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# Reasonableness In and Out of Negligence Law

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REASONABLENESS IN AND OUT OF NEGLIGENCE LAW

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BENJAMIN C. ZIPURSKY<sup>†</sup>

INTRODUCTION ..... 2132

I. VARIANTS IN THE LANGUAGE OF REASONABLENESS ..... 2135

    A. *Reasonable and Unreasonable* ..... 2136

    B. *Optimizing or Range-Delineating* ..... 2136

    C. *Adjectival Versus Adverbial Modification* ..... 2137

II. FAMILIES OF “REASONABLENESS” USE ..... 2138

    A. *The Antonym of “Excessive”* ..... 2138

    B. *Passable Exercises of Judgment or Interpretative Capacity*  
        *(and Deference)* ..... 2139

    C. *Reasonableness and Justifiability (Epistemic)* ..... 2140

    D. *Two Kinds of Practical Reasonableness* ..... 2142

    E. *Secondary Qualities in the Law* ..... 2143

    F. *Mixed and Other Categories* ..... 2145

III. JURISPRUDENTIAL OBSERVATIONS ..... 2146

    A. *Standards and Vagueness* ..... 2146

    B. *Two Kinds of Delegation of Judgement Power* ..... 2147

    C. *The Reasonable Person as a Decision-Guiding Device* ..... 2148

    D. *The Normative Versus Descriptive Confusion* ..... 2149

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IV. REASONABLENESS IN NEGLIGENCE LAW: THE POSNERIAN ACCOUNT .....	2153
V. THE MODERATION-BASED ACCOUNT OF REASONABLENESS IN NEGLIGENCE LAW .....	2153
VI. REASONABLENESS IN NEGLIGENCE LAW: A CRITIQUE OF THE MODERATION ACCOUNT .....	2155
A. <i>The Reasonable Person and the Reasonably Prudent Person</i> .....	2155
B. <i>Performance and Precautions</i> .....	2156
C. <i>Returning to Unreasonable Risks</i> .....	2157
VII. THE HAND FORMULA REVISITED .....	2158
VIII. THE MODERATION-AND-MUTUALITY CONCEPTION OF REASONABLENESS IN NEGLIGENCE LAW .....	2160
A. <i>The Mutuality Conception</i> .....	2160
B. <i>The Overdemandingness of the Hand Formula Conception of the Duty of Care</i> .....	2165
C. <i>Reasonableness and Contractualism</i> .....	2167
IX. CONCLUDING REFLECTIONS ON REASONABLENESS, REALISM, AND DOCTRINALISM .....	2168

## INTRODUCTION

The law's use of the terms "reasonable" and "unreasonable" are legion and notorious. Indeed, the law's seemingly carefree attitude in throwing around these terms has often served Legal Realists and their descendants well in their effort to depict legal language as simply a shell through which actors exercise the widest sort of discretion to select their favored outcomes or policies. Conversely, ambitious agendas from philosophers and economists have often found that "reasonableness" provides a readily available anchor in the positive law for their normative theories. Work by moral and political philosophers devoted to analyzing "the reasonable" and work by economists, decision theorists, and game theorists on rationality understandably turn the law's use of "reasonableness" into a magnet for legal theory. In these respects, "reasonableness" might be seen as the third "r" of legal theory. Like "rights" and "responsibility," "reasonableness" is beloved by legal theorists and equally beloved by the skeptics who spend their time skewering those theorists.

However tempting it is to join one side or the other in these jurisprudential wars, it is useful to step back and do some legwork on the place of the reasonable within the law, and more specifically, on the variety of places

that “reasonable” and its cognates are found in the law. Hohfeld and many since him have found what I might call “varietal analysis” useful in exploring the concept of rights,<sup>1</sup> as did Hart within the concept of responsibility.<sup>2</sup> If exploration of the varieties of reasonableness in the law were to provide even a fraction of the illumination generated by their work on the other two “r”s, the enterprise will have been worthwhile.<sup>3</sup>

There is, of course, an irony in my suggested sequence of research. The word “reasonable” is a paradigmatic example of a *standard* in the law, and its meaning is, if nothing else, vague. And—as intimated above—that is why it is so tempting to reach to legal, philosophical, and economic theories to flesh out some content for “the reasonable” when content is needed.<sup>4</sup> It thus seems odd—backwards, even—to turn to legal doctrine to try to illuminate reasonableness.

My reasons for looking at doctrine relate to a suspicion that legal scholars with a theoretical proclivity have too quickly conflated three quite different attributes of the language of reasonableness in the law: the attribute of *vagueness*, the attribute of *meaninglessness*, and the attribute of *ambiguity*. For a term or a phrase to fall short of clarity because of vagueness is quite different from having no meaning at all, and both are different from having multiple meanings—being ambiguous. A failure to distinguish among these features of meaning can distort our view of the relevant domain of law. Indeed, the failure to recognize the multiple ambiguity of “reasonableness” can lead to a distorted view of its vagueness and unclarity in the law.

Candor requires me to reveal that I too come with a special interest in, and theoretical agenda for, one particular occurrence of a “reasonableness” cognate in the law: reasonableness in negligence law. Most tort theory debates about reasonableness in negligence law focus on the question of whether the Hand Formula conception of unreasonable risk—deriving from earlier work by Henry Terry<sup>5</sup>—should be understood in a utilitarian or

<sup>1</sup> See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

<sup>2</sup> See generally H.L.A. Hart, *Varieties of Responsibility*, 83 L. Q. REV. 346 (1967).

<sup>3</sup> Sir Neil MacCormick undertook a similar project in one of his last American publications. See Neil MacCormick, *Reasonableness and Objectivity*, 74 NOTRE DAME L. REV. 1575, 1576 (1999) (exploring the concept of “reasonable” throughout the law). MacCormick put forth a rationalistic and homogeneous set of analyses of the sort that I aim to reject in the present Article.

<sup>4</sup> The temptation to draw the legal analysis from work in moral and political philosophy is particularly great, given the power and depth of work such as that of Rawls and Scanlon on reasonableness. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

<sup>5</sup> See Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

economically oriented approach, on the one hand, or in a deontic manner, on the other. Terry started with the idea that being negligent was a matter of deviating from a reasonable person standard, and then essentially analyzed being a reasonable person as a matter of not taking unreasonable risks. Once one moves on to the question of which risks are unreasonable, one is essentially making a judgment about which risks should be taken and which should not be taken: “unreasonable” is a vessel into which such a judgment can be poured. American negligence law—which gives the question of breach in a negligence case to the jury—can be understood as delegating the normative decision about which risks are justifiable to the jury. Common law negligence doctrine in the United States, the United Kingdom, and former Commonwealth countries, contains much guidance on how best to think about this normative question. Instrumentalists and utilitarians tend to offer one sort of interpretation of this body of doctrine,<sup>6</sup> while rights-based theorists tend to offer a rather different account.<sup>7</sup>

I belong to a handful of tort scholars who believe that the terms of the debate are themselves unacceptable,<sup>8</sup> because the *breach* or *negligence* standard of the negligence tort is not really about ascertaining a reasonable level of risk. On this view, the Hand formula grossly misrepresents what “negligence” really is. Indeed, Henry Terry and the Restatements of Torts (the most recent of which analyzes breach through the foreseeability of harm, magnitude of harm, and burden of precautions)<sup>9</sup> were all making a big mistake at an analytical level that leads to a variety of different distortions in tort doctrine and tort theory.

