver herself was competent, but whether the allegedly negligent conduct was prototypical of the competent driver. As thinkers from Henry Terry to Heidi Feldman have pointed out,¹⁴³ negligence is a concept we utilize by referring to this prototypical figure.

In another respect, however, the competency of drivers is too thin to explain the concept of the reasonably prudent person. Like the surgeon, the driver is an important example for thinking about care in the executive scenario; of the pairing "reasonably careful" and "reasonably prudent," driving works particularly well for "reasonably careful." It works less well with "reasonably prudent," because prudence makes avoiding the difficult challenge of explaining the deliberative aspect of negligence harder. Here, the notion of competence—at least if interpreted in terms of skill, socialization, and compliance with convention—falls short of capturing "prudence."

What is interesting about both the virtue conceptions of prudence and the social norms regarding prudent conduct is that they do not simply relate to skill or performance; they relate also to the very activity of taking others' well-being seriously in conducting oneself. A reasonably prudent camper at a public campground in the wilderness, for example, would put out her fire before leaving her campsite; this is a matter of socialization, skill, and convention. But the reasonably prudent camper would also not leave trash or debris that included bits of meat at her campground after she left, rules or no rules. She would be alert to the risk of attracting wild animals,

143. See Feldman, *supra* note 20, at 1442-43 (quoting Terry, *supra* note 65, at 261, 263-64).

and to the risk this presented to other campers after she left. Part of being reasonably prudent, under such circumstances, is being able to think through an appropriate way to behave that does not unduly imperil others. And this is not simply a question of skill or intelligence or foresight, though it frequently involves these. A person who is skillful, intelligent, and capable of reasonable foresight might nevertheless not even consider the risk to others of leaving trash with meat, or, if she thought of it, might not care. Reasonable prudence here involves being other-regarding to a certain extent.

Deontological accounts of reasonable care begin to capture the other-mindedness that goes into reasonable prudence, or the reasonable prudence of our common law of negligence. So, too, do virtue accounts of prudence. But the deontological account comes closer to capturing the idea of a baseline, rather than an excellence. The concept of "reasonable" prudence is not, to repeat, an excellence. It is an idea of a satisfactory or adequate level of prudence, and in this context, it means an adequate consideration of others. So my own view would be, in the trash-with-bits-of-meat case, that there is no question that one should not leave the trash, and it would be imprudent to do so. But if this were a tort action after a bear drawn to the campsite mauled those in the tent near the garbage, putting duty questions aside, I think it would probably be a jury issue on the question of ordinary care, because ordinary care is not all that high a standard.

Is this really a concept of competency, even if it also includes both the intellectual capacity and the moral disposition to constrain one's conduct in order not to cause harm to others? Does it not beg the question of the desirability of this attribute to call it a "competency"? One need not be a conventionalist or some kind of moral realist to suppose that it *is* a concept of a certain kind of person. It is perfectly cogent to suppose the following: our tort system invites fact-finders to make judgments on conduct by asking them to compare the conduct to a prototype of a kind of person, and that kind of person is an amalgam of a set of abilities, skills, dispositions to satisfy certain social conventions, and dispositions to take possible injuries to others seriously in their deliberations and their conduct. That is, indeed, precisely what the common law of negligence appears to do.

The concept of reasonable prudence as a competency, rather than a virtue, is the idea that the shortcoming of negligent conduct should be conceived as conduct that deviates from what may be expected of an ordinary citizen in society. The concept is derivative of a kind of character, but a character that we envision as good enough, not great. Part of being good enough—being competent as a member of society—is being sufficiently other-minded that one's conduct and one's dispositions are adjusted to not harming others. More particularly, part of being competent as a member of society is complying with an obligation to others to temper one's conduct so as not to injure them. What is that scope of the obligation to others to temper one's conduct so as not to injure them? The answer—ordinary care—takes us back to the reasonably prudent person. But that is just to say that the answer is, to a certain degree, “like this”; it involves conceiving of a prototypical figure, and how she or he would behave.

