Non-Utilitarian Negligence Norms and the Reasonable Person Standard

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INTRODUCTION

Informal social norms play a crucial, albeit largely unheralded, role in negligence law. The reasonable person standard is an empty vessel that jurors fill with community norms. Jurors do this rather than performing cost-benefit analysis. The proposed Restatement (Third) of Torts: General Principles (Discussion Draft) ("Discussion Draft") misses both of these points. It dramatically overstates the role of utilitarian, cost-benefit analysis in the reasonable person standard, and it dramatically understates the role of non-utilitarian negligence norms in this standard. This Article will explore these twin failings of the Discussion Draft.

The negligence cause of action makes up the lion's share of modern tort law. Negligence is thus the focus of the Discussion Draft of the "General Principles" of tort law.1 It is settled law that there are four elements to a cause of action in negligence—duty, breach, causation, and damage.2 I will raise the question whether the Discussion Draft properly characterizes the case law with respect to the second element, breach. The Discussion Draft strongly endorses a Hand Test formulation for determining the standard for breach.3 Specifically, the so-called balancing test is interpreted in terms of cost-benefit analysis.4 While the Hand Test is not inherently utilitarian, nevertheless, in the Discussion Draft's analysis, this test is transformed into a tool for the advancement of social welfare, the touchstone of utilitarian value theory.5 I will argue that this mischaracterizes case law, however, as the common law of negligence is not best interpreted as utilitarian.

With regard to duty, the first element of a cause of action in negligence, Professors Goldberg and Zipursky argue that the Discussion Draft mischaracterizes case law because it fails to list duty as an element despite the fact that almost all United States juris-

1. See Restatement (Third) of Torts: General Principles § 4-5 (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].
2. Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts: Cases and Materials 130 (10th ed. 2000) (describing the four elements as "[a] duty to use reasonable care ... [a] failure to conform to the required standard ... [a] reasonably close causal connection between the conduct and the resulting injury ... [and] [a]ctual loss or damage resulting to the interests of another").
3. Id. § 4 cmt. c, d.
4. Id. § 4 cmt. d.
5. Discussion Draft, supra note 1, § 4 cmt. j ("By imposing the threat of liability, the law seeks to encourage the defendant to avoid negligence—that is, to adopt reasonable safety precautions. The defendant's adoption of these precautions improves the overall welfare of society, and thereby advances economic goals.").
dictions routinely and overwhelmingly list duty as the first element to be established in a negligence cause of action. Because a re-statement should, by definition, restate the core features of the law for which it claims to be a re-statement, in effect, Goldberg and Zipursky may be seen as arguing that the Discussion Draft is not a re-statement with respect to the duty element.

If Goldberg and Zipursky are right that the Discussion Draft fails to re-state the element of duty, and I am right that the Discussion Draft fails to re-state the law of breach, we may fairly conclude that the Discussion Draft fails to re-state the law of negligence. Con- trary to the pronouncements of the American Law Institute, then, the Discussion Draft is not principally an interpretative document that seeks to provide an “explanation” or to “clarify” key terms of tort law. Rather, as I will suggest, the Discussion Draft is a thoroughgoing normative document, one that seeks to promote one normative theory of tort law over competing normative theories of tort law. Specifically, the Discussion Draft promotes utilitarianism. If the common law of negligence were best described as utilitarian, then an accurate Restatement would also be utilitarian in character. The problem with the Discussion Draft’s descriptive account, then, is not that it is normatively loaded, but that it is incorrectly normatively loaded.

In fairness, it must be noted that the Reporter of the Discussion Draft appears to think he has achieved theory neutrality with respect to the standard for breach. The Discussion Draft notes that its account is consistent with “fairness” concerns as well as


7. In the Forward to the Discussion Draft, Geoffrey Hazard, Director of the American Law Institute, writes, “[h]erein the Reporter, Professor Gary T. Schwartz, undertakes to clarify the meaning of such basic concepts of tort law as intention, recklessness, and negligence. The text provides explanation and elaboration and, in accordance with the usual format, demonstration through Illustrations.” Discussion Draft, supra note 1, at xi (emphasis added). The Reporter’s Introductory Note states that “[t]he purpose of this Restatement project is to work through the ‘general’ or ‘basic’ elements of the tort action for liability for accidental personal injury and property damage.” Id., at xxi.


welfarist concerns in this regard.\textsuperscript{10} I will argue below, however, that this passing nod to theoretical pluralism or neutrality fails, as the proposed Restatement’s conception of fairness is also a utilitarian conception.

The goal of the following discussion is not to criticize the proposed Restatement’s utilitarian account \textit{qua} normative account. Nor is it to criticize this account in order to make room for a distinct normative account. The point is that, for basic reasons of clarity and accuracy, a Restatement should restate the law, nothing more and nothing less.\textsuperscript{11} Most importantly, it should not surreptitiously seek to redirect the moral course of tort law. Making the common law of tort a vehicle for the promotion of utilitarianism would be an important and controversial political act. If pursued at all, it should be done subject to explicit discussion and overt efforts at justification.

It is always of value to be clear on the distinction between law as it is and law as it ought to be.\textsuperscript{12} It is especially important to do so, however, in systems of law in which \textit{stare decisis} plays a role. Under \textit{stare decisis}, contrary to Hume’s law,\textsuperscript{13} courts may indeed derive, to some extent, an “ought” from an “is,” as the mere fact that cases were decided in a certain manner in the past lends normative force toward deciding like cases in a like manner in the future. This is true for specific legal rules. In the hands of theorists such as Richard Posner, however, this argument is applied more broadly to second-order norms, such as the norm of efficiency.\textsuperscript{14} In other words, because past courts have sought to promote efficiency, it is legitimate for courts in the present to do so as well. Thus, it is crucial to restate the law of breach in a non-prejudicial manner so as not to unleash normative forces that have not been properly legitimized through the mechanism of \textit{stare decisis}.\textsuperscript{15}

\begin{itemize}
\item \textsuperscript{10} \textit{Id.}
\item \textsuperscript{11} For those readers who teach torts to law students, ask yourself what is your response to students who ask about the purpose, function, or significance of the Restatement (Second). I predict the answer is not that the Restatement is an instrument to shift and consolidate tort law around the utilitarian normative paradigm.
\item \textsuperscript{13} See David Hume, \textit{A Treatise of Human Nature} 561 (L.A. Selby & P.H. Nidditch eds., 2d ed. 1978).
\end{itemize}
Judge Richard Posner thinks that tort law should seek to promote wealth.\textsuperscript{16} He also happens to think, as a positive matter, tort law is best understood as having historically promoted wealth.\textsuperscript{17} Professor George Fletcher, on the other hand, argues that the concept of reciprocity is the key to understanding the negligence standard.\textsuperscript{18} According to Fletcher, courts have sought to decide cases in such a manner so as to promote a reciprocal sharing of risks and benefits.\textsuperscript{19} While Fletcher's normative focus is fairness, Posner's is wealth maximization, and the Discussion Draft's is social welfare, these accounts nevertheless share something very important: each provides a positive account of tort law that, as it happens, precisely dovetails with the prescribed normative account of each. This finding is counterintuitive, as there is no logical connection between tort law understood as an historical institution and tort law as it should ideally be constituted.

The utilitarian thinks tort law should be used as an instrument to promote social welfare because social welfare alone is what is ultimately worth promoting. The Rawlsian thinks tort law should promote fairness because fairness, understood in the broad Rawlsian sense of the term, is ultimately what social institutions should seek to foster. Finally, the wealth maximizer thinks wealth should be promoted because wealth is an important and uncontroversial social value. In other words, these normative frameworks are justified from the top down, as a result of foundational normative commitments. None of these theorists argues that the reason tort law should promote the normative ideal each prescribes is because tort law has done so in the past. Thus, it is strange that there is any correlation between how these scholars, \textit{qua} normative theorists, think the world should be, and how these scholars, \textit{qua} lay social scientists, think that the world has in fact been, with respect to the standard for breach.