In the majority of cases, an actor is negligent when he or she fails to use ordinary care, and ordinary care is that which a reasonably prudent person, or a reasonably careful person, would take under like circumstances. The concept of “ordinary care” carries content that is not dependent on the

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<sup>6</sup> See generally Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (setting forth an economic interpretation of the Hand Formula).

<sup>7</sup> See generally Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996) (setting forth a rights-based interpretation of reasonableness and the Hand Formula).

<sup>8</sup> See, e.g., Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 591 (2002) (surveying jury instructions on “negligence” in all 50 states); Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 343-44 (1990) (challenging the idea that “the unreasonable foreseeable risk test is really the standard of conduct applied in negligence cases”); Richard W. Wright, *Hand, Posner, and the Myth of the “Hand Formula,”* 4 THEORETICAL INQUIRIES L. 145, 162-80 (2003) (explaining how Hand did not apply his “aggregate-risk-utility formula” in many cases in which he said he did).

<sup>9</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010).

notion of “reasonableness,” understood as an objectively justifiable risk level. The level of risk is not the key question. The phrases “reasonable person” and “unreasonable risk” are not best analyzed as shells into which risk–benefit analyses should be poured. I began spelling out this view in the article *Sleight of Hand*,<sup>10</sup> published several years ago and briefly summarized in Part V, *infra*. This article is an indirect continuation of that project. Negligence law is so deeply associated with reasonableness that a critique like my own requires that I delve more deeply into reasonableness throughout the law, before returning to examine negligence law.

Parts I, II, and III explore, respectively, syntactical, semantic, and conceptual aspects of reasonableness cognates throughout various parts of the law. Part IV turns to torts, setting forth a leading position on reasonableness in tort law—roughly speaking, a Hand Formula view as understood in Posnerian terms. Part V provides a concise critique of the Hand Formula account and tentatively puts forth a competing account, called the “moderation-based account of reasonableness.” In Parts VI, VII, and VIII, I develop, dialectically, a critique of the moderation-based account, a renewed version of the Hand Formula account, and a “modernation-and-mutuality” conception of reasonableness. The article concludes in Part IX by reflecting on the place of reasonableness within the debate between realism and doctrinalism that forms the core of this Symposium.

## I. VARIANTS IN THE LANGUAGE OF REASONABLENESS

The range of uses of “reasonableness” in law is so great that a list is not an efficient way to describe and demarcate it. The modes of employing “reasonable” and its cognates differ in many respects, which combine in innumerable ways. This Part thus begins simply by considering the various cognates of “reasonable” that appear in different parts of the law, and some dimensions of difference in their meanings. Part II begins to distinguish between different families of reasonableness uses in the law.<sup>11</sup>

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<sup>10</sup> See Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007).

<sup>11</sup> While I am not among those who believe that dictionary definitions are normally entitled to any special salience in legal analysis, I note that Merriam-Webster’s online dictionary definition of “reasonable” provides a set of alternatives that is consistent with what is provided in this essay.

1a: being in accordance with reason <a *reasonable* theory>  
 b: not extreme or excessive <*reasonable* requests>  
 c: moderate, fair <a *reasonable* chance> <a *reasonable* price>  
 d: inexpensive  
 2a: having the faculty of reason  
 b: possessing sound judgment <a *reasonable* man>

### A. Reasonable and Unreasonable

The most obvious cognate of the “reasonable” in the law is the “unreasonable.” While negligence law and basic criminal law typically refer affirmatively to the “reasonably prudent person,” the “reasonable person,” “reasonable care,” or the “reasonable consumer,” Fourth Amendment law and antitrust law do the opposite. The Fourth Amendment’s text does not require that searches and seizures be “reasonable,” but instead forbids “unreasonable” searches and seizures.<sup>12</sup> Similarly, as the United States Supreme Court has interpreted the Sherman Act, it prohibits “unreasonable” restraints on trade.<sup>13</sup> Cognates of both “reasonable” and “unreasonable” can be found throughout the law.

It might seem obvious that unreasonableness is simply the opposite of reasonableness, and that it makes no difference whether a legal standard is expressed in terms of a requirement of reasonable conduct or a requirement to refrain from unreasonable conduct. It is by no means clear whether this is true. Forbidding of the unreasonable may, despite its negativity, be more permissive than requiring the reasonable. Rather than selecting conduct that satisfies some standard and requiring that all adhere to that standard, an unreasonableness standard seems to permit everything except that which is unreasonable. The domain of possible restraints on trade that transactors agree to is vast, and most are permitted; it is only the “unreasonable restraints on trade” that are prohibited.

### B. Optimizing or Range-Delineating

I suspect that the distinction between the reasonable and the unreasonable is not actually very accurate in tracking a difference between less and more permissive standards, but this discussion does alert us to what may be an important ambiguity within the term “reasonable” itself. Perhaps the requirement of a “reasonable rate,” a “reasonably prudent person,” a “reasonable factfinder,” or a “reasonable expectation of privacy” can be used in a

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*Reasonable definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/reasonable> (last visited Feb. 2, 2015), *archived at* <http://perma.cc/9YV6-4L97>.

<sup>12</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

<sup>13</sup> *See* *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (citations omitted)(“[T]he Court has repeated time and again that § 1 ‘outlaw[s] only unreasonable restraints.’”); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (holding that “the standard of reason” applies to anti-competitive restraints of trade under the Sherman Act).

pointed, optimizing way<sup>14</sup> (as, for example, Posner’s analysis of the standard of care in negligence law suggests<sup>15</sup>). Even if this is so, it certainly can be used in a broader manner that denotes a range of possibilities, the members of which remain permissible so long as they do not extend beyond some outer demarcation into the domain of the unreasonable.<sup>16</sup>

Among the most prominent of the range-delimiting usages of “reasonable” are financial ones: statutes, regulations, case law, and contracts frequently refer to “reasonable rates” or “reasonable prices.”<sup>17</sup> Here, “excessive” is a comfortable antonym for “reasonable.”<sup>18</sup> Relatedly, it is worth noting that sometimes a definite article is used preceding a “reasonable” cognate, as in “*the* reasonable person” standard, while sometimes it is an indefinite article, as in “beyond *a* reasonable doubt.”

### C. Adjectival Versus Adverbial Modification

As significant as the positive–negative difference is the distinction between the adjectival use of “reasonable” (or “unreasonable”) to modify a noun and the adverbial use of “reasonably” to modify an adjective (or a verb). The uses of “reasonable” in the phrases “reasonable expectation of privacy” and “reasonable factfinder,” while quite different from one another, are entirely different from the use of “reasonably” in the phrases “reasonably necessary,”<sup>19</sup> “reasonably feasible,”<sup>20</sup> “reasonably fair,”<sup>21</sup> “reasonably clear,”<sup>22</sup> and “reasonably detailed.”<sup>23</sup> In the latter contexts, “reasonably” is

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<sup>14</sup> See, e.g., 16 U.S.C. § 824e(a) (2012) (noting that the Federal Energy Regulatory Commission shall set “*the* just and reasonable rate” (emphasis added)).

