

Sleight of Hand

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I. 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 While 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. It is thus unsurprising that 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. 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.

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 a negligence case at all; indeed, it

* Professor, Fordham Law School. Thanks to Fordham University for research support. I am grateful to Mark Geistfeld, John Goldberg, Michael M. Martin, Arthur Ripstein and Joseph Sweeney for helpful conversations on this paper over the past several months and years. Although the ideas in this paper connect, in my view, quite closely with my ongoing research projects with John Goldberg on the nature of negligence law and tort law more generally, all errors here are my own.

¹ See generally, Gerald Gunther, *Learned Hand: The Man and the Judge* (1994).

² 159 F.2d 169 (2d Cir. 1947).

is not even a tort case, but an admiralty case. Beyond that, the allegedly unreasonable conduct in that case involved a plaintiff's carelessness, not a defendant's carelessness;³ even the very general idea of a wrongdoer being held responsible to those it has injured is not implicated in *Carroll Towing*, because it is about plaintiff's fault. And in both *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. 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, and it is easy to 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's launched the most illustrious phase of his remarkable 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*,⁴ 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. Moreover, because there is a twinkling of algebra and efficiency lurking

³ In the language of admiralty law at that time, the "libellant" (seeking compensation for damages), not the "respondent" (from whom compensation was sought).

⁴ Richard A. Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972). See also, William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987).

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. The Restatement (Third) of Torts: Liability for Physical Harm expressly embraces a version of the Hand formula, but stops short of a fully economic interpretation of it.⁵ While 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.⁶ 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.⁷

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

⁵ Restatement of the Law Torts: Liability for Physical Harm, Proposed Final Draft No. 1 (April 6, 2005) §3.

⁶ 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 (1996) (adopting social contract interpretation of the Hand formula).

⁷ See, e.g., Heidi M. Hurd & Michael S. Moore, Negligence in the Air, 3 Theoretical Inquiries in Law 333 (2002).

and reasonable, in thinking about which precautions to take, to consider precaution cost, probabilities of injuries, and magnitude of injuries. And it is true that the reasons against taking the precaution tend to increase with its cost, and in favor of the precaution tend to increase with the reduction of injury likelihood or severity that the precaution would effect, all else equal. 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 a 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 account of the standard of care has been displayed by Patrick Kelley,⁸ Stephen Gilles,⁹ Gregory Keating,¹⁰ Richard Wright,¹¹ Michael Green,¹² Heidi Feldman¹³ and numerous¹⁴ others.¹⁵ 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 has called

⁸ Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 *Clev. St. L. Rev.* 315 (1990); Patrick J. Kelley & Lauren A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 *Chi.-Kent L. Rev.* 587 (2002).

⁹ Stephen G. Gilles, *The Invisible Hand Formula*, 80 *Va. L. Rev.* 1015 (1994); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 *Vand. L. Rev.* 813 (2001).

¹⁰ Keating, *supra* note 5.

¹¹ Richard W. Wright, *The Standards of Care in Negligence Law*, in *Philosophical Foundations of Tort Law* 249-75 (D. Owen, ed. 1995); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 *Theoretical Inquiries L.* 145 (2003).

¹² Michael D. Green, *Negligence = Economic Efficiency: Doubts >*, 75 *Tex. L. Rev.* 1605 (1997).

¹³ Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 *Chi.-Kent L. Rev.* 1431 (2002).

¹⁴ 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.

¹⁵ Unlike the other authors cited in the list in the text, 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.

it, a “myth,”¹⁶ 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. This is presumably what Posner came to realize when he began talking about “overcoming law”;¹⁷ he has begun to recognize, more clearly, that he is in the bind of wondering whether there is really law for him to see, since his reductive accounts of what the law says are implausible, and he refuses to countenance those versions of the law that take its content seriously. Posner’s radical philosophical skepticism about the normative language of the law makes him blind 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 I have argued at length elsewhere – then neither he nor others should be taken in. Breach in negligence law is to be judged by the ordinary care standard, and there is no evidence 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*, it appears that Posner 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

¹⁶ Wright, supra note __ [Hand, Posner, and the Myth of the “Hand formula”].