A civil competency theory of the standard of care promises many advantages. Most obviously, it genuinely captures the language used in jury instructions, for it is structured around the idea of a care level that we expect of one another in society and that—as Lord Alderson suggested—such a level of competency involves being “guided upon those considerations which ordinarily regulate the conduct of human affairs.”¹⁴⁴ Because it is designed to capture the concept of reasonable prudence as something less than a virtue, but nevertheless a commendable attribute of an ordinary socialized person, it is also apt to capture the idea of “ordinary care.” And because it is designed around a prototype, there is reason to think it can admit of incremental judgment, and accommodate the notion of a thought experiment in which a juror contemplates the reasonably prudent person under the circumstances.

Second, the civil competency notion is entirely comfortable with both inadvertence and advertence in negligence. Insofar as it draws upon an idea of competency in skill and execution, it makes room for the inadvertence. But because civil competency also requires an attitude of taking others seriously, and a capacity to work through decisions with that attitude, it also handles cases of advertence.

144. *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047, 1049.

Third, nothing is odd about the idea that, in some contexts, tort law might set the standard of care higher than that of a person with what I have called civil competency. Those who are involved in highly dangerous enterprises, with which they are better acquainted than their customers or consumers, with which they are better able to take precautions, from which they profit, and in whom trust is placed, might plausibly be held to go beyond what we require of one another merely as a matter of competency. Relatedly, it is perfectly cogent for courts to think about higher and lower degrees of care. Lower degrees of care, for example, may be proper if it is desirable to constrict liability for policy reasons, and yet to leave a modicum of liability where particularly egregious conduct just short of intentionality is involved; here, gross negligence is significantly below a failure to comply with the conduct of an ordinary person who diligently and competently conducts herself. Similarly, higher degrees of care may be proper for professionals and those who undertake highly risky enterprises. Such people are relied upon to exercise abilities and skills, and utilize knowledge, far above what is a matter of being a diligent, socialized, and civil adult operating as such.

In the fourth place, a civil competency notion of negligence leaves room for a relational conception of duty in a way that the Hand Formula does not. For the question arises as to who is within the ambit of persons to whom a duty of vigilance is owed. The failure to take care not to inflict injury upon another is not actionable by that other unless there was a duty running to that person or the class of persons to which she belongs. Underlying the value of taking care is the fact that one is taking care not to injure others; conversely, the actionability of a victim's injury by a tortfeasor depends upon the tortfeasor's having failed to take the care owed to her. As argued above and elsewhere,¹⁴⁵ this makes no sense on a Hand Formula conception of negligence. On the notion sketched above, it does make sense; part of the nature of the civil competency is taking seriously, and integrating into the guidance of one's behavior, the possibility of injury to others and the need to avoid that. The "others" are not an amorphous mass of possible injury victims, but an overlap of individuals and classes of individuals whom the civilly

145. See *supra* Part II.A.

competent person recognizes—or should recognize—as beneficiaries of her prudence. The claim here is not that a notion of civil competency in and of itself precludes a nonrelational conception of duty—I believe Holmes’s conception of negligence may indeed have been a nonrelational civil competency notion. The claim is that a Hand Formula conception precludes a cogent relational conception, but a civil competency notion does not.

It is important to note that the civil competency notion of negligence does not preclude acceptance, in certain scenarios, of a risk/benefit balancing norm as a norm that the reasonably prudent person would utilize, or would guide her conduct under novel circumstances in which decisions had to be made about precaution levels. Plainly, a juror or judge could adopt such a framework in thinking about how a defendant ought to have conducted himself. But this is not a matter of what “negligence” or “ordinary care” or “reasonable prudence” *means*, but what, under certain kinds of circumstances, *it might require*. From a few academic thinkers in the early twentieth century, through Richard Posner, to innumerable torts professors today, the allure of the risk/benefit balancing as a norm of prudence has been sufficiently powerful to obscure from sight the fact that negligence is about a more basic idea of using ordinary care, an idea that has content and structure of its own.