If welfare, fairness, and wealth were corporations and Gary Schwartz, George Fletcher, and Richard Posner were their respective counsel, then, one would fully expect them, as good advocates, to argue for their respective positive theses. They are not advocates, however; but rather they are scholars. Scholars do not advocate for instrumental reasons, they attempt to glimpse truth as best they are able. Accordingly, they, no less than we, should expect no posi-

\textsuperscript{16} See generally \textsc{Landes & Posner, supra} note 14.
\textsuperscript{17} Id.
\textsuperscript{18} Fletcher, \textit{supra} note 8, at 544.
\textsuperscript{19} Id.
tive correlation between their respective positive and normative theses, given that none have provided an adequate explanation of how it is that negligence law has come to embody the right normative framework.

The existence of a positive correlation, then, stands as an unexplained mystery. Less mysterious is the existence of the theorists' belief in such a correlation. One might easily imagine, for example, that there is some sort of cognitive bias at play. Utilitarians tend to see the world through welfare-maximizing glasses, Rawlsians see the world through fairness-reciprocity glasses, and Posnerians see the world through wealth-maximizing glasses. This possibility is disturbing because it suggests that were either Posner or Fletcher the Reporter for the Discussion Draft, rather than Schwartz, the product would have been different. This fact, if true, would belie the ALI's claim that the proposed Restatement is simply an explanation or clarification. What is needed, then, is a Restatement that is free, as much as is possible, from the normative commitments of any particular tort theorist.

The following discussion is meant as a plea for clarity with respect to the positive and normative theses concerning the relationship between the standard for breach as it actually emerges from litigated cases and the Hand Test rendered in cost-benefit terms. What matters here is not the normative question of whether tort law should seek to promote cost-benefit analysis. Perhaps it should. Instead, the proper concern of a restatement of the common law of tort is whether the case law has, in fact, significantly utilized the cost-benefit test in the standard for breach. The one simple but extremely important point that will become apparent in the following discussion is that the Hand Test appears to have played almost no role in the determinations of the countless jury decisions over the years that, taken together, constitute the substance of the standard for breach in American tort law. Instead, I contend that the norms of ordinary morality, in all their normative

20. If such a cognitive bias exists, perhaps even more disturbing is the fact that some of the century's leading, and most strongly normatively committed, tort theorists currently sit on the federal bench.

21. Even for utilitarians, it is not analytic that either judges or juries should explicitly seek to promote cost-benefit analysis, specifically, or social welfare, generally. The whole thrust of the various forms of modern utilitarianism labeled as "rule utilitarianism," "indirect utilitarianism" or "institututional utilitarianism" is that social welfare may best be promoted by not trying to directly, explicitly, or intentionally promote it. See generally RUSSELL HARDIN, MORALITY WITHIN THE LIMITS OF REASON 53-59 (1988); John Rawls, Two Concepts of Rules, 64 PHIL. REV. 3 (1955).
heterogeneity and theoretical impurity, have been the overwhelmingly dominant influence in jury decisions on negligence.22 Even if this fact would make no normative theorist happy, it may be a fact nevertheless. Thus, the standard for breach as it has developed in the case law over the years cannot be accurately restated in terms of the utilitarian Hand Test (or in terms of any other single normative theory, for that matter).

In the following discussion, I will first consider and critique the Discussion Draft’s welfarist conception of breach, encapsulated in a cost-benefit rendering of the Hand formula. Next, a more plausible conception of the restatement of breach will be examined, one initially articulated in the Restatement (First). This account provides a moralized version of the Hand Test under which courts are portrayed as appealing to community norms as part of an indirect strategy for maximizing social welfare. This account is intuitively more attractive than the Discussion Draft’s account because it gives the abstract Hand Test a more determinate content. Nevertheless, I will argue that, due to its utilitarian characterization of social norms, it fails to correctly restate the law of breach.

The rejection of both of the above versions of the Restatement will have the impact of creating an either/or situation. Either the proposed Restatement should drop the cost-benefit approach to breach (and also restore duty to its rightful place as the first negligence element),23 or drop the word “Restatement” from the title of the work. Neither suggestion is as radical as might appear to be the case. Regarding the Hand Test, the draft could be amended to delete all the language prescribing a cost-benefit approach as well as any suggestion that the balancing approach entails a consequentialist mode of practical reasoning. The balancing test, per se, may remain, as such phraseology may adequately be used to characterize a theory-neutral, normatively pluralistic account of the reasonable person standard.24 Regarding the second suggestion, there is precedent within the traditions of the American Law Institute for removing the word “Restatement” from a draft document that is not in fact a restatement.25 The alternative, after all, is for the word

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22. See infra Part III.
“Restatement” to become a legal term of art, and for the tort re-statement project to become a sort of institutionalized legal fiction, one with a significant sub rosa political bite. These developments would be inconsistent with the ALI’s goal of increasing clarity in the law.

I. THE DISCUSSION DRAFT’S APPROACH TO BREACH

Section A below briefly establishes the utilitarian nature of the duty element in the Discussion Draft and then examines the relationship between duty and breach. The next two Sections then discuss alternative approaches to the standard for breach.

A. Utilitarian Duties in the Proposed Discussion Draft

Professors Goldberg and Zipursky argue that the structure and organization of the Discussion Draft are determined crucially by its skewed normative vision of the role of duty.26 Whereas the common law gives duty a role that is both central and “relational,” the proposed Restatement pushes duty under the rug. In the cases, duty is the first question, not the last. As Cardozo famously argued in Palsgraf, until the duty threshold is passed, proximate cause is not even an issue.27 In the Discussion Draft, however, the element of duty is relegated to the status of a possible policy-based exception to the standard analysis in which duty is simply taken for granted.28 Acting in this mode, a court may simply decide, for whatever reason, to deny liability by a finding of no duty.29 As Goldberg and Zipursky argue, this account misstates the “relational” role-played by duty in the common law.30

Goldberg and Zipursky argue that the proposed Restatement exhibits what they refer to as “duty skepticism,” which is a normative vision of tort law that is skeptical of duty’s relational role.31 Elsewhere, they argue that duty skepticism is the tort law parallel to the rights skepticism that pervaded constitutional law in the

29. Id.
30. Id.
The ultimate source of each is the philosophical positivism that pervaded the intellectual world during that period. The Discussion Draft is not, however, skeptical toward the existence of duty per se, but only skeptical of relational duties. The Discussion Draft contains a conception of duty that is implicitly utilitarian. The utilitarian perspective on duty is that all people have duties to all other people all the time, a duty "to the world," as Judge Andrews long ago famously remarked in his dissent in *Palsgraf*. The Discussion Draft contends that duty is a "non-issue," because there is always a duty. The Discussion Draft refers to the duty in tort as a "general duty." This conception of tort duty is implied by the more general act-utilitarian conception of moral duty, according to which moral agents are obligated to seek to maximize social welfare in all their actions.