¹⁷ Richard A. Posner, *Overcoming Law* (1995).

rooted trend in the legal academy that was getting in the way of clear thinking about negligence law.¹⁸ He sought to look at the body of actual tort cases to undermine this way of thinking. He particularly thought it critical to take the concept of “negligence” seriously, 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. And he identified as a cause of the problem legal scholars’ concerns that the language of negligence was too “moralistic.”¹⁹ 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 II begins by with the two pieces of writing I have mentioned: Hand’s famous opinion in *Carroll Towing*, and Posner’s seminal article, *A Theory of Negligence*. The central point of Part II 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 III.A offers the central critical argument of the article: there is an abundance of evidence in negligence law that the Hand formula simply fails to capture the concept of negligence. The evidence consists in the jury instructions given across the country: the commonality of words and concepts in those jury instructions, and their tendency to

¹⁸ Posner, *supra* note __, at 29-32, esp. 30 notes 1 & 2. Calabresi’s critique of negligence law is a major antagonist of Posner’s in this article.

¹⁹ *Id.* at 31.

refer to a particular, overlapping concepts – that of ordinary care and reasonable prudence or carefulness – that do not bear any particular conceptual connection to the Hand formula; 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; the existence of a spectrum of care levels in negligence law that are of a similar kind (but different stringency than) ordinary care, but make little sense as contrasted with the Hand formula; the continuity between breach standards in non-professional 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; 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 that 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 III.B explains why, notwithstanding the evidence that the standard of care in negligence law is not at all captured by the Hand formula, one nevertheless finds some courts using the Hand formula to think about negligence, and doing so appropriately. Together, Parts IIIA and IIIB establish that, while 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 IV 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 is one that 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. These critical and revisionary arguments are also unsound (at least on that ground) if the Hand formula does not in fact occupy a central 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 decision-making. 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 V and VI 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 a void. For this reason, Part V reviews many of the most important non-Hand theories of negligence: rights based and corrective justice accounts, conventionalist accounts, and virtue. All have significant strengths and weaknesses as interpretive accounts of the concept of negligence or due care in negligence law.

Part VI 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 – reasonable prudence – 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, to conduct oneself 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.

II. 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.²⁰ 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 where they are relevant, breach is more likely as B diminishes and less likely as P and L diminish. Indeed, insofar as *Carroll Towing Company* genuinely relies on an analysis of the role of B, P, and L in reasonableness

²⁰ *Carroll Towing*, 159 F.2d at 173. “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 less than PL.”

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: (i) 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 ; and (ii) 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. Judge Hand's focus was on (ii). The owner of the tug (*Carroll Towing Co.*) 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, *arguendo*, it could recover at all. 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. Hand recognized that this was not really a decision about the care owed to others, but rather whether "it was a failure in the Conner [sic] Company's proper care of its own barge."²¹ However, Hand reasoned that if a bargee's absence could be a ground of liability to others in these circumstances, then it could be a ground for finding a failure in the Company's care for its own barge, and then proceeded to analyze the issue in terms of whether it could be a ground of liability to others.²²

²¹ *Carroll Towing*, 159 F.2d at 172.

²² *Id.* at 173.

The Connors Company had argued to District Judge Moscovitz that many Second Circuit precedents had addressed the question of whether it is was a ground of liability not to have a bargee on board. And, it had asserted, the Second Circuit had decided the issue: it is *not* a ground of liability for the bargee to be absent. On the strength of these precedents, the District Judge had sided with the Connors Company, and had held that the absence of the bargee could not count as negligence.²³ That determination by the District Judge was one of the principal points of appeal against the Connors Company.

Judge Hand decided, as pre-decision memoranda reveal, that he would reject the Connors' Company's argument and reverse on this point.²⁴ It appears that Judge Chase 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. As Prof. Gilles has observed, it seems that Hand was interested in establishing that the District Court made an error of law by supposing that there was a general rule against using the absence of a bargee as a reason for imposing liability. 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.²⁵ "It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. . . the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables."²⁶ 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, there could

²³ *Connors Marine Co. v. Pennsylvania RR. Co.*, 66 F. Supp. 396, 398 (S.D.N.Y. 1946) (Moscovitz, D.J.).

²⁴ I rely, in this draft, on Gilles' accounts of the Hand documents from the Hand archives. See Stephen G. Gilles, *United States v. Carroll Towing Co.*, *The Hand Formula's Home Port*, in *Torts Stories* 11-39, 19-21 (R. Rabin & S. Sugarman, eds. 2003).

²⁵ *Carroll Towing*, 159 F.2d at 173.