<sup>15</sup> See Posner, *supra* note 6.

<sup>16</sup> See, e.g., 16 U.S.C. § 2621(18)(B) (2012) (noting that each state shall consider authorizing qualified utility companies to create investment programs including “*a* reasonable rate” of return (emphasis added)).

<sup>17</sup> E.g., *Id.*

<sup>18</sup> See *infra* Part II.A. (discussing further “excessive” as an antonym for “reasonable”).

<sup>19</sup> See, e.g., 11 U.S.C. § 1325(b)(2) (2012) (defining “disposable income,” in part, by reference to the amount “reasonably necessary” to be expended for maintenance and support of dependents).

<sup>20</sup> See, e.g., 38 U.S.C. § 3106(b) (2012) (requiring development of a vocational plan for veterans where attainment of a vocational goal is “reasonably feasible”).

<sup>21</sup> See, e.g., NEB. REV. STAT. § 71-20, 108(5) (2014) (empowering the creation of a public utility conditioned, in part, on whether the seller will receive a “reasonably fair” value for its capital investment).

<sup>22</sup> See, e.g., MASS. GEN. LAWS ch. 176D, § 3(9)(f) (2014) (including, among unfair or deceptive acts or practices of insurance companies, failure “to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear”).

<sup>23</sup> See, e.g., R.I. GEN. LAWS § 17-8-10(b)(3) (2010) (noting that where bond proposals are to be placed on local ballots, there must be advance notice for voters including “reasonably detailed” descriptions of the proposal).



used not to designate an attribute of a person, expectation, action, or policy, but to qualify in degree the attribute specified. In federal bankruptcy law, for example, many provisions require the use of the concept of monthly “disposable income,” which in turn needs to be defined. Rather than defining disposable income by subtracting expenditures that are “necessary,” the bankruptcy code subtracts expenditures that are “reasonably necessary.”<sup>24</sup> Rather than requiring of administrative agencies measures that are “feasible,” the law sometimes requires measures that are “reasonably feasible.”<sup>25</sup> How clear must a contractual provision be in order to bind an obligor to some kind of waiver? In some cases, the contractual provision must be “clear and convincing” or “clear and incontrovertible,” while in other cases, it must be “reasonably clear.”<sup>26</sup>

Among adverbial uses of “reasonably,” some (like those indicated above) modify adjectives, while others modify verbs. Thus, in fraud cases, a court asks whether the plaintiff “reasonably relied” upon the defendant’s misrepresentation,<sup>27</sup> and in nuisance cases, whether the defendant unreasonably interfered with the plaintiff’s use and enjoyment of her property.<sup>28</sup>

## II. FAMILIES OF “REASONABLENESS” USE

### A. *The Antonym of “Excessive”*

Many usages of “reasonable” in the law invoke a notion that is familiar to the marketplace: twelve dollars is a reasonable price for a large pizza, but it is not a reasonable price for a loaf of bread. Frequently in the law, reasonableness is utilized to qualify prices, rates, and costs. It is often used to qualify “time,” as in “within a reasonable time.”<sup>29</sup> In all of these cases, “reasonable” is roughly the opposite of “excessive.”

The “unreasonable restraint of trade” of antitrust law and the “unreasonable interference” of nuisance law are all examples of unreasonableness as excessiveness: excessive restraints of trade and excessive interferences

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<sup>24</sup> See § 1325(b)(2), *supra* note 19.

<sup>25</sup> See § 3106(b), *supra* note 20.

<sup>26</sup> See § 3(9)(f), *supra* note 22.

<sup>27</sup> See, e.g., *Raysoni v. Payless Auto Deals, LLC*, 766 S.E.2d 24, 25 (Ga. 2014) (noting that fraud includes a reasonable reliance requirement).

<sup>28</sup> See, e.g., *Grundy v. Thurston Cnty.*, 117 P.3d 1089, 1092 (Wash. 2005) (en banc) (noting that nuisance contains a requirement that the defendant unreasonably interfered with the plaintiff’s use and enjoyment of property).

<sup>29</sup> See, e.g., *Mayfield v. Koroghli*, 184 P.3d 362, 366 (Nev. 2008) (noting that absent a provision specifying that time is of the essence, contracts must be performed within a “reasonable time”).

with the use and enjoyment of property are both violations of the prohibitions of these respective legal norms. Indeed, it is part of the force of these norms that they do not rule out all restraints of trade or all interferences with land use and enjoyment—only excessive ones.

It is worth recognizing that even within the few examples just given, there may be significant variation in force, tone, and nuance. “Reasonable” is a very common and well-worn adjective for referring to a moderate, or buyer-favorable price, and “reasonable” is comfortably and commonly used as a qualifier of time vaguely connoting a kind of Goldilocks “just right” quality. In both of these examples, the excessiveness connoted by “unreasonable” and the moderation connoted by “reasonable” implicitly call to mind a sort of scalar evaluation—dollars or days, or some other scaled unit. No such scalar conception of excessiveness is easily available in the antitrust or nuisance examples. It would be a distortion of judicial thinking to ignore the many different aspects of excessiveness that could, for example, make a neighbor’s business an unreasonable (or excessive) interference with the use and enjoyment of property.

#### B. *Passable Exercises of Judgment or Interpretative Capacity (and Deference)*

Civil litigators and civil procedure scholars every day confront the question of when a litigant’s case should even go to trial, or if at trial, should be sent to the jury, or if appealed, should be upheld. Judges confront the question of whether to permit a jury to hear evidence, to permit a jury to deliberate, or to permit a jury verdict to stand. The answer, overwhelmingly, is that the jury should get to decide, but only if a reasonable juror could find in favor of the plaintiff.<sup>30</sup> Conversely, a judge is not bound to defer to a jury’s decision if the court decides that no reasonable juror could (or could have) found as the jury did. The boundary between what a reasonable juror could have found and what a reasonable juror could not have found is the boundary the judge must be willing to cross if he or she wishes to supplant the jury’s judgment. Regardless of whether the judge agrees or disagrees with the jury finding, he or she is not permitted to find the other way, but is required to accept it unless he or she determines that the jury’s determination was not one that a reasonable jury could have found. Here, a “reasonable” finding is one that is *within the domain of judgments that could be reached without something having gone wrong in the factfinding process*, and it should be

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<sup>30</sup> See FED. R. CIV. P. 50(a)(1) (describing the standard for when a court may grant judgment as a matter of law in terms of whether “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue”).

capable of being applied independently of whether, in the end, the person calling it “reasonable” accepts the finding (or happens to exercise her judgment in a way that is likewise reasonable, but diverges in outcome).