For the utilitarian in a potentially tortious situation, the duty of the reasonable person is to act so as to maximize social welfare, not just one's own welfare. In other words, when taking actions that create risks to others, the reasonable person acts to maximize the overall social welfare of the act. The actor takes account both of the value of the act to herself as well as the possible

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33. *Id.* Out of positivism flowed a general skepticism toward the scientific legitimacy of normative theory. Goldberg and Zipursky focus on this skepticism. I am interested in a related alleged entailment for normative theory of positivism. During the ascendency of positivism, a belief took hold that utilitarianism was a scientific theory, whereas other normative theories were based on empty metaphysics. In Bentham's oft-repeated quip, rights are nonsense on stilts. From an historical perspective, it did not take long for metaethical theorists to destroy the claim of utilitarianism's superior scientific status. Nevertheless, it was in this period that the *Restatement (First)* of Torts was promulgated. In other words, the initial Restaters had the misfortune to be working at a time when some bad moral metaphysics was going around. Early utilitarian approaches to tort law are found in OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 94-96 (1881); James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 110 (1908); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). On Holmes' utilitarianism, see H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984). See also Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989) (finding utilitarianism running through nineteenth century tort law). See generally Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315 (1990) (arguing that Terry's five-part negligence test was an improvement on Holmes' account, and that Terry's test formed the basis of the Hand Test).
34. *Palsgraf* v. Long Island R.R., Co., 162 N.E. 99 103 (N.Y. 1928) (Andrews, J., dissenting); see also Oliver W. Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873) (duty "of all the world to all the world").
36. *Id.*
37. See generally SHELLY KAGAN, *THE LIMITS OF MORALITY* (1989). Goldberg and Zipursky treat the utilitarian analysis of duty as a form of duty-skepticism because it fails to capture what it means for a person to be under an obligation to another.
disutility the act creates for the potential victim. The act is justified only if the benefit outweighs the risk. The Discussion Draft uses liability rules to enforce this moral standard, which it refers to as the "ethical norm of equal consideration."38

B. The Discussion Draft’s Elevation of the Hand Test For Breach

In the case law, breach is related to the first element, duty, in that negligence is simply the breach of a duty.39 This fact creates an obvious problem for the Discussion Draft. As just discussed, the Discussion Draft sweeps the element of duty under the rug. If courts do not first engage in an inquiry into whether the element of duty is satisfied, how then will they be able to determine negligence, since negligence is simply the breach of a duty? In other words, because the Discussion Draft fails to state duty as an overt element, it cannot overtly define negligence as the breach of a

38. Discussion Draft, supra note 1, § 4 cmt. j (“The defendant who permits conduct to impose on others a risk of harm that exceeds the burden the defendant would bear in avoiding that risk is evidently a party who ranks personal interests or welfare ahead of the interests or welfare of others. This conduct violates the ethical norm of equal consideration, and a tort award seeks to remedy this violation.”). The notion that utilitarians treat all people equally is an idea that has developed in utilitarian moral theory in response to the criticism that utilitarianism allows individuals to be sacrificed for the good of the whole. See generally HARDIN, supra note 21; Rawls, supra note 21. The complexities of this core metaethical debate cannot be explored here. It must be noted, however, that utilitarian tort theory faces a parallel problem as utilitarian moral theory, as it is not the individual plaintiff, per se, whose interests are taken into account but rather the class of potential plaintiffs. See Discussion Draft, supra note 1, § 6 cmt. h (“In conducting such an analysis, the court can take into account factors that might elude the attention of the jury in a particular case, such as the overall social impact of imposing some significant precaution burden on a category of actors.”) (emphasis added). Thus, indeed, it is possible for individual victims to be sacrificed to the utilitarian whole. The Discussion Draft’s notion of “equal consideration” is then an ex ante conception. As is the case with utilitarian moral theory, such justifications are cold comfort to real plaintiffs who seek redress for real injuries, as their claims may be subordinated to the overriding concern for aggregate welfare. See generally JULÉS L. COLEMAN, RISKS AND WRONGS (1992). The Discussion Draft does make one superficial nod toward acknowledging the moral complexity of determinations of negligence. When providing a rationally for negligence liability, the Discussion Draft notes “fairness” between the litigants as a factor. This is evidently an attempt to address the criticism of the utilitarian approach that it does not deal with the actual moral relationship between the injurer and victim. The problem, however, is that the notion of fairness as understood by the Discussion Draft is completely reducible to utilitarianism for the reason just indicated. Fairness just means that, ex ante, liability rules are as likely to promote one’s welfare as the welfare of others. This conception has no connection to the leading conceptions of fairness that animate modern tort theory, such as those of Fletcher, Keating, or Wright. Nor, of course, does it take account of broader conceptions of corrective justice that do not reduce to fairness. See, e.g., id.

39. See SCHWARTZ ET AL., supra note 2.
duty. The proposed Restatement sidesteps this problem by proceeding directly to a discussion of negligence or fault.

The proposed Restatement sets forth a utilitarian “risk-benefit test” for negligence which it explicates as follows: “the ‘risk’ is the overall magnitude of the risk created by the actor’s conduct and the ‘benefit’ is the advantages that the actor or others gain if the actor refrains from risk prevention measures.” Alternatively, the proposed Restatement says it offers a “cost-benefit test” in which “‘cost’ signifies the cost of precautions and the ‘benefit’ is the reduction in risk those precautions would achieve.” Finally, the proposed Restatement says, “[M]ore simply, this can be referred to as supporting a ‘balancing approach’ to negligence.” The Discussion Draft explicates the balancing approach as follows:

The balancing approach rests on and expresses a simple idea. Conduct is negligent if its disadvantages exceed its advantages, while conduct is not negligent if its advantages exceed its disadvantages. The disadvantage in question is the “magnitude of risk” that the conduct occasions: the phrase “magnitude of risk” includes both the foreseeable likelihood of harm and the foreseeable severity of harm, should the incident ensue. The “advantages” of the conduct relate to the burdens of risk prevention that are avoided when the actor while engaging in conduct declines to incorporate some precaution. The actor’s conduct is hence negligent if the magnitude of the risk exceeds the burden of risk prevention.

This passage from the Discussion Draft evinces a utilitarian conception of balancing, as “disadvantages” are weighed against “advantages.” In particular, this is a quantitative conception, one in which these values are to be measured on a single scale by comparing their respective “magnitudes” in order to determine whether the advantages “exceed” the disadvantages.

Note as well that this is a Hand formulation, in that it emphasizes the “burdens of risk prevention,” rather than the overall

40. Had the Discussion Draft wished to highlight the general duty of all to all, it could then have defined breach as the failure to act so as to maximize welfare. Apparently, however, the Discussion Draft wishes to downplay duty in order to downplay debate over welfarism as the undergirding normative rationale for duty in tort.

41. Discussion Draft, supra note 1, § 4.

42. Id. § 4 cmt. d.

43. Id. § 4. The Discussion Draft notes that the cost-benefit factors make up the “primary factors” to consider, id., and the “factors that ordinarily play the primary role in making determinations on the negligence issue.” Id. § 5 cmt. b. This crucial point is noted in passing without any further consideration of the nature of these other factors or under what circumstances judges or juries are to take them into account. This is a huge lacunae in the Discussion Draft. The existence of these other factors indicates that the Discussion Draft’s utilitarian account is not the whole story.

44. Id. § 4 cmt. d.

45. Id.

46. Such a quantitative conception is not a necessary feature of utilitarian moral theory. See, e.g., DEREK PARFIT, REASONS AND PERSONS (1984).
utility of defendant's act. The Hand Test, as famously articulated by Judge Learned Hand, focuses on the burden that must be expended in order for a tort defendant to avoid liability, specifically; if $B < P \times L$, then one will be liable if one's action results in injury to another. The Discussion Draft gives the "reasonable care" standard a gloss that implicitly reflects the Hand Test formulation.

The Discussion Draft claims that the best way to understand the case law is that it has reflected an attempt by courts to implement the balancing approach described above. The Discussion Draft explicitly equates its suggested balancing approach with the Hand Test approach. The Restatement provides a long string cite of cases that purportedly utilize the balancing or Hand approach. The Discussion Draft equates this approach with cost-benefit analysis. I will argue below, however, that there is no logical connection between factor balancing, generically understood, and the cost-benefit approach. First, however, I will seek to refute the Discussion Draft's claim that cost-benefit analysis is the most accurate means to restate typical jury applications of the reasonable person standard.