²⁶ *Id.*

not be a hard and fast rule that worked for every case. 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: “we hold that 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.”²⁷ Once addressing the question, on these facts, he determined that it was fault for the bargee to be absent in this case. Notably, his decision that it was for the bargee to be absent did not emerge from any consideration of B, P, and L; it related, indeed, to Hand’s suspicions based on the bargee’s lying.²⁸

Thus, in his own clever (though non-misleading) legerdemain, Hand used the variability of circumstances as a reason not to defer to the lower court’s decision that there was no basis for diminishing the libellant’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. Hand used the Hand formula to illustrate the point that whether a bargee’s absence was 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 respondents could use, under the doctrine of both-to-blame reductions in

²⁷ Id.

²⁸ 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 that time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence.”)

maritime law, to diminish the libellant's recovery.²⁹ 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*³⁰ is whether he intended to be using the Hand formula as an illustration of a particular way of deciding whether there was negligence 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."³¹ Judge Hand, Posner suggests, "was adumbrating, perhaps unwittingly, an economic meaning of negligence."³² 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

²⁹ See Nicholas J. Healy & Joseph C. Sweeney, *The Law of Marine Collision* 303-05 (2d ed. 1998). At the time *Carroll Towing* was decided, the rule in force was the federal common law (maritime) rule of the United States Supreme Court in *The Schooner Catharine v. Dickinson*, 58 U.S. 170 (1854), which divided damages equally where the libellant and the respondent were both to blame. In the context of *Carroll Towing*, where libellant had sought a 50/50 split between two responsible respondents, the determination of some form of fault or blame on the libellant's own part led to an equal, three-way split of responsibility.

³⁰ 1 J. Leg. Stud. 29 (1972).

³¹ Id. at 32. (emphasis added)

³² Id. (emphasis added)

have exceeded the cost of the 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.”³³

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 there are negative moral overtones to these terms, since 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 precautions that would be warranted from the point of selecting cost-justified precautions. Richard Wright and others have demonstrated that Hand’s sprinkling of other opinions mentioning or using the Hand formula are no more helpful.³⁴ Though it is perhaps a bit dismissive to say so, it is not worth debating whether Posner’s comments here on the moral connotations of “negligence,” are persuasive; as John Goldberg has pointed out, they plainly are not;³⁵ 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 the indignation; it is much more a resentment of persons who do not take others’ needs seriously.

So what supports the Hand formula? Of course, as a rights-based philosopher of law, it is tempting to say that rampant utilitarianism and reductionistic thinking is the cause of this misconception. Although, there is more than a grain of truth in this, it is

³³ Id. at 33.

³⁴ See sources cited in note ___, supra. Wright’s analysis of Hand’s eleven opinions leaves no room for rehabilitating a central place for the Hand formula by reference to Hand’s other work. See Wright, “Posner, Hand”, supra note ___.

³⁵ John C. P. Goldberg, *Twentieth Century Tort Theory*, 91 *Geo. L. J.* 513, 553 (2003).

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; 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,"³⁶ and then placed by the American Law Institute into the First Restatement of Torts;³⁷ Hand was a cofounder of the American Law Institute, and quite deliberately incorporated an algebraic variation of this idea in *Carroll Towing*; the balancing in some form also recurs in the Restatement (Second) of Torts.³⁸ 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. The central claim of the next part – and really the central claim of this article – is

³⁶ Henry T. Terry, *Negligence*, 29 Harv. L. Rev. 40 (1915). See Green, *supra* note __, at __, for a brief discussion of Terry's largely undocumented identity and history. Feldman, *supra* note __, as well as Moore and Hurd, *supra* note __, at __, indicate that there was significantly greater complexity in Terry's own balancing framework than the Hand formula suggests.

³⁷ Restatement (First) of Torts § 291 (1934). See also *Chicago, B & Q. R. Co. v. Krayenbuhl*, 91 N.W. 2d 836 (Neb. 1902) (while setting forth reasonable and prudent person standard, also discussing negligence in terms of the balance of advantages and disadvantages of precaution). Green, *supra* note __, and Gilles, *supra* note __, both reach the conclusion that the Reporter for the Restatement (First) 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.

³⁸ Restatement (Second) of Torts § 291.

that the very idea of the Hand formula, economic or non-economic, is fundamentally ill-suited to capturing the meaning of negligence in American tort law.