The use of “reasonable” in *Chevron* deference cases works similarly.<sup>31</sup> Courts will not accept an agency interpretation that diverges from what the text plainly demands, but after that it is largely up to the agency to decide how to interpret the statute—largely, but not entirely. *Chevron* requires that a court accept the agency’s interpretation (at this stage) so long as it is reasonable.<sup>32</sup> The *Chevron* holding means that where the interpretation is one that could only have been the product of something going awry in the legal interpretive reasoning, a court is not required to accept it. As in the case of judgments as a matter of law in civil procedure, “reasonableness” marks a boundary of deference to the judgments of others within the legal system. A court determining whether to displace the judgment of another actor in the system is being told that when the other actor has essentially made a judgment among options, each of which *could* have been arrived at by a passable exercise of reasoned judgment and without skewing by passion or prejudice, it is not proper to displace the judgment. Otherwise, however, it is proper. While reasonableness in this context serves the function of circumscribing deference, it does so by utilizing a notion of what is a rationally defensible exercise of factfinding judgment, interpretive judgment, and so on. In this sense, reasonableness is *de facto* playing a role of power allocation, and at least purporting to do so by reference to whether a capacity for a certain kind of judgment has been exercised passably well. A determination of whether the power allocation is the horse pulling the cart of the epistemic evaluation, or vice versa, would require greater analysis of the domains within which courts utilize such standards.

### C. Reasonableness and Justifiability (Epistemic)

In certain parts of the criminal law of some jurisdictions and in certain constitutional torts, whether a defendant’s breach of a legal rule is actionable will turn on whether it would have been reasonable to believe, under those circumstances, that the legal rule was not being breached.<sup>33</sup> An important subset of these are “reasonable mistake of fact” cases. The Model

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<sup>31</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>32</sup> *Id.* at 844 (noting that where Congress has implicitly delegated to an agency the authority to “elucidate a specific provision of [a] statute by regulation,” “a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency”).

<sup>33</sup> See, e.g., TEX. PENAL CODE ANN. § 8.02(a) (West 2013) (noting that reasonableness of mistake is a component of a criminal defense).

Penal Code and the Supreme Court of California (in *People v. Hernandez*<sup>34</sup>), for example, famously declared that a defendant's reasonable belief that his sexual partner was over the age of consent could exculpate him from charges of statutory rape.<sup>35</sup> Certain cases of self-defense involve a defendant who mistakenly believed he was being attacked with deadly force. In those cases, the reasonableness of the mistaken belief is essential to whether the defense truly exculpates, or merely mitigates, the defendant's use of deadly force.<sup>36</sup>

"Reasonableness" of belief here has nothing whatsoever to do with deference, but it is epistemic and it does pertain to proper exercises of judgment. This utilization of reasonableness actually presupposes that there is a true answer to the question (e.g., whether the woman eighteen years of age yet), and the defendant missed it. Nonetheless, whether it was or was not due to a faulty exercise of judgment is an important question. Although there was, in an important sense, a legal wrong committed, certain jurisdictions have decided, in these circumstances, not to hold the defendant responsible for having committed it if he or she had the good faith belief *and* his having the belief was not attributable to a faulty exercise of judgment. Remarkably, the United States Supreme Court expanded its form of qualified immunity in § 1983 claims to be significantly broader than this.<sup>37</sup>

The torts of fraud and negligent misrepresentation include a qualified reliance requirement sometimes labeled a "reasonable reliance" requirement and sometimes labeled a "justifiable reliance" requirement. As this pairing indicates, reasonableness in this context is much the same as justifiability.<sup>38</sup> Where the reliance stems from a poor, defective, or ungrounded decision to rely on another's statement, the putatively injured party is not entitled to redress the putative injury. It is not quite right to pin the harm done on the party inducing the reliance, where the party who was in fact deceived was unwarranted in having relied on the defendant's misrepresentation. Reasonableness is used to pick out epistemic defensibility, as in the case of reasonable mistake.

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<sup>34</sup> 393 P.2d 673 (Cal. 1964).

<sup>35</sup> *Id.* at 677; *see also* MODEL PENAL CODE § 213.6(1) (Official Draft and Explanatory Notes 1985) (noting that apart from statutory rape cases involving children below the age of 10—in which reasonable belief does not exculpate—the accused can rebut a statutory rape charge by proving reasonableness of his belief that the child's age was above the statutory minimum).

<sup>36</sup> *See, e.g.*, *State v. Joseph*, 803 A.2d 1074, 1108 (N.J. 2002) (noting that self-defense requires a reasonable belief in the necessity of force).

<sup>37</sup> *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982) (expanding qualified immunity).

<sup>38</sup> *See, e.g.*, *Lucky 7, L.L.C. v. THT Realty, L.L.C.*, 775 N.W.2d 671, 676 (Neb. 2009) (treating "justifiable reliance" and "reasonable reliance" as interchangeable).

*D. Two Kinds of Practical Reasonableness*

Two families of reasonableness usage in the law resemble the epistemic deployments set forth in the previous section because they both involve justifiability, but they differ because they do not pertain in the first instance to the deliverances of the senses or the deliverances of speculative reason. One sort of usage of reasonableness involves the reasonableness of instrumental rationality. To some degree, the Supreme Court's requirement that a statute must be reasonably related to its end in order to pass rational basis review is a requirement of instrumental rationality. If a statute is putatively aimed at achieving a certain end, but it is poorly designed to reach that end (being underinclusive, overinclusive, or otherwise ill-fitting) it is likely to fail the test of being "reasonably related."

A different but equally important practical conception of reasonableness pertains to the use of practical reason and practical judgment in settings of mutuality or interdependency. A nuisance, for example, is an unreasonable interference with the use and enjoyment of property. Courts sometimes further define such interferences as ones that exceed what a reasonable person can be expected to tolerate.<sup>39</sup> An example of practical reasonableness that is quite distinct from economic rationality (and requires taking other persons' needs and expectations seriously) is found in the law of contracts, leases, and licenses: documents frequently require a landowner's consent prior to an assignment, sublease, or sublicense, but prohibit the person enjoying this right from "unreasonably" withholding consent.<sup>40</sup> Insurance companies are frequently deemed to owe a duty of reasonable settlement.<sup>41</sup>

Philosophers might notice that the reasonableness involved in these settings has the flavor of John Rawls's use of the concept of reasonableness in *Political Liberalism*<sup>42</sup> and other works, and also to some of Thomas Scanlon's use of reasonableness in the articulation of his contractualist views.<sup>43</sup> For each, the unreasonable person is one with an inadequate sense of mutuality or reciprocity; he is like a spring break buddy who insists on Chinese food for the fourth night in a row because he likes it so much better than the pizza, salads, or sushi preferred by his travel mates. Being reason-

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<sup>39</sup> See, e.g., *Wietzke v. Chesapeake Conf. Ass'n*, 26 A.3d 931, 939 (Md. 2011) (approving a jury instruction that recognized that landowners must be willing to endure a certain amount of inconvenience and discomfort).

<sup>40</sup> See, e.g., *1010 Potomac Assocs. v. Grocery Mfrs. of Am.*, 485 A.2d 199 (D.C. 1984) (noting that a "reasonable refusal" clause does not permit pure economic motives).

<sup>41</sup> See, e.g., *Hamilton v. Md. Cas. Co.*, 41 P.3d 128, 132 (Cal. 2002) (noting a duty to accept reasonable settlement).

<sup>42</sup> See RAWLS, *Political Liberalism*, *supra* note 4.