47. Discussion Draft, supra note 1, § 4 cmt. d. The Discussion Draft states that what matters is the burden of precaution issue, and not the overall value of the activity. Id. § 4 cmt. i ("In those cases in which a party does allege negligence in the actor's decision to engage in an activity, the overall utility of the activity is a factor the court needs to consider. For more ordinary negligence claims, however, the utility of the activity is of minimal relevance. Supplying electricity, for example, is of extraordinary value to the community. Even so, the transmission of electricity poses serious risks. If certain precautions can minimize those risks, it is the burden of those precautions, and not the value of the activity itself, that is of primary relevance in a negligence analysis."). see also Stephen G. Gilles, Causation and Responsibility After Coase, Calabresi and Coleman, 16 QUINNIPIAC L. REV. 255, 257 (1996) (uncommon for courts to find entire activity negligent).

48. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("If the probability [of an accident] be called $P$; the injury, $L$; and the burden [of adequate precautions], $B$; liability depends upon whether $B$ is less than $L$ multiplied by $P$; i.e., whether $B$ is less than $PL$."").

49. Discussion Draft, supra note 1, at § 4. ("An actor is negligent in engaging in conduct if the actor does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the actor and others if the actor takes precautions that eliminate or reduce the possibility of harm."). (emphasis added).

50. Id., § 4 Reporter's Note cmt. c ("A balancing approach to negligence has been accepted in judicial opinions in a majority of jurisdictions.") The Hand Test, per se, was not developed at the time of the Restatement (First). Hand was involved in developing the Restatement (First). The articulation of the Hand Test in Carroll Towing is arguably seen as Hand's attempt to promote the risk-utility analysis of the Restatement (First). See Stephen G. Gilles, The Invisible Hand Formula, 80 VA. L. REV. 1015, 1029-32 (1994).

51. Discussion Draft, supra note 1, § 4 cmt. g ("A famous exposition of the balancing approach was by Judge Learned Hand in United States v. Carroll Towing Co.").

52. Id. § 4 cmt. c.
II. FAILURE OF THE DISCUSSION DRAFT'S COST-BENEFIT ANALYSIS

A. The Restatement's Misguided Attempt to Read Cost-Benefit Analysis Into the Reasonable Person Standard

The proposed Restatement does not develop a focused set of arguments to establish the claim that cost-benefit analysis is the most accurate means to restate the case law on the breach element. Instead, it offers a number of scattered remarks from which the Discussion Draft's position may be constructed. The proposed Restatement first notes that a number of federal appellate courts have explicitly endorsed the Hand formula.53 This is loosely presented as evidence for the claim that the Hand Test has really played a pervasive role in case law, despite the failure of trial courts to explicitly mention cost-benefit analysis in jury instructions.

Upon reflection, however, this argument is obviously flawed. From the mere fact that some federal appellate courts have been influenced by the normative account of breach contained in the Hand Test, there is no reason to conclude that trial courts have been similarly influenced. If explicit mention of the Hand Formula is taken as evidence of the influence of this formula in federal appellate courts, then by parity of reasoning, one would more naturally conclude that the failure of the formula to receive explicit mention by trial courts is evidence of its lack of influence there.54 Certainly, in the absence of explicit discussion of the Hand Test by trial courts, the initial presumption, albeit a rebuttable one, should be that it has not played a role there.

The fact that negligence is a fact question determined by jurors is additional reason to think that trial court decisions do not result from cost-benefit analysis. Under settled American practice, juries are under no obligation to explain or justify their decisions.55

53. Id.
54. RESTATEMENT (FIRST) OF TORTS §172 (Tentative Draft No. 4) ("The comparison between the social utility of the act and the magnitude of the risk is occasionally, but only occasionally, stated as the basis of decision in negligence cases."); see also Stephen G. Gilles, On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury, 54 VAND. L. REV. 813 (2001); Michael D. Green, Negligence = Economic Efficiency: Doubts, 75 TEX. L. REV. 1605 (1997) (documenting paucity of negligence cases explicitly adopting cost-benefit balancing approach as of adoption of the Restatement (First) in 1934).
55. Stephen Gilles writes:
The jury simply applies the "reasonable person standard" to the facts as it finds them, and issues a general verdict.\textsuperscript{56} Contemporary jury instructions typically tell the jury to apply the reasonable person standard, without explaining or defining this standard.\textsuperscript{57} In particular, juries do not receive instructions to apply the Hand Test, the risk-utility test, or the risk-benefit test. This is straightforward and powerful evidence for the supposition that juries do not apply any of these tests.

In products liability cases, where defense attorneys might seek Hand Test instructions, they nevertheless typically choose not to do so because they fear jury nullification.\textsuperscript{58} In other words, seasoned trial lawyers intuit that typical jurors would find a cost-benefit mode of reasoning morally unattractive. This is additional evidence that juries do not think in Hand Test terms in the usual case.\textsuperscript{59} Moreover, even if they were morally inclined to do so, typical juries may be practically incapable of such reasoning.\textsuperscript{60}

With regard to the probability component of the Hand Test, the Discussion Draft says, "although 'probability' is a word that may be more technically precise, nevertheless, the Restatement uses the word 'likelihood,' as this is a word in common usage with a clear meaning."\textsuperscript{61} In this passage, the proposed Restatement seeks to sug-

\textsuperscript{56} Under settled American practice, the jury applies the negligence standard to the facts it finds, and renders only a general verdict that does not explain or justify the outcome. Together with the rules effectively limiting judicial review of jury verdicts to cases of manifest error, these features of trial practice ensure that the operational meaning of negligence is largely determined by juries in particular cases, rather than by the doctrines stated in appellate decisions (and restated in Restatements of Torts).

\textsuperscript{57} Id.


\textsuperscript{59} See Gilles, supra note 50, at 1049 (discussing rejection of model cost-benefit instruction by Los Angeles trial judges on grounds it would invade the province of the jury).

\textsuperscript{60} Leon Green attacked the Restatement (First) on the basis that its formulations were not suitable for jury instructions. There is no reason to think this situation has changed. See Leon Green, The Tort Restatement, 29 U. Ill. L. Rev. 582, 595 (1935) ("Cases come to the courts through formal pleadings cut to some pattern or patterns of legal theory. Evidential data are offered to support these and the opposing theories. There is no suggestion that the tenor of the Restatement is designed for these purposes. After the evidence is heard, the theories insisted upon by the parties through their lawyers are translated to the jury by instructions in terms of formulas. Certainly the black letter statements are not intended to supplant the formulas already worked out and utilized by the courts in tort cases. These are too ponderous and elaborate for such a purpose. Assuming that a judge would know which ones to give, no jury would comprehend them.").

\textsuperscript{61} Discussion Draft, supra note 1, at § 4 cmt. f.
suggest that the cost-benefit test is capable of being performed by ordinary people.

But what is the significance of this point? The proposed Restatement presumably means to imply that as the test is one that can be stated in pedestrian, rather than technical terms, it therefore is a test capable of application by ordinary persons such as jurors. This only establishes the hypothetical that if juries were to apply the Hand test, the use of “likelihood” as compared to “probability” would make the test more easily applicable by ordinary people. This does nothing to establish that jurors who are not told to apply the Hand test, either in terms of probability or likelihood, will somehow be more inclined to apply the test.

Next, consider an ordinary language argument pertaining to the reasonable person standard.62 The ordinary language phrase “reasonable person” does not in any way suggest a utilitarian or economic approach of the sort conventionally read into the Hand Test. According to Webster’s, “reasonable” simply means “sensible,” not “extreme,” “immoderate,” or “excessive.”63 Based on the mere fact of their hearing jury instructions, then, there is simply no reason to think that juries, composed of laypersons as they are, would somehow insert a technical mode of reasoning such as cost-benefit analysis into their untutored deliberations regarding the behavior of reasonable persons.

It will be the atypical juror who will have had more than a passing acquaintance with cost-benefit analysis specifically, or utilitarian reasoning more generally. Even when jurors are exposed to utilitarian thinking, however, this exposure probably will not influence their actual behavior. There are two separate reasons, each grounded in a competing conception of human nature, for thinking that welfare-maximizing actions will not be forthcoming from typical jurors.