Finally, a civil competency notion of ordinary care promises more than a better doctrinal account of negligence law. As John Goldberg and I have argued in response to Calabresi’s *The Costs of Accidents*—ironically, Posner’s own target—a theory of the common law of torts ought to be able to explain in what sense tort law is integrated into the practices and mores of social life;¹⁴⁶ this is part of what tort law is as a form of common law. This should go beyond Calabresi’s efforts to depict tort law as something other than command-and-control. To his credit, Posner strove to do just that in this own theory of negligence law, trying to explain in what sense both judges and actors were, in what we regard as a highly improbable mix of Hegel, Holmes, and Adam Smith, driven toward a set of customary behaviors that tends toward efficiency.¹⁴⁷ For reasons

146. See CALABRESI, *supra* note 26; see also John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 395 (2005).

147. See Posner, *supra* note 10, at 32-33.

explained here and elsewhere, that picture is not, at the end of the day, plausible.

A civil competency notion points in the right direction. Negligence law is not best understood as standing on its own two feet as a device for deterrence and compensation. It is best understood as an institutionalized, proceduralized, rule-bound set of norms and powers that play a complementary role to a broader set of social practices, norms, and social mores. We understand one another as bound to conduct ourselves with a level of care toward others; we understand ourselves as owed such care by others. Insofar as we are players in a mutual social enterprise of activities in a civil society, that enterprise requires a level of maturity, competency, and considerateness in our activities. The reasonably prudent person is such a player, created through education, socialization, and convention, and supported by the law. Part and parcel of the idea that such mutual care is a basic expectation of one another is the idea that to injure someone through failing to take such care is to wrong that person. That is the wrong of negligence. Because the actionable wrongs of negligence law are in this manner intertwined with what we expect of one another, what we take to be "those considerations which ordinarily regulate the conduct of human affairs,"¹⁴⁸ negligence law and social norms of responsibility play a mutually enforcing role.

CONCLUSION

Learned Hand's famous opinion in *Carroll Towing* intelligently finessed a tricky question in an admiralty case by demonstrating that the standards for proper care of one's barge would have to vary with circumstances.¹⁴⁹ Ever attracted by the appearance of analytical clarity, Hand advanced his argument by briefly suggesting an algebraic inequality: is $B < PL$? None of this should have been particularly controversial, nor was it when this relatively unimportant case was decided in 1944. During the 1950s and 1960s, however, tort law underwent a massive change, in which the concept of negligence fell into deep disfavor among leading academ-

148. *Blyth*, 156 Eng. Rep. at 1049.

149. See *supra* notes 36-55 and accompanying text.

ics. In part for political reasons, in part for economic reasons, and in part because of the dim view that academic thinkers in law and social science took of ordinary moral vocabulary, the moral connotations of "negligence" drove leading tort scholars to doubt the very idea and structure of a law of negligence.¹⁵⁰

Into this environment entered Richard Posner—lawyer, not economist—evidently displaying somewhat different political leanings than those, like Calabresi, who pushed toward a regime of strict liability.¹⁵¹ Posner asked whether negligence law really was a formless charade, whether the concept of negligence was merely an emotive shell covering incoherence. When it was written, *A Theory of Negligence* was intended to provide an emphatic "no" in answer to that question.¹⁵² Drawing upon the legendary Learned Hand, and taking central provisions from the *First* and *Second Restatements of Torts*, Posner reinvigorated the notion that "negligence" meant something and that negligence law hung together as a coherent whole. He did this by making the Hand Formula the core of negligence.¹⁵³

Unfortunately, Posner's utilization of the Hand Formula turns out to be indefensible sleight of hand, as I have called it.¹⁵⁴ But this is not to say that he was wrong about the cogency of negligence law; he was right about that, albeit for the wrong reasons. Negligence law is, as it purports to be, about ordinary care. Ironically, the challenge of accounting for ordinary care turns out to be, in many ways, greater than the challenge of generating an account friendlier to expert conceptions of care owed. But we should be encouraged by the fact that, if a genuine account of ordinary care can be constructed, we will have done what we need to do without venturing into the territory of abstract moral theory. And we will have done so without sleight of hand.

150. See Posner, *supra* note 10, at 29-32.

151. See *id.*

152. See *id.*

153. See *id.*

154. See *supra* Part II.