<sup>43</sup> See SCANLON, *supra* note 4.

ble in this sense involves recognizing that others have similarly placed demands, and that we are all in this together. Tort and property law's commitment to the idea that there are unreasonable interferences with the use and enjoyment of property requires believing that there are some interferences that it *is* reasonable for us to be expected to put up with, and others that go beyond this level. Reasonableness requires a sense of fitting one's demands alongside the multiple demands of others, which one accommodates to a certain extent.

Practical reason in the sense of instrumental rationality, speculative reason in the purely epistemic sense, and reasonableness in the mutuality sense referred to above, are all quite comfortably linked to a notion of justifiability and, in this sense, to the concept of reasons and the language of reasons. The philosophical viability of each of these, and the relationships among them, or lack thereof—indeed, even the question of whether they are one or two or three different concepts—are of course topics that have generated tomes of philosophical work at the highest (and lowest) levels. The point here is not to take a position, but merely to observe that there are at least quite prominent superficial differences among these reasonableness concepts as used by the law, even though all of them connect in important ways with the language of justification and reasons.

#### E. *Secondary Qualities in the Law*

In a number of settings, legal rules are made to turn on properties that are quite difficult to define because they seem to depend in some way on subjective responses of thought or emotion. The public disclosure of private facts tort is a good example. The Restatement (Second) of Torts defines a "private fact," in part, by looking at the sort of personal fact (unlike one's hair color, for example) that would be embarrassing to have publicly disseminated (like suffering from an STD, for example).<sup>44</sup> It is difficult to say who would be highly offended by the disclosure of such a fact about herself or himself—need it be everyone, most people, some people, or just the plaintiff? The Restatement articulates the standard by saying that a private fact is that which a *reasonable person* would find embarrassing to have disclosed.<sup>45</sup>

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<sup>44</sup> See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>45</sup> *Id.*

I have elsewhere used the term “secondary legal qualities” to refer to the privacy of private facts and similar attributes or qualities.<sup>46</sup> The idea is that just as colors are defined in reference to the perceptual responses of normal persons, so too are certain legal qualities defined in reference to the affective responses of normal persons. For these kinds of qualities, the word “reasonable” is typically used in defining moments. In an earlier article,<sup>47</sup> I argued that the justification of self-defense implicitly draws upon the idea that *threatening* conduct under certain circumstances creates a privilege of self-defense; our legal system utilizes the idea of conduct that a reasonable person would regard as presenting an imminent threat of bodily harm in order to delineate the privilege of self-defense so conceived. The tort of battery involves intentionally causing a touching that is harmful or offensive. “Offensive” is defined in terms of what would lead a reasonable person to be offended.<sup>48</sup>

Secondary legal qualities present yet a different role for reasonableness, which some usages involve and some do not. Of course, this notion is partly epistemic, and in other ways can be characterized in terms of many of the categories laid out above. But the key phenomenon here is that legal rules govern by setting forth a certain standard for those who are expected to apply the rules, but the standard contemplates that those following the rule will have the capacity to recognize the qualities through which the rule categorizes. Of course, at some level, the law is privileging those who respond to a set of circumstances in a way that the judge or jury would later find “normal,” as against those who have the same response but under circumstances the decisionmaker does not regard as normal; in this respect, the law entrenches conventional responses. The word “reasonable” might appear to be a self-congratulatory emblem of such conventionalism. This picture misses something of significance, however. The legal system’s expectations of (potential) defendants are circumscribed in an important way; the acts for which one will be held accountable—or, in the case of self-defense, for which one might face aggressive action deemed rightful—do not turn on the reactions they in fact generate, but on whether they possess qualities that are generally understood to precipitate such reactions in people with normal sensibilities and reactions.

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<sup>46</sup> See generally John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (applying the concept of secondary qualities to illuminate the tort of emotional harm); Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579 (1996) (introducing the concept of “secondary legal quality” by reference to the *threateningness* of a putative assailant’s conduct).

<sup>47</sup> Zipursky, *supra* note 46, at 603.

<sup>48</sup> *Id.* at 600.

Products liability law offers a famous example in modern tort law of a secondary legal quality that has caused some serious trouble in the courts and the legal academy. The attribute of “defectiveness” in the “consumer expectation test” for design defect—as design defect was initially understood—is probably best analyzed as a secondary legal quality. Under the Restatement (Second) of Torts § 402A, comment (g), a product is defective if it is “unreasonably dangerous” to the consumer, and under comment (i), whether a product is “unreasonably dangerous” turns on whether it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer.”<sup>49</sup> Jurors are invited to speculate, after an accident, whether the product as it actually performed would strike the ordinary consumer as surprisingly dangerous. Although the word “ordinary” was used in comment (g) to modify “consumer,” here, it is just the kind of context in which “reasonable” is often used. Some jurisdictions do, in fact, spell out the consumer expectation test by using the term “reasonable” rather than “ordinary” to qualify “consumer.”<sup>50</sup>

The products liability example suggests an even larger role for “reasonableness” as a secondary quality in the law, for it is (or is very close to being) an example of contract interpretation. Whether a person has accepted an offer in contract law does not turn on what was in the promisor’s mind, but rather on whether his or her actual conduct, under the circumstances, would have been understood by a reasonable person as an expression of consent.<sup>51</sup> Put differently, whether a course of conduct by an alleged obligee actually had the attribute of *being an acceptance* turns on how a reasonable person would interpret the conduct. This is but another example that goes along with the idea that meaning in contract law is to be understood objectively, but what objectively means is *in accordance with how a reasonable person under the circumstances would have understood the language and conduct of the other party*.

#### F. *Mixed and Other Categories*

The categories laid out above are not put forward as jointly exhaustive or as mutually exclusive. The Americans with Disabilities Act’s “reasonable accommodations” requirement might (or might not) fall outside of all of the categories listed above, for example. Conversely, the “beyond a reasonable

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<sup>49</sup> RESTATEMENT (SECOND) OF TORTS § 402A, cmt. (g).

<sup>50</sup> *See, e.g., Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994) (describing a version of this type of consumer expectations test).

<sup>51</sup> *See* JOSEPH M. PERILLO, *CONTRACTS* 27 (7th ed. 2014) (describing the objective theory of assent).



doubt” standard of criminal law might fall into several categories simultaneously. My point is that there are a variety of different meanings of “reasonableness” cognates in the law, and the identification of families of reasonableness uses does not purport to be exhaustive and does not purport to capture every use without remainder.