III. Evidence on Whether The Hand Formula Captures 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, be it economic or non-economic form. But that claim is not largely my concern in this paper. My aim is to scrutinize the claim that the Hand standard gives the meaning of reasonable care in American negligence law. As to that claim, too, I arrive at the conclusion that the Hand formula *does not* give the meaning of reasonable care 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 that the legal authority lies in the concept, not in the precise verbal formulation. This can be inferred in part from the fact that while 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.³⁹ Here is a typical definition of negligence in jury instructions, taken from New York Pattern Jury instructions:

“Negligence is lack of ordinary care.⁴⁰ 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.”⁴¹

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 something which a reasonably careful person would have done under the same or similar circumstances.”⁴²

³⁹ Kelley & Wendt, *supra* note __.

⁴⁰ The canonical citation for this proposition is *Vaughan v. Menlove*, 132 E.R. 490 (1837).

⁴¹ N.Y.P.J.I. Civ. 2:10 (3d ed. 2000).

⁴² Wash. W.P.I. Civ. 10.01 (1989).

Preliminarily, note that there are at least four aspects to these instructions. 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 the sort 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 care, a failure that can be done through acting or through failing to act. Fourth, there is the relativization to the circumstances. All four structural features appear in virtually all of the instructions. Moreover, I think all four are roughly the same in content in all of the jurisdictions: negligence is about lack of care: the care level is defined both with initial adjective and adjectives, and by reference to a type of person; the instructions make clear that the failure to exercise care can be displayed through action or inaction, and they all particularize to circumstances.

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.” That is true in most states (e.g., California, Michigan, Illinois, Virginia), however a few, like Alaska, Connecticut, and Florida, use “reasonable,” and some, like Alabama, use “ordinary or reasonable care,” or give a trial judge an option to use either.

When New York’s instructions expound on what “ordinary care” is they state that it is the care that would be used by a “reasonably prudent” person under the circumstances. Washington, like many other states, uses the word “careful” instead of

“prudent,” thereby asking jurors to think about the “reasonably careful” person.

Overwhelmingly, jurisdictions use “reasonably prudent person” or “reasonably careful person.” Scattered around are phrases “reasonable person” or “ordinarily careful person” or “person of ordinary prudence” or “reasonable and prudent person”.

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” which 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 extreme, that is still a responsible adult level of care. But remember, this is an expansion of “ordinary care”. And so the idea is that there is kind of figure – the reasonably 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, otherwise there would not be something around which they are hovering with almost synonymous phrases. 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 there is a particular concept 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 real, 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 standard, non-balancing 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;⁴³ the overwhelming majority of those which use a derivative of “reasonableness” (which is the great majority), as discussed above, define “negligence” or “ordinary care” in terms of the “reasonably prudent” or “reasonably careful” person, not the “reasonable” person. An examination of *Blyth v. Birmingham Waterworks Co.*⁴⁴, the Lord Abinger 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 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

⁴³ Kelley & Wendt, *supra* note ___, at 597 & notes 33, 35, & accompanying Appendix provisions.

⁴⁴ 156 E. R. 1047 (Ex. 1856).

would not do.”⁴⁵ And the factual context of *Blyth* again indicates that the whole point is that ordinary or reasonable prudence is needed, not extraordinary prudence; in *Blyth* the court rejected the plaintiff’s effort to have liability imposed upon defendant waterworks company because it failed to anticipate an extraordinary cold winter, which caused its pipes to freeze; its guarding against weather in the usual range was sufficient prudence.

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. Here are a number of examples:

Patron v. Waiter: Waiter is in restaurant and accidentally spills hot soup on Patron, burning him and ruining his suit;

Pedestrian v. Driver: Driver rounds a corner awkwardly, skidding off the road and into Pedestrian.

In both of these cases, plaintiff will assert that defendant was negligent, and the judge will instruct 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 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

⁴⁵ Id. at 1049 (Abinger, B.).

careless act. And they will do it by asking themselves to compare the defendant's conduct 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 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 that perhaps he permitted himself to go to sleep too late the night before and was therefore 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 views.⁴⁶

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 wherever 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 a bit 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.⁴⁷ Perhaps when we call the waiter careless, we are merely presuming he must have been taking some risk, and perhaps conduct warranting such a

⁴⁶ Cite to Grady's work.

⁴⁷ Cite to Grady.

presumption counts as “careless” only by analogy to the presumed risk-taking version, and 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, or acting in a manner that falls below what a reasonably careful person would do under the circumstances.