On one assumption about human nature, people are narrowly self-interested rational actors, *homo economicus*.64 To the extent that jurors are rational actors, mere exposure to utilitarianism

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62. While ordinary language philosophy has rightfully been rejected as an approach to deriving metaphysical or epistemological conclusions, ordinary language is nevertheless valuable for uncovering the internal point of view of particular linguistic communities. See ERIC VOGELIN, THE NEW SCIENCE OF POLITICS: AN INTRODUCTION 27-31 (1952) (distinguishing concepts used for theoretical purposes and concepts used as working symbols in a set of institutional arrangements and human actions in a community).


64. See generally THOMAS HOBBES, LEVIATHAN (1651).
would not cause them to act according to the dictates of utilitarianism. Instead, if a particular outcome would tend to promote their perceived interest, they would promote that outcome, regardless of the decision mandated by the Hand Test.

On the second, competing assumption about human nature, people are best modeled as predominantly, rather than narrowly, self-interested rational actors. In other words, people are, at least to some extent, morally motivated. The jury system appears ideally designed to take advantage of jurors' moral propensities because jurors typically have little to gain one way or another from the outcome of a trial. Thus, their propensities toward self-interest will be unlikely to interfere with their propensities toward moral behavior. The genius of the jury system is that by compelling jurors to deliberate in an environment in which their actions are neutral in terms of their self-interest, the cost of moral behavior is reduced practically to zero. Thus, predominantly self-interested jurors might nevertheless act so as to promote morally desirable outcomes, as doing so can be done with almost no personal sacrifice.

The implication of this finding is not, however, that jurors will therefore act as utilitarians. It is more plausible to suppose that under these conditions, jurors will simply make decisions based on their ordinary moral understanding of the world. In other words, the determination of liability will depend largely on whether the behavior in question conformed to community norms. One thing is certain; ordinary morality bears little resemblance to utilitarianism. This explains, for example, the venerable criticism of utilitarianism that it is too morally demanding. Therefore, we should not expect that morally motivated jurors applying the reasonable person standard would act in a manner so as to maximize social welfare.


66. See Steven Hetcher, Creating Safe Social Norms in a Dangerous World, 73 S. CAL. L. REV. 1 (1999); Kelley, supra note 33, at 353-63 (cost-benefit negligence is a distortion of traditional, normatively superior, reasonable person standard based on community norms); Stephen R. Perry, Responsibility for Outcomes, Risk, and the Law of Torts, in PHILOSOPHY AND TORT LAW 7 (Gerald Postema ed., 2000) ("Jointly-created risks are, very roughly, those that fall within the range of risks which is normally or customarily associated with a given pattern of social interaction. Such risks are properly regulated by a negligence rule, which is itself best understood by reference to a constrained form of cost-benefit analysis.").


In sum, this Section has rejected a number of arguments for thinking real-world juries apply a utilitarian reasonable person standard. The fact that some federal circuit courts explicitly discuss cost-benefit analysis is no reason to think that at trial, juries implicitly appeal to this analysis. Just the opposite; the fact that there is no explicit mention is reason to think there is not an implicit appeal. Furthermore, even in products liability cases when lawyers might seek Hand Test jury instructions, they typically decline to do so. Most important in understanding juror behavior is the fact that juries do not receive jury instructions regarding cost-benefit analysis. Moreover, jurors do not typically learn about cost-benefit analysis elsewhere so as to be able to intuitively appeal to it in their deliberations. Finally, even if jurors happen to learn about cost-benefit analysis, there is no reason to think that they are inclined to promote it. Instead, we might expect them either to act in a narrowly self-interested manner or to conform to the expectations of ordinary morality, neither of which is likely to coincide with global welfare maximization.

B. The Restatement’s Misguided Attempt to Assimilate Cost-Benefit Analysis and Factor Balancing

The previous Section examined and rejected the proposed Restatement’s claim that the case law of breach is best restated in terms of cost-benefit analysis. This Section refines this inquiry by focusing on the relationship between the idea of balancing and cost-benefit analysis articulated in the Restatement (First).

Just as the duty issue is relegated to a latter section of the proposed Restatement, where it can be treated as an exceptional case,\textsuperscript{69} so too for social norms, where they are relegated to Section 11, entitled “Custom,” which deals with the rule of custom in determining negligence. The Discussion Draft follows The T.J. Hooper in holding that conformity to custom may count as evidence of due care but is not dispositive with regard to due care.\textsuperscript{70} Thus, the Discussion Draft only countenances a role for social norms in the special situation in which there is an instantiated custom in place, such that either the defendant pleads conformity as a defense or the plaintiff seeks to demonstrate lack of conformity as evidence of negligence.

\textsuperscript{69} See generally Goldberg & Zipursky, supra note 6 (criticizing this move by the Discussion Draft).

\textsuperscript{70} See The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).
What is missing is any acknowledgement of the pervasive role that social norms play in providing grist for the jury's concrete application of the reasonable person standard. This process may occur not only in situations in which custom is explicitly introduced as evidence by one of the parties, but in all situations in which lay juries deliberate.

While not currently a part of the Discussion Draft, incorporating social norms into its balancing test might render the Discussion Draft more plausible. It will be worthwhile, then, to briefly consider the Restatement (First)'s social norms approach in this regard. The Restatement (First) held that courts should pay attention to "social value[s]" of the surrounding community in making determinations of the standard of care required of the reasonable person under the particular circumstances of the case at bar. In contrast, the Discussion Draft merely says that courts should determine reasonableness "under all the circumstances."

The Restatement (First) approach may be preferable, then, as it gives the reasonable person standard a determinate content. The content comes from the thick moral norms of the actual communities out of which the pool of jurors are drawn. Jurors have no choice but to appeal to community norms since the language of the "reasonable person standard" is general and must be interpreted. Jurors, being ordinary members of the community untrained in utilitarian, Kantian, or other theoretical reasoning, have nothing else to appeal to but their social sense of how ordinary moral members of the community would have acted in parallel circumstances.

In an influential article, written during the period in which the Restatement (First) was first being discussed, Warren Seavey sought to legitimate community norms as an objective source of legal decisions. Seavey writes:

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

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71. RESTATEMENT (FIRST) OF TORTS §292(a) (1934). The Restatement (Second) follows the Restatement (First) in this regard.
72. Discussion Draft, supra note 1, § 4.
73. Warren A. Seavey, Negligence—Subjective or Objective?, 41 HARV. L. REV. 1, 1 n.1 (1927). On the influence of Seavey, and the history of the Restatement (First) generally, see Green, supra note 54.
phrasing it differently, to the extent that the actor's conduct is determined with reference to the community valuations, we may say that an objective test applies.\textsuperscript{74}

In the above passage, Seavey first notes that the process of discounting for the uncertainty of particular injuries is a process that will not vary with particular communities. Speaking anachronistically, this is the "P," or probability, component in the Hand Formula. But regarding the values to be imputed to the benefit received by the tortfeasor and the loss inflicted on the victim, respectively, "community valuations" are to serve as the measure. While these valuations may vary from community to community, the fact that they will be standardized within particular communities nevertheless allows for the conclusion that "an objective test applies."

In an important recent article defending a \textit{Restatement (First)} approach to the \textit{Restatement} project, Stephen Gilles endorses the legitimacy of community values as a source of objective legal standards.\textsuperscript{75} Gilles adds an additional gloss to Seavey's account by arguing that the negligence test is best understood as incorporating a "Hand Norm." According to Gilles, "[t]he Hand Norm tells us that it is negligent to omit a precaution if the reduction in expected accident costs would have been greater than the costs of the precaution."\textsuperscript{76} The Hand Test, then, is not merely an arid academic formulation but also one important component of the set of norms that characterizes the community morality of jurors. If Gilles is right, the task of the positive theorist is potentially rendered more tractable. The Hand Test is no longer merely a description of what juries do. Instead, it attempts to give center stage to cost-benefit balancing by explaining that such balancing is itself a moral norm held by jurors.