### III. JURISPRUDENTIAL OBSERVATIONS

#### A. *Standards and Vagueness*

A number of different attributes of “reasonableness” cognates in the law cut across several different areas and are therefore worth mentioning separately. First, both the adjectival and the adverbial uses of “reasonableness” cognates are frequently used in a manner that flags the standard-like quality of the relevant legal norm. This is patently true when the Supreme Court holds that reasonable constraints of trade will be permissible. In order to condemn a constraint of trade as impermissible and illegal, one needs to decide first that it is unreasonable. In other words, the Sherman Act’s legal norms, as they have been interpreted, are better understood as *standards*, rather than *rules*. The Supreme Court entrenched that determination in its early Sherman Act decisions, holding that only unreasonable restraints of trade are violations.<sup>52</sup> The same is arguably true of the requirement in nuisance law that an interference be an “unreasonable interference” if it is to generate a right of action.<sup>53</sup> This principle is also reflected in Fourth Amendment law’s rule that not all searches and seizures are constitutionally prohibited, only *unreasonable* searches or seizures (or warrantless searches and seizures).<sup>54</sup>

Notably, the adjective “reasonable” and the adverb “reasonably” can be utilized simply to convert what would otherwise operate as a rule into something operating as a standard. As indicated above, “reasonably feasible” replaces “feasible,” “reasonably related” replaces “related,” and so on. Not only do these qualifiers ensure that it is a moderate level of the quality being designated, they also ensure that the one applying the law (be it legal actor or judge) is being guided in a manner that requires the exercise of judgment, not simply the identification of a clear-cut attribute. Of course,

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<sup>52</sup> See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63-68 (1911) (explaining role of judgment—rule of reason—in adjudicating antitrust violations).

<sup>53</sup> See, e.g., *Grundy v. Thurston Cnty.*, 117 P.3d 1089, 1092 (Wash. 2005) (en banc) (noting that nuisance contains a requirement that the defendant unreasonably interfered with the plaintiff’s use and enjoyment of property).

<sup>54</sup> U.S. CONST. amend IV.

in some cases, the term being modified is itself standard-like, as in the case of “reasonably related,” but there is no reason to suppose that such is the case across the board.

It is worth noting that whether a legal term or phrase renders the legal provision in which it occurs a *standard* rather than a *rule* is not necessarily the same question as whether the legal term or phrase is *vague*. “No overweight persons are permitted on the rollercoaster under any circumstances” is probably best categorized as a rule, not a standard, but the phrase “overweight persons” is like the adjective “tall,” a prototypical example of a vague term. Leaving aside the question of whether legal provisions consisting only of non-vague predicates could sometimes qualify as standards, we can say, at a minimum, that the vagueness of key predicates does not necessarily capture all of what renders a legal provision standard-like rather than rule-like. A term is relatively vague when a substantial set of cases exist in which there is not convergence among linguistically competent and well-informed speakers as to whether or not the term is properly applied as to the case. There is not a correct answer, from the point of view of a competent English speaker, as to whether a man who is 5’11” counts as “tall,” and to this extent “tall” is vague.<sup>55</sup> A legal provision operates as a standard rather than a rule when the capacity to apply the provision turns on the ability to utilize a relatively broader set of capacities for judgment, typically including purposive reasoning.

#### B. *Two Kinds of Delegation of Judgment Power*

Second, many legal norms that include reasonableness cognates are, in effect, left to appellate courts to flesh out the content of the law. In this sense, the use of reasonableness language sometimes results in a de facto delegation of lawmaking power to the appellate courts. The United States Supreme Court’s body of decisional law on the Fourth Amendment’s “unreasonable search and seizure” provision is perhaps the most illustrious example of this phenomenon. The Court’s seizing upon its own language of “unreasonable restraint of trade” in interpreting the Sherman Act is a similar example. In each case, a more sophisticated institutional analysis would ask whether there is interpretive lawmaking by government actors outside the judiciary (e.g., police departments and state or federal legislatures, in the Fourth Amendment case, or the Department of Justice and Federal Trade Commission, in the Sherman Act example).

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<sup>55</sup> See TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 31-33 (2000) (describing vagueness as a source of indeterminacy).

Notwithstanding the commonness of “reasonableness” predicates serving as instruments for de facto delegation of law construction power, not all reasonableness predicates—indeed, not all reasonableness predicates that allocate power—work in this way. Courts applying considerations of juror reasonableness in matter-of-law rulings are not using the vagueness of reasonableness to construct new law (as a general matter). Indeed, in *Chevron* cases, reasonableness analysis is a device for refraining from making or constructing law, for deferring (or not deferring) to other decisionmakers.<sup>56</sup>

Even when “reasonableness” determinations are not to be used for deferring, but rather to guide a decisionmaker into a certain kind of substantive judgment, the judgment is not necessarily law creation. A court is not necessarily making law when it decides, in a particular contract case before it, what would qualify as a reasonable time of acceptance. And, in any of the examples of secondary legal qualities, reasonableness in the law is a guide for factfinders, not lawmakers. In one sense, the power to determine the content of a legal standard is being delegated, but it is not a delegation of lawmaking power but a delegation of judgment (typically normative or partially normative) to factfinders in a particular case. To be sure, courts often make judgments as a matter of law under the rubric of the reasonable person, but that is a different matter.<sup>57</sup>

### C. *The Reasonable Person as a Decision-Guiding Device*

Third, the famous figure of “the reasonable person” is found in many parts of the law that utilize “reasonableness” or its cognates, but not all of

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<sup>56</sup> See *Chevron, USA, Inc. v. Nat'l Res. Def. Council*, 467 U.S. 838 (1986)

<sup>57</sup> Cf. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1230 (7th Cir. 1993) (Posner, J.) (holding that dissemination of information about the plaintiff's misconduct, drinking, and adultery did not generate liability under public disclosure of private fact tort, and expressly discussing “what would offend the sensibilities of a reasonable person”). To say this is, in a sense, to construct law via the use of the term “reasonable.” What is going on here, however, is that the common law of privacy has, in the first instance, empowered factfinders to decide whether something was a private fact and directed them to use the concept of a reasonable person in answering what is essentially a mixed question of law and fact within the circumstances of each particular case. In utilizing their power to override or preempt certain findings in this domain by ruling as a matter of law, courts can, in effect, make law. But that is very different from a federal court utilizing the “reasonableness” cognates as it articulates judge-made rules determining which kinds of business practices constitute antitrust violations and which do not. It is different not just procedurally but also substantively. In the Sherman Act context, the concept of unreasonableness serves only to capture, conclusorily, an after-the-fact lawmaking decision made on independent grounds, while in the privacy context, the court is actually saying something about what a factfinder should be able to find reasonable or appropriate for a person to consider embarrassing.

them. Rational basis scrutiny in constitutional analysis considers whether a statute is “reasonably related” to its ends, but the reasonable person (or even the reasonable legislature) is not really a part of this. Similar for antitrust law’s reasonable restraints, utility statutes’ reasonable rates, personal jurisdiction considerations, and so on for a wide range of cases that fall in the non-excessiveness and circumscribing-deference categories above.

“The reasonable person” is most commonly utilized as a decision-guiding device for judges and jurors, one that often allows them more comfortably to make reasonableness determinations where necessary. In ascertaining whether, for example, “a reasonable jury would not have a legally sufficient evidentiary basis to find for” a nonmoving party on some issue, a judge would typically think about whether a reasonable person hearing that evidence could find for the plaintiff.<sup>58</sup> When ascertaining whether a piano teacher’s strumming his fingers briefly on his student’s shoulders during a lesson was offensive, the court was required to determine whether a reasonable person under those circumstances would have been offended; when a criminal defendant who preemptively stabbed a person whom he wrongfully believed was attacking him, we ask whether a reasonable person in those circumstances would or could have believed that.<sup>59</sup> In none of these cases, however, are we ultimately worried about the standard of conduct for this hypothetical law-abiding person. In all, we are ultimately concerned with what lies inside and what lies outside of the boundaries of the concept that circumscribes liability.