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 to plaintiff are not always judged by the “ordinary care” standard. There are other levels of care in tort law, 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.⁴⁸ The jury verdict was rendered against the defendant on the basis of an instruction that the defendant must lose unless he proves that he was using extraordinary care. The Supreme Judicial Court of Massachusetts, per Justice Shaw, reversed, holding that plaintiff must be required to bear the burden of proving lack of care; defendant may not be required to

⁴⁸ 60 Mass. 292 (1850).

prove care as an affirmative defense, and, more importantly, that the appropriate standard of care was “ordinary care”, not “extraordinary care.”

The lower court in *Brown* was not unusual or inventive in employing a standard of extraordinary care. Its theory was that plaintiff had proved a trespass *vi et armis* (this was, 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. This affirmative defense, under the trial judge’s plausible interpretation of the common law (on this point) was very demanding, and required proof that the defendant was using extraordinary care.

Even today, however, there are jurisdictions and parts of tort law that permit plaintiffs to win by demonstrating that defendant failed to live up to its standard of care, where the standard of care is defined quite stringently. A 1990 Pennsylvania case illustrates the point. In *Jones v. Port Authority of Allegheny County*,⁴⁹ the 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. 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.”⁵⁰ *Jones’* holding correctly characterizes the common law standard for common carriers. Heightened standards have also applied, under the common law, to

⁴⁹ 583 A.2d 512 (Pa. Comm. 1990).

⁵⁰ *Id.* (quoting, with approval, Pa. Suggested Standard Civil Jury Instructions).

bailors and to innkeepers and to certain other enterprises of a public nature, on which consumers depend heavily for their safety.⁵¹ 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 it was quite a narrow duty, 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 or should have known of, and that would not appear to a reasonable licensee. And, of course, in some common law contexts, and in a variety of statutory settings, the law creates privileges or immunities that can be overcome by a showing of “gross negligence.”

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 referring to optimal precaution taking.

4. Care Levels for Special Types of Relationships and Professions

In professional malpractice and in tort sorts involving children, the standard of care is no longer that of the reasonably prudent *person*. As for children, it is typically altered so

⁵¹ 3 Harper, James & Gray, *The Law of Torts* 500-12 (2d ed.1956). At least by the second edition, the treatise is indicating that courts are 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 500-01. 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 500 and 503 n. 13, it does in fact indicate the continuing existence of this differentiation.

as to refer to the reasonable child of age ___ with the knowledge, skills, and judgment of a child age ___.

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. 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, and there are three other elements: injury, duty, and causation. The breach must be a breach of the duty to due care. In most cases, “ordinary care” is the answer to a question: what duty of care is due from the defendant to the plaintiff. Ordinary care is the duty that is owed to the plaintiff by the 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 the plaintiff not to act negligently to the defendant or the class of persons to which she 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 the plaintiff or the class of persons to which she belongs. It would be simply a duty, without a relational quality. But negligence law in fact has rich

relational duties. Therefore, the form of breach that actually applies to negligence law must be such that we can think of failing to use care toward the plaintiff. The duty to use ordinary care can be conceived of relationally in this manner: it is a matter of taking ordinary care toward the plaintiff.⁵²

B. What About Cases Where 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 to argue to courts; that English courts appear to use some version of balancing in many cases.⁵³ Don't these phenomena 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.

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. This means that if Richard Posner were on a jury, trying to decide whether a defendant's conduct was tortious, and he decided that what a reasonably prudent person he would be entitled to

⁵² See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *Vand. L. Rev.* 657 (2001).

⁵³ See Stephen G. Gilles, *The Emergence of Cost-Benefit Balancing in English Negligence Law*, 77 *Chi.-Kent L. Rev.* 489 (2002).

use the Hand formula, he would not simply have the raw juror's power to do so. 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. As Stephen Gilles has recently shown, many English judges use a similar balancing approach to deciding whether ordinary care was taken in negligence cases.