With reference to shared community norms of the sort that juries consult, Gilles refers to the "common coin of 'social value.'"\textsuperscript{77} He goes on to say, "human beings have various interests, and those interests have more or less social value."\textsuperscript{78} Thus, for Gilles, talk of community morality and norms shifts to talk of values on a uniform scale in which interests have "more or less social value," and all

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\textsuperscript{74} Seavey, supra note 73, at 8 (emphasis added).
\textsuperscript{75} Gilles, supra note 54, at 833-34 ("Jurors can safely be presumed to be familiar with prevailing community values. Beyond that, in consulting community values the jury would in an important sense be applying the 'law' because the common law has designated those values as part of the reasonable person standard.").
\textsuperscript{76} Id. at 818.
\textsuperscript{77} Id. at 828.
\textsuperscript{78} Id.
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values may be reduced to a "common coin." Elsewhere, Gilles refers to "social value" as a "metric for weighing risk against utility."79

Recasting balancing as a moral norm, however, does not establish the primacy of a welfarist conception of fault or breach. This is because there is no logical connection between factor balancing, generically understood, and the cost-benefit approach. Both Gilles and the Discussion Draft take too literally the metaphors of "balancing" and "weighing" of utility. A set of scales can balance weights at either end, just as a bathroom scale reduces all persons to one unit they all share, physical weight. But ordinary usage also permits a more general sense of the words "weigh" and "balance" to mean simply that rational actors may take account of numerous factors in their practical reasoning with regard to a particular issue.80 Practical reason itself typically involves taking account of numerous factors. There is nothing intrinsically utilitarian or consequentialist in practical reasoning. A deontologist can engage in practical reasoning by balancing various considerations, every bit as much as a utilitarian can.

79. Id. Gilles believes that the reasonable person will sometimes explicitly apply the Hand Test. Gilles appears to conceive of this in the manner that act utilitarians conceive of the utility maximization test. Gilles also appears to believe that people will sometimes act like rule utilitarians, conforming to customs and social norms rather than performing Hand Test calculations on each occasion in which they act. Id. at 825. Here, Gilles falls unwittingly into the trap of thinking that customs are welfare-maximizing such that conforming to them will necessarily be a welfare-maximizing shortcut; however, customs are not always welfare-maximizing. The custom may be structured so as to allow for third-party externalities such that the custom is welfare-maximizing for the conformers but not for the overall community. Or the custom may be the result of a collective action problem such that a collection of individually maximizing actions serves to maintain a practice that is nevertheless suboptimal. See Hetcher, supra note 66, at 52.

80. Hand himself was not deluded into thinking that the Hand Test implied weighing in anything more than a metaphorical sense. Nor did Hand have any illusions that values could be quantified. He wrote: "If these factors care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and besides, probability varies with the severity of the injuries." Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949). Hand noted elsewhere that the problem with "the appraisal and balancing of human values" is that "there are no scales to weigh" them on. Hand continued, "the difficulty here does not come from ignorance, but from absence of any standard, for values are incommerable." LEARNED HAND, THE SPIRIT OF LIBERTY 161 (1963). Note how this contrasts with Posner's hope that, someday in the future, we will be able to attach dollar figures to the relevant factors. McCarty v. Pheasant Run, Inc., 826 F2d 1554, 1557 (7th Cir. 1987) (Posner, J.) ("Conceptual as well as practical difficulties in monetizing personal injuries" mean that, "for many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula."). For a recent defense of his view, see Richard A. Posner, WEALTH MAXIMIZATION AND TORT LAW: A PHILOSOPHICAL INQUIRY, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99 (David G. Owen ed., 1995).
For example, a deontologist may balance freedom of action against security. Doing so in no way transforms the deontologist into a utilitarian. This can be seen by imagining a community of deontologists. In this community, like all communities, accidents will occur and thus, there will be injuries to tort victims due to allegedly negligent actions of potential tortfeasors. The utilitarian will be committed to interpreting the jury's response to an injury to a plaintiff and the injurious action by the tortfeasor in cost-benefit terms, despite the fact that no one on the jury conceived of the balancing test in these terms.

Gilles' argument appears to provide support for the utilitarian thesis, due to its conceptualization of the social values at stake as "Hand Factors." Stripped of rhetoric, however, the so-called Hand factors are simply the core factors of any account of negligence. These factors will be present under any theoretical conception of the reasoning processes engaged in by jurors.

The first of Gilles' Hand factors concerns the utility of the defendant's action. Any theoretical approach to torts must take account of the defendant's actions. The Kantian will hold this action to the test of the categorical imperative. The corrective justice theorist will consider the sort of wrongfulness contained in the action. In a general sense of the term, each of these can be seen as "factors" looked into by courts. The same is true for the second factor that courts consider, the injury to the plaintiff. Here as well, a Kantian or corrective justice theorist will, of course, provide a role for the victim's injury within her theoretical account of the negligence standard.

The third Hand factor is based on the fact that, ex ante, the injury to the plaintiff was not certain to occur (otherwise it would be an intentional tort). Gilles and the Discussion Draft describe this

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82. When the U.S. Supreme Court performs its multi-part balancing tests in deciding cases involving basic constitutional rights, it would be implausible to suggest that the Court has first reduced all the competing rights-based considerations to some "common coin" of consequentialist value. Likewise, there is no reason to think that when the ordinary juror weighs or balances various community-based moral factors, that she is therefore somehow transformed into a utilitarian.
83. Gilles, supra note 54, at 818 ("The 'Hand Factors,' if you will, are thus the raw data to which the 'Hand Formula' is applied to determine whether there was negligence in accordance with the 'Hand Norm.'"); Id. at 817 n.5 ("I use 'Hand Formula approaches' as a shorthand for the whole range of approaches that balance the costs and benefits, however defined, of taking greater care to avoid an accident.").
84. See Keating, supra note 24; Richard W. Wright, The Standards of Care in Negligence Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249 (David G. Owen ed., 1995).
85. See COLEMAN, supra note 38.
factor in terms of "risk," "probability," or "likelihood," of the injury occurring. There is nothing that is particularly utilitarian, however, about factoring in risks, probabilities or likelihoods. Because outcomes that are probable, rather than certain, are an unavoidable part of life, any theory of practical reason, and any normative theory of liability in negligence, must sometimes take account of them.

It is apparent, then, that with regard to all three of the so-called Hand factors, there is nothing that is inherently utilitarian about any one of them. Any normative approach will necessarily involve the balancing of these considerations. What is distinctively welfarist is putting all such considerations on one scale of value. But as we have seen, there is no evidence that this is what juries do, and there is, in fact, good reason to think this is not what they do. In other words, there is nothing to make the label "Hand factors" more appropriate than "Wright factors," "Keating factors," or "Coleman factors."

At times, the Discussion Draft echoes the Restatement (First) in emphasizing the multiple considerations that enter into the assessment of fault, as, for example, when it discusses the idea of "ethical particularism" in commentary to Section 5.66 Reviewing the famous Holmes/Cardozo debate regarding the appropriateness of bright-line negligence rules, the Discussion Draft endorses Cardozo's position and describes it as an approach favoring "ethical particularism." But it is clear, notwithstanding this nod to the possibility of genuinely pluralistic reasoning about fault, that the Discussion Draft understands ethical particularism in utilitarian terms. Its claim is simply that each fact pattern giving rise to a negligence claim in tort litigation presents particular factual details that distinguish it from other similar factual situations. Thus, rather than having a bright line rule to deal with similar situations, courts allow the negligence question to go to the jury, which can then perform more fine-grained Hand factor analysis based on all the details of the case.67

The Discussion Draft's error is to reduce all the ethical particularities of specific fact patterns to their consequential value, that is, how they are to be quantified in terms of cost-benefit analysis. In fact, however, the argument from ethical particularism to which the Discussion Draft cites has nothing to do with making a

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66. Discussion Draft, supra note 1, § 5 cmt. d. The Discussion Draft makes a rare citation to a philosophical text on the topic: Jonathan Dancy, Ethical Particularism and Morally Relevant Properties, 92 MIND 530 (1983).
67. Discussion Draft, supra note 1, § 5.
full count of utilities. Rather, the ethical particularities thought to be implicit in specific situations cannot be reduced to any particular critical normative framework, be it consequentialist or non-consequentialist. As Part Three below will indicate, the moral judgments rendered by juries are often based on a variety of moral factors such as directness of the injury and reciprocity, which cannot be reduced to consequentialist factors to be measured by their relative magnitudes.