#### D. *The Normative Versus Descriptive Confusion*

Finally, there has been substantial writing on the question of whether reasonableness standards are normative or descriptive.<sup>60</sup> In a nutshell, the issue revolves around the analysis of statements like, “A reasonable person would not *X* under circumstances *C*,” when used in reasoning that someone who *X*’d under circumstances *C* had violated a legal norm requiring reasonableness. One view is that the statement means, “one should not *X* in circumstances *C*,” and the transitional premise would be, “being reasonable requires not *X*’ing in circumstances *C*” or, “reason requires not *X*’ing in circumstances *C*.” That is, of course, the normative interpretation. Another view is that the statement means, “The modal behavior in the relevant legal

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<sup>58</sup> FED. R. CIV. P. 50(a)(1).

<sup>59</sup> *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

<sup>60</sup> See, e.g., Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012) (exploring whether “reasonable person” standard is best defined in normative or positive terms, and arguing that defining “reasonable person” normatively is the superior choice).

community is not  $X$ 'ing in circumstances  $C$ ," and the transitional premises would be, "average persons in the relevant legal community do not  $X$  under circumstances  $C$ ." This is the so-called "descriptive" interpretation.

The discussion in prior Parts of this Article demonstrate that neither the normative nor the descriptive interpretation, as stated, captures how reasonableness operates in the law in the vast majority of cases that invoke a "reasonable person" standard. The question is not simply what ought to be done or what ought to be believed. Nor is the question one of head counting in a straightforward empirical way, as the putative descriptivist imagines. The thought experiment—say, in a privacy case, "what would a reasonable person feel about his mental illness being publicly revealed; would he be embarrassed?"—involves a kind of judgment that is both normative and descriptive. For one thing, what counts as a reasonable person is itself a question with significant normative content. It is a bit like asking what a person with good moral character would say, in that there is no non-normative answer to the question of who would count as a reasonable person just as there is no non-normative answer to the question of who would count as having good moral character. Nonetheless, it would also be a mistake to suppose that the question is equivalent to the question about what ought to be done or how one ought to behave. Let us assume for the purposes of argument that a reasonable person would save his own children before others in case of mass drowning. One may simultaneously concede the normativity of "reasonable person" and the truth of that statement without committing oneself to a view on what ought to be done in such a scenario.

#### IV. REASONABLENESS IN NEGLIGENCE LAW: THE POSNERIAN ACCOUNT

The comments above do not, of course, present any thorough analysis of the place of "reasonable" and its cognates in the law, but they should suffice to undercut any presumption that reasonableness in the law is essentially epistemic, economic, or rationalistic. Perhaps more importantly, they should also undercut the claim that "reasonable" and its cognates are essentially delegative, makeweight, or meaningless. Our new point of departure ought to be this: the word "reasonable" and its cognates play a variety of different roles in the law, and one must understand something about the way the law in question works in order to grasp how "reasonable" cognates are used within it.

With this in mind, I turn to an area of law I do know something about—tort law in general and negligence law in particular. This Part presents a

Posnerian account of the breach standard in negligence law, followed by a critique of that account based on the positive law of negligence in all fifty states. It then reformulates that critique in terms of the analysis of *reasonableness* in negligence law. Parts V and VI are dialectical. While Part V presents three different sorts of challenges to my own account, each based on a different aspect of reasonableness, Part VI modifies my earlier account to meet these challenges. Recognizing a suitable conception of reasonableness for negligence law remains critical to understanding how negligence law works.

Richard Posner's classic interpretation of the negligence standard as an economic version of the Hand Formula is plainly the most illustrious extant theory of the meaning of "negligence."<sup>61</sup> For many scholars, one of its most attractive features is that negligence law is supposedly based on a standard of "reasonable care." When reasonable care is understood to require *rational* conduct, and when rationality is understood as economic rationality from a point of view that aggregates social wealth, then reasonable care requires taking precautions if and only if those precautions are cost-justified. And, lo and behold, the classic Hand Formula of negligence law actually defines "reasonable care" as the taking of precautions if and only if the cost of the precaution is justified by the magnitude of risk it diminishes.<sup>62</sup> The marriage between the economists' cost-benefit analysis as a metric for the standard of right conduct and the "breach standard" of negligence law is made when "reasonable care" is interpreted as care that it is cost-justified from the point of view of socially aggregative economic rationality.<sup>63</sup>

There is a second way to get to a Posnerian account. The early twentieth century tort scholar Henry Terry published a prominent article on negligence in the *Harvard Law Review* expressly stating that negligence is behavior "involv[ing] an unreasonably great risk."<sup>64</sup> Terry's work, moreover, has been embraced by the First, Second, and Third Restatements of Torts. Hand's innovation (made between the First and Second Restatements) was to make Terry's idea algebraic and utilitarian, and Posner's was to turn the soft utilitarian conception in Hand's formula into one that appeared rigorous and openly wealth-based rather than welfare-based. But the first, and in some ways the most basic, change laid in Terry's characterization of

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<sup>61</sup> See generally Posner, *supra* note 6.

<sup>62</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>63</sup> See Keating, *supra* note 7, at 333 n.25 (depicting Posner's interpretation of the Hand Formula as rooted in economic rationality).

<sup>64</sup> Terry, *supra* note 5, at 40.

negligence as the generation of *unreasonable risk*,<sup>65</sup> rather than negligence as the failure to act as a reasonably prudent person would act. Terry's famed *Negligence* article set out a model of what factors go into making a risk reasonable or unreasonable: (i) the magnitude of the risk; (ii) the importance or value of the thing risked; (iii) the value of the collateral object for which the dangerous activity is undertaken; (iv) the likelihood that taking the risk will produce the collateral object; and (v) the likelihood that not taking the risk will preclude obtaining the collateral object.<sup>66</sup>

Let us ask a fundamental question here. In what sense do these factors bear on whether a risk is *reasonable* or *unreasonable*? This question leads, in turn, to a more basic one: how can a risk have the attribute of reasonableness or unreasonableness? As to the latter question, I think that there appear to be three plausible answers, based on our exploration thus far. One is that, when we speak of a reasonable or unreasonable risk, we are referring, in an abbreviated manner, to a risk that a reasonable person would (or would not) take. A second idea is that the word "unreasonable" in this context means excessive and the word "reasonable" connotes the opposite of excessive. A third is that "reasonable" means justifiable or justified, while "unreasonable" means unjustifiable or unjustified. Whether these three are, could be, or should be independent from one another is yet a further question, to which I will turn at various junctures.

Terry's own approach strongly suggests that, whether or not he eventually meant to connote the first and second senses of "reasonable," he aimed above all to make progress on the third. His analysis suggests that the reasonableness of a risk depends on what is being risked and its value, the reason it is being risked, at what costs and with what prospects. In Hand's, Posner's, and the Restatement versions, we are greatly concerned with how burdensome the elimination or reduction of the risk would be. In any version, the focus of the inquiry is whether it is really justifiable, all things considered, to take the risk. I highlight Hand, Posner, and the Restatement accounts not to characterize the three accounts of negligence, but rather to illuminate what they intend to capture by distinguishing between reasonable and unreasonable risks. They mean to separate the justifiable from the unjustifiable risk-taking. In this way, a negligence standard based on not taking unreasonable risks is a negligence standard demanding that people refrain taking unjustifiable risks.