I have argued above that it would not follow from the choice of factfinders to use the Hand formula some times 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, while negligence law contains many cases like the Waiter case and the Driver case, above, it contains many other cases that are the opposite. These are cases with the following attributes: (i) there is a deliberative choice on the part of the defendant to act without taking some precaution, and (ii) factfinders do not come armed 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 factfinder needs a way into thinking about what reasonable 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, including 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 being risked by the failure to take such precautions, in whom, in how many people, and to what

extent, what degree of risks exist without precautions, and what range of precautions ought to be considered, and how each of those would diminish or alter the risks, and whether there is a way to 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 or regulation or professional or institutional standard would require some precautions, whether it is custom to do so, or whether anything has been said about it or whether there is reliance upon it, or, conversely, an understanding that such precaution is not being taken; 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 and extent and nature of potential losses, various range 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. It is because 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). This is for at least three reasons. First, it is not clear that everything really does fall into burden, probability, or loss; this is

in fact a point that economists and Heidi Hurd and Michael Moore have made; the three factors are too few to capture this.⁵⁴ My own inclination is that when we are talking about the norm of deliberation that reasonable prudence requires, it is probably even more complex. Second, the balancing metaphor can mean various things, and it is by no means clear that the aggregative version that approximates utilitarianism is what our norms of ordinary care require. Arthur Ripstein and Gregory Keating have spelled out what a Rawlsian version might look like.⁵⁵ 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. Third, there is no suggestion here that there is a single metric of value that is being maximized.

It is worth noting that there may be scenarios in which, again, it would be reasonable – and would be regarded as reasonable – to adopt a single metric and to adopt an aggregative analysis. For example, in *Rhode Island Hosp. Trust Nat'l Bank v. Zapata Corp.*,⁵⁶ 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 showed that it was far cheaper and only very marginally less effective (or perhaps as effective) than a system that looked at every check. Affirming a District Judge, and using the Hand formula and cost-benefit analysis, Judge Breyer agreed with the bank. The

⁵⁴ Hurd & Moore, *supra* note __, at 360-65 (expansion of Hand formula into eight-factor analysis).

⁵⁵ There are substantial differences between Keating's and Ripstein's form of Rawlsian tort theory. See Fordham Rawls symposium. It appears that Ripstein 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 factfinder, which is central to Keating's view.

⁵⁶ 848 F.2d 291 (1st Cir. 1988) (Breyer, C.J.).

financial burden of examining each check's signature was not warranted by the reduction of risk of forgeries, on the Hand formula. 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 cost of the increased cost of forgery-detection. There is 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, it may well be what reasonable care requires us to do. 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.

IV. 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 standard, 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. 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 standard captures the liability regime of the tort of negligence, and tends to believe this based on the Posner/Hand analysis. Since there is strong reason to believe this assumption is false, the soundness of the analysis based upon it is undermined. A particularly striking example of permitting the tail of the Hand formula wag the dog of negligence law is seen in some well-known work of Prof. Kip Viscusi's; Viscusi infers from empirical studies that demonstrate laypersons' non-Hand like judgments about negligence, that it may be problematic to permit jurors to decide negligence cases.⁵⁷

Third, both economic and non-economic proponents of the Hand formula interpretation of the meaning of negligence find incoherences at many points in tort law, and argue based on this interpretation 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, it may be that there are other reasons for the modifications, so the modifications may themselves be salutary. But if they are

⁵⁷ Viscusi, J. Leg. Stud. __. This is not to say that Hand based or economic accounts of tort law could not credit the role of juries; see, e.g., Mark Geistfeld, Negligence, Compensation and the Coherence of Tort Law, 91 Geo. L. J. 585, 606-08 (2003).

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. Many scholars reject a description of the difference between plaintiff's negligence and defendant's negligence. The law defining standard of care for landowners and for common carriers, has been different from ordinary care, but scholars have not known what to do with it, and so have sought to eliminate these different standards; And, as Goldberg and I have argued at length, a Hand formula conception of breach has led Twentieth Century scholars to favor a non-relational conception of duty, and have, therefore, led to an abandonment of duty as carrying any weight. All of these features of negligence law, and many others too, are on the agenda of the Restatement (Third) and other scholars as places for basic modification of tort law. To emphasize, it is not that they are wrong, but that they are unjustified.

Finally, the contention that reasonable prudence designates the Hand standard in the history of American tort law is frequently used not only to defend various policy proposals and doctrinal and theoretical claims; it is also used 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 decision-making; the debate is particularly protracted as to large corporate actors. Economists and non-economists alike have pointed to the putative fact that the law of negligence puts the

Hand standard at its epicenter as a justification in favor of a certain kind of approach. Typically, it is used as justification for the appropriateness of aggregative cost-benefit analysis in corporate decision-making. Again, whether such analysis ought to be used in corporate decision-making, 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.