It is worth noting that the proposed Restatement's misconception regarding the prospect of quantifying all factors relevant to negligence has an important practical bite. The proposed Restatement notes that directed verdicts for negligence, per se, should increase as more exact measurement of utilities becomes feasible. In other words, the role of the jury in tort law will diminish over time, as utilitarian science displaces lay juror guesses regarding the exact utilities to be attached to the Hand factors. Given the important and unique role that juries have played in American tort law, this aspect of the Discussion Draft deserves greater attention from future scholars.

As a general matter, the Discussion Draft gives the jury short shrift. Similarly, the jury is barely mentioned in Posner's discussions in which he develops his positive account. Instead, these texts repeatedly refer to the actions of "courts." The term "court" when referring to a trial court is ambiguous between the actions of judges and the actions of juries, however. Generally speaking, judges apply, and sometimes make, law while juries find facts. With regard to a jury's determination of negligence, the situation is more complex. Bohlen refers to negligence as a mixed question of law and fact. Hand refers to the jury as, in effect, enacting mini-legislation

88. Dancy, supra note 86, at 530.
89. Discussion Draft, supra note 1, § 5 cmt. b.
90. Posner notes that social efficiency is the dominant philosophy among judges and policy makers and that it is less controversial than other philosophical views, such as those that require redistribution of wealth. LANDES & POSNER, supra note 14. It should be clear, then, why Posner would not be in a position to discuss the role played by the jury as distinct from the court, as one cannot credibly claim that utilitarianism is the social philosophy among the class of ordinary people who typically fill the ranks of juries (the claim is equally implausible for judges as well, but this point is not a present concern).
91. Frances Bohlen, Mixed Questions of Law and Fact, 72 U. PA. L. REV. 111, 119 (1924). Terry argued that the issue of negligence turns on what a "standard man," not "an ideal or perfect man, but an ordinary member of the community," would have done under the circumstances. Terry, supra note 33, at 47. Questions of negligence are left to the jury "because the jury is supposed to consist of standard men, and therefore to know of their own knowledge how such a man would act in a given situation." Id. Moreover, Terry thought this appropriate because these are questions of fact; "the inference of reasonableness or unreasonableness, of due care, of negli-
when making findings with regard to negligence. This is recognition of the broad discretion left in the hands of jurors when it comes to the determination of negligence.

Summing up this section, we have seen that both the Discussion Draft approach and the Restatement (First) approach are misguided attempts to assimilate factor balancing and cost-benefit analysis. The previous Section demonstrated that the Discussion Draft's attempt to read cost-benefit analysis into the reasonable person standard was implausible. Overall, then, Part Two has shown that the Restatement's cost-benefit conception of fault fails to restate the law of breach.

III. MORAL HETEROGENEITY IN THE REASONABLE PERSON STANDARD

The previous Part accomplished the goals set out in the first paragraph of the Article. There I said that I would explore the twin failings of the proposed Restatement. The Restatement's first failing is that it dramatically overstates the role of utilitarian, cost-benefit analysis in the reasonable person standard. The above discussion demonstrated that this is clearly the case. The Restatement's second failing is that it understates the role of non-utilitarian negligence norms in filling out the actual substance of the reasonable person standard. As the above discussion indicated, the proposed Restatement has, by and large, moved away from the role accorded to social norms in the earlier Restatements. While the Restatement (First) incorrectly dealt with social norms by reducing them into a utili-

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92. In Stornelli v. United States Gypsum, Hand wrote:

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

tarian framework, nevertheless there was an acknowledgement of their pervasive role in the courts' search for concrete values to place into the balancing test. The Discussion Draft, by contrast, sweeps social norms under the rug. For this reason, the proposed Restatement fails to adequately account for the role played by social norms in providing content to the abstract reasonable person standard.

In order to better understand the normative factors that go into filling out the reasonable person standard in particular factual circumstances, more empirical work would be required to identify the contours of the thick moral sociology of the communities in question. This final Part will briefly consider a sample of what such a study might turn up.

I will focus on the roles played by strict liability and directness of injury in the reasonable person standard. The orthodoxy is of course that the reasonable person standard is not a strict liability standard. Strict liability is liability without fault, and the reasonable person standard requires fault. As long as the injurer was acting reasonably, taking due care, the reasonable person will not be liable for injuries. Some courts have observed that the fault standard is a morally superior standard, claiming it to be "immoral and unjust" to hold an injurer liable in a situation in which the injury was not reasonably preventable. Despite this orthodoxy, however, the cases themselves are more complex. In particular, there is strong evidence that strict liability plays a substantial role in actual jurors' application of the reasonable person standard. Indeed, there is strong evidence that this has long been the case. Bohlen, for example, writes,

> [the general utility of such conduct in not likely to receive much consideration from a jury who sees before them a plaintiff whose vital interests have been harmed by a particular instance of it. A court might emphasize to the jury ad nauseam the social value of the act, but the jury would only see one man injured by another. And only the most confirmed optimist would dare to hope that they would]

93. See NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 104-11 (2000). Feigenson finds that jurors do "total justice." What is meant by total justice is that jurors decide liability not solely on either a welfare-maximizing criterion or on a corrective justice criterion, but rather, they take account of a plurality of factors. Some of these factors may be dubious from the perspective of prevailing critical moral frameworks, such as the wealth of the defendant or the likelihood that the defendant is insured. Nevertheless, these factors may play a role in ordinary morality and this is what matters when presenting the best positive account of juror behavior. See also LEON GREEN, JUDGE AND JURY (1930). Note that juries do not determine other features of tort law. These other features may well be modeled in terms of other normative frameworks. See Jules L. Coleman, The Structure of Tort Law, 97 YALE L.J. 1233 (1988).

judge the defendant's conduct by what the ideal creature, the "reasonable man" would do . . . . The concept universal among all primitive men, that an injury should be paid for by him who causes it, irrespective of the moral or social quality of his conduct, while it has disappeared from legal thought, still dominates the opinion of the sort of men who form the average jury.95

Bohlen's remarks indicate that in his experience, the actual outcome of jury decisions applying the reasonable person standard will reflect the tendencies of juries to find liability based on whether the defendant "caused" the "injury" rather than on whether the defendant was acting to maximize "social value" at the time he caused the injury. In other words, many actual court decisions tend to reflect strict liability more than negligence liability.

There is reason to believe that juries continue to sometimes apply a strict liability standard. Gilles writes, "[f]urthermore, the juror objections to Hand Formula balancing in large part amount to a preference for strict liability in certain types of cases."96 While Gilles perceptively notes that jurors show a preference for strict liability in "certain types of cases," he does not specify which types. One particularly salient factor appears to be the directness of the injury. Juries composed of ordinary people appear to give this factor great weight in their findings of liability.