V. *Ordinary Care: Right, Virtue, and Convention*

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, too. 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 it might be helpful to have one. 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.

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 while each has something important to add to thinking about the meaning of negligence, none provides a complete theory of theoretical framework.

[This section sets forth and discusses three significant competitors to Hand-formula type analyses of the standard of care in negligence law: rights-based theories, such as those of Keating, Ripstein, Weinrib, and Wright; conventionalistic theories, such as Kelley's, and virtue-theories, such as Feldman's. It explains the core idea of each, and then surveys their relative strengths and weaknesses, ultimately finding none of them to be adequate. Briefly, the section will argue that rights-based theories are insufficiently attentive to extant social norms, poorly suited to jury competency, and unable 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: while well-suited to jury competency and attentive to social norms, it leaves juror normativity out of the picture, and leaves insufficient room for the T.J. Hooper rule that custom is not dispositive of standard of care. Of equal importance, conventionalist accounts do not explain adequately the central role of the prototype of the reasonably prudent person, and do not explain how the reasonable person standard can function where 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 selects for the standard of care concept one which relates to a family of concepts that puts an exemplar of some attribute in position to provide content for the concept more generally. Moreover, while it builds in normativity, it leaves much more space for incrementalist judgments and circumstance-based evaluation than the rights-based approach does. A fundamental problem of the virtue approach, as Kelley and Wendt have pointed out, is that virtues are excellences, and the concept of “ordinary” care is fundamentally something much less high-reaching than an excellence. It is also unclear whether jury competency and the relevance of social norms will be adequately handled by the virtue theory.]

VI. Ordinary Care: A Civil Competency Theory

Can these diverse theoretical strands be woven 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, there are certain respects in which Feldman’s virtue-based view is remarkably well-suited to accounting for the idea of negligence, but other respects in which 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 meaning of negligence into a depiction of compliance with custom. Finally, rights based theories are promising insofar as they take relational duties seriously, and recognize that due care can sometimes have a kind of prioritization, and treat certain kinds of needs of others as demanding special attention; it is unpersuasive, all told, 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. 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 all others. We expect it 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 – the lack of reasonable prudence, or negligence – 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, there are social norms according to which 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 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 certainly a kind of competency. The competency here combines skill, socialization, and compliance with certain conventions, as well as law. And 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, or not. As thinkers from Henry Terry to Heidi Feldman have pointed out, negligence is a concept we utilize by making reference 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 it harder to avoid the difficult challenge of explaining the deliberative aspect of negligence. 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 the both virtue conceptions of prudence and 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 rotting meat at her campground after she left, rules or no rules. She would be alert to the risk of attracting wild animals, 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 was skillful, intelligent, and capable of reasonable foresight might nevertheless not even consider the risk to others of leaving rotten 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 rotten meat case, that there is no question that one should not leave the rotting meat, and that 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. That is 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”? I would caution that 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 factfinders 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 negligence 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 that there is a care level that we expect of one another in society and that – as Lord Abinger suggested – such a level of competency involves being “guided by considerations which ordinarily regulate the conduct of human affairs.”⁵⁸ 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

⁵⁸ *Blyth*, 156 E.R. at 1049.

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.

Third, there is nothing 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, for example, when 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, professionals and those who undertake highly risky enterprises are relied upon to be exercising abilities and skills, and utilizing 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), 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 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 non-relational conception of duty (I believe Holmes' conception of negligence, may indeed have been a non-relational 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*⁵⁹ – 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; 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 his 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 Hegelian, Holmes, and Adam Smith, driven toward a set of customary behaviors that tends toward efficiency. For reasons 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 a 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 and competency and considerateness in our activities. The reasonably prudent person is such a player, created through

⁵⁹ Guido Calabresi, *The Costs of Accidents* (1970). See John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 *Md. L. Rev.* 364 (2005).

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,”⁶⁰ negligence law and social norms of responsibility play a mutually enforcing role, while not quite defining one another.

VII. 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. 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 60s, however, tort law underwent a massive change, in which the concept of negligence fell into deep disfavor among leading academics. 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.

⁶⁰ *Blyth v. Birmingham Waterworks Co.*, 156 E.R. at 1049.

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. Posner asked whether it really could be the case that negligence law was a formless charade; that 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. 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.

Unfortunately, Posner’s utilization of the Hand formula turns out to be indefensible sleight of hand, as I have called it. 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.