Perhaps the most famous directness case is Polemis.97 In this case, the court held that because of the directness of the injury, there could be a finding of liability, even without consideration of whether there was reasonable foreseeability on the part of the defendant.98 This case is sometimes contrasted with Wagon Mound II in which the Privy Council, as just noted, rejected the directness test as "immoral and unjust." The Wagon Mound II court here exhibits a value judgment which evidently is at odds with ordinary morality, however, as across most jurisdictions, directness and reasonable foreseeability have each commanded respect from jurors.99

With respect to strict liability, Gilles notes: "But the common law has been committed to a general regime of negligence liability for over a century. To allow the resistance of some jurors to return

95. Bohlen, supra note 91, at 119.
96. See generally Gilles, supra note 54.
98. According to the Restatement, the risk must be "recognizable" (reasonably foreseeable).
99. SCHWARTZ ET AL., supra note 2, at 350 ("There are two general approaches to the problem of proximate cause—the hindsight, or direct-causation approach and the foreseeability approach. Practically every jurisdiction has used both, at one time or another."). In addition, the hindsight or direct-causation approach may introduce further biases not consistent with wealth maximization. See Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hind-sight, 65 U. CHI. L. REV. 571 (1998).
that regime would be legislation writ large, not small."\textsuperscript{100} The problem with Gilles' remark is that it begs the question. There is no reason to think that jurors ever stopped taking strict liability seriously. Thus, there is no need for them to "return" to this regime. Furthermore, because there is no need to return to strict liability, it is inaccurate to characterize jury determinations of liability that incorporate strict liability considerations as "legislation writ large." Rather, these are simply instances of mini-legislation of the sort discussed above, in which juries plug their norms of reasonable behavior into the abstract reasonable person standard.

It will be of interest to conclude with a bit of normative sociology in order to get a better sense of the bona fides of strict liability, as judged by the morality of ordinary jurors. It was Bohlen's failure to appreciate the normative respectability of non-utilitarian frameworks that caused him in the above passage to disparage ordinary jurors as "primitive" for supporting a strict liability standard.

Note that ordinary morality may support the normative intuition that undergirds strict liability, particularly when the injury is direct. For example, if we are in a restaurant and I accidentally and non-negligently spill coffee on your coat which is sitting on the back of a chair, it would certainly be consistent with, and perhaps demanded by, ordinary morality for me to offer to pay for the dry-cleaning. It would be no surprise, then, if ordinary people employed similar reasoning when functioning as jurors in tort suits, by sometimes holding injurers liable for their directly caused injuries.\textsuperscript{101}

I am not claiming that strict liability and directness are the core, or even the main normative influences, in jury determinations on the issue of negligence, but that they are among the normative influences that may come into play. Other fact patterns may highlight other normative concerns, such as reciprocity of risk, the pro-

\textsuperscript{100} See generally Gilles, supra note 54.

\textsuperscript{101} All torts have one thing in common: an injured victim. Thus, by necessity, the loss must either lie with the victim or be shifted elsewhere, such as onto the injurer. Of the two, it is far from clear from a moral point of view, to say the least, that it is the victim who should suffer the loss. See Coleman, supra note 38. The "fault standard" is a rule under which victims bear the risk of non-negligent injuries. While the fault standard is often contrasted with strict liability, Judge Guido Calabresi more accurately notes that the so-called fault standard is equivalent to strict liability of another sort, strict victim liability. In other words, when no one is at fault for an accident, the injury will lie with the victim upon whom it fell, rather than being shifted back onto the injurer who caused the injury. Guido Calabresi, Optimal Deterrence and Accidents, 84 Yale L.J. 656 (1975); see also Catharine Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich. L. Rev. 2348 (1990) (jury should be left to decide where the losses in negligence cases should reasonably fall, even including strict liability).
duction of social welfare, or correcting wrongful injuries. Fletcher is right, then, to note the role of reciprocity, and Schwartz is right to note the role of welfare promotion. They err, however, in thinking that their normative accounts are exhaustive, or anything close to it.

Perhaps Bohlen was emboldened to denigrate his fellow citizen as primitive because Bohlen thought he had modern science on his side. As mentioned earlier, Bohlen was writing during a brief period of history when utilitarianism was considered by its adherents as not merely normatively superior but also epistemically superior. It was scientific whereas other theories were based on superstition and bad metaphysics. Seventy years after Bohlen's remark, however, utilitarianism has been on the academic ropes for a quarter century and most leading normative theorists are not utilitarian. These normative theorists may or may not be right, but they are hardly primitive. Thus, Bohlen and those in his line cannot simply assume the superiority of their preferred normative framework. With this in mind, the Discussion Draft should either drop its exclusive commitment to cost-benefit analysis or quit calling itself a Restatement.

Many normative tort theorists have attempted to redescribe the positive law of the past in their normative image. One explanation of this phenomenon speculated on earlier was that it was the result of a cognitive bias. An alternative explanation, however, is that these theorists have consciously attempted to restate the law in correlative positive terms in order to promote their normative ideal, which these theorists view as superior to informal community norms.

Finally, it is worth mentioning that it might make sense to stand this notion on its head and see the heterogeneity of ordinary morality as valuable. The heterogeneity is not valuable, per se, but as the product of a valuable process whereby the community is allowed to make its moral voice heard. If, in a representative democracy, politicians should to some extent function as norm entrepreneurs, then the fact that ordinary people have their moral voice heard by means of jury primacy with regard to the negligence standard may be a feature of American tort law that is desirable from

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102. Bohlen, supra note 91.
103. Coleman, Dworkin, Habermas, MacIntyre, McKinnon, Nagel, Nozick, Rawls, Rorty, and Williams, to name a few.
104. Indeed, for an act consequentialist, such an instrumental use of scholarship may be demanded, if the normative goal of welfare maximization would thereby be promoted.
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the perspective of democratic theory. American tort law is distinct in the primacy of the jury. The jury may serve an important democratic function of filling out the substance of the negligence standard with the dominant social norms of the demos. The primacy of the jury is threatened, however, by the Discussion Draft. As mentioned earlier, veiled within its analysis is the belief that once we are able to apply magnitudes more accurately to the Hand factors, the need for the jury is diminished. Thus, the proposed Restatement, in addition to not accurately restating the law of breach, may also be anti-democratic.

CONCLUSION

This Article has examined the Discussion Draft's attempt to restate the breach element of the negligence cause of action. We have seen that the Discussion Draft conceives of the reasonable person standard as consisting almost entirely of the application of a cost-benefit version of the Hand Test. I have argued that this characterization of the case law is not descriptive or interpretative, but rather normative. In particular, it represents an attempt to change the reasonable person standard into a tool for promoting social welfare. Next, we reviewed the Restatement (First)'s more promising attempt to restate the element of breach in terms of community norms of conduct. We saw, however, that this account nevertheless fails because it reduces the jury's consideration of social values into a form of utilitarian effort at wealth maximization. Thus, we must conclude that both the Discussion Draft approach and Restatement (First) approach fail to restate the law with respect to the element of breach.

This is a strong claim. Is it perhaps an overstatement on my part? I think not. The Discussion Draft is not a restatement of the law of breach, by the lights of the plain meaning of the term “restatement.” Rather, it seeks to articulate and proselytize a normative conception of breach not found in the common law standard as filled out by juries. The law of breach does not contain a unified critical normative vision. Because it evolved as a messy real-world institution, it is not pure in this manner, but rather normatively heterogeneous. The Discussion Draft isolates and highlights a certain strand from this larger mosaic, in order to promote this strand. As mentioned at the outset, the ALI says that the tort's Restatement is meant to be an “explanation” and “elaboration.” Gilles re-

105. See supra text accompanying notes 89-92.
marks that a Restatement should be at most incrementally normative.\textsuperscript{106} The Discussion Draft is not an elaboration, nor a proposal for incremental change. Rather, it is a proposal for a fundamental change, namely, to remake the breach standard in tort law so that it exclusively promotes social welfare.

My analysis entails an either/or conclusion. Either the Restatement should drop the cost-benefit approach to breach, or drop the word Restatement from the title of the work. The draft could simply be amended to take out all the language reflecting a cost-benefit approach. The balancing test, per se, can be left insofar as the language could be used in a theory-neutral way to characterize a test that juries can perform to give some content to the reasonable person standard. Alternatively, as mentioned at the outset, the ALI could abandon the title of restatement. Although this course is perhaps unattractive to the Reporter and the ALI, it is hardly unprecedented and may, ironically, give added credibility and influence to the project.

\textsuperscript{106} See generally Gilles, supra note 54.