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<sup>65</sup> *Id.* at 40 ("Negligence is conduct which involves an unreasonably great risk of causing damage. Due care is conduct which does not involve such a risk.").

<sup>66</sup> *Id.* at 42-43.

If one takes the first route, then one might end up with the Hand Formula by taking, as the discussion above suggests, an economic conception of reasonableness as rationality. This is not a particularly coherent view, because the economic conception of rationality as a capacity does not easily carry over from the individualistic to the aggregative. Posner does not believe that a person who did not face tort liability for overly risky conduct would be unreasonable in failing to take it. Indeed, the deterrence argument in favor of tort liability largely presupposes the rationality of declining to take precautions (absent tort liability).

We do much better in understanding the appeal and the evolution of the Hand Formula if we simply look at the Terry-derived version of the Hand Formula in which reasonable risk is the converse of unreasonable risk, and unreasonable risk is the failure to take justifiable precautions alongside of one's risky activities. This way of thinking about the Hand Formula also leads nicely to Posner's economic account of negligence. When one adopts an efficient deterrence account of the point of imposing liability on defendants for those costs of their activities that have resulted from their failure to take justifiable precautions, we understand justifiable risk through the lens of a monetized version of the Hand Formula.

#### V. THE MODERATION-BASED ACCOUNT OF REASONABLENESS IN NEGLIGENCE LAW

In *Sleight of Hand*,<sup>67</sup> following a number of other scholars of tort doctrine, including especially Patrick Kelley and Richard Wright,<sup>68</sup> I argued that Posner's view is entirely indefensible as an interpretive account of the breach element in American negligence doctrine. None of the fifty states define "negligence" (the breach element) in terms of the Hand Formula, economic or otherwise. They do not utilize the concept of "reasonable care" in their jury instructions; they use the concept of "ordinary care." Negligence is not defined for juries in terms of "unreasonable risks;" it is defined in terms of what a "reasonably careful person" or a "reasonably prudent

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<sup>67</sup> Zipursky, *supra* note 10.

<sup>68</sup> See Kelley & Wendt, *supra* note 8, at 591 (discussing the various meanings of the negligence standard); Kelley, *supra* note 8, at 343-344 (discussing the theoretical origins of the unreasonable foreseeable risk of harm standard); Wright, *supra* note 8, at 162-80 (analyzing several tort cases that Hand adjudicated by applying the formula); see also Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994) (evaluating the status of the formula in contemporary cases); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 816-21 (2001) (discussing the Hand Formula in the context of the Hand factors, the raw data in each case, and the factors' applicability to the Hand Norm).



person” would do.<sup>69</sup> When jurors in plain vanilla negligence cases are asked whether the defendant acted as a reasonably prudent person would, they are being asked to make a certain kind of middle-of-the-road decision. The standard is not whether the defendant did all she could have done, or what would have been best to do, or what every last precaution would have been. There are standards of care like this in negligence law for certain defendants (e.g., common carriers), but this standard does not apply in the typical negligence case. In typical cases, what is due is *ordinary care*, a less stringent standard of conduct. Similarly, a standard set at conduct displaying indifference to the well-being of others or conduct marking an extreme departure from ordinary care would be lower than the “ordinary care” standard. Due care in the normal case, as conventionally understood and as still represented in jury instructions, lies in between “the highest degree of diligence and care” and “gross negligence”; that is what “ordinary care” is supposed to mean. Our system elaborates on this sort of ordinariness by saying that the jury is to determine whether the defendant acted as “a reasonably careful person” or “a reasonably prudent person” would have acted. This might be called the “Moderation View of Reasonableness.”

In terms of tort theory, this picture of breach in American negligence law is dramatically different from that which our leading tort scholars (Posner and others) have been saying over the past few decades. Posnerian cost-benefit analysis is nowhere to be found in this picture. More strikingly, the analytical apparatus of the Hand Formula itself—whether in algebraic form or otherwise—is alien to American negligence law on this account. In addition, the account does not derive simply from pervasively adopted jury instructions; it pertains to the duty-breach nexus, the availability in negligence doctrine of a variety of breach standards other than “ordinary” care, the place of custom in understanding breach, and several other features of the law of negligence.<sup>70</sup>

In light of our analysis in the earlier parts of this paper, we now see almost a category mistake in the Posnerian account. The principal “reasonableness” cognate in negligence law is adverbial (“reasonably prudent person”), not adjectival (“reasonable risk”). Its principal role is to qualify the prudence or carefulness level expected of the actor (to be reasonably prudent), not to demand the rational defensibility of the risk (to refrain from taking unjustifiable risks). It connotes non-excessiveness or moderation in degree, rather than linking to an epistemic or rationality-based

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<sup>69</sup> Zipursky, *supra* note 10, at 2015–16.

<sup>70</sup> *Id.* (explaining the failure of the Hand Formula conception to capture an array of features of negligence law, such as the duty-breach nexus).

conception. As I have argued elsewhere<sup>71</sup> (and will revisit in part below), there are important consequences to this difference for how cases should be decided, how law should be taught, how clients should be advised, how legal scholarship should be done, and how taught law should be conceived.

## VI. REASONABLENESS IN NEGLIGENCE LAW: A CRITIQUE OF THE MODERATION ACCOUNT

### A. *The Reasonable Person and the Reasonably Prudent Person*

An important objection to the Moderation account of Part V is that, while it may be the case that jury instructions use the adverbial form of reasonableness (as indicated), there is no denying that the common law of negligence sometimes utilizes the idea of the reasonable person—what the court (in a different era) in *Blyth v. Birmingham Water Works*<sup>72</sup> famously called “the reasonable man.” This prominent phrase involves the term “reasonable” adjectivally (and even if it did not, it might be odd to rest too much legal analysis on the adverbial/adjectival distinction). More generally, lawyers and judges—including judges on appellate courts and judges deciding motions—utilize the phrase “reasonable person” in talking about negligence law, even if jury instructions more commonly utilize the phrase “reasonably prudent person” (or the phrase “reasonably careful person”). It is, of course, quite tempting to say that the same concept is being used in both settings, even if the phrases are slightly different. But even if we were to assume this is so, we would be left with the question of what that concept is: i.e., is it about a person who exercises reason properly (as the phrase “reasonable person” might suggest), about a person who is moderately careful (as “reasonably prudent person” suggests), or about both at once (or neither)?

The observation of these two phrases next to one another—the “reasonable person” and “the reasonably prudent person”—suggests the hypothesis that the “the reasonable person,” as a phrase, might seem to be a comfortable collapsing of the adverb and adjective in the phrase “the reasonably prudent person.” In other words, “reasonable” might be short for “reasonably prudent.” We are thus led to ask what work the concept of prudence performs within negligence law. Heidi Feldman has observed that

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<sup>71</sup> See *id.* at 2026-28 (highlighting the concerns behind whether Hand’s negligence theory permits “an adequate amount of negligence”).

<sup>72</sup> 156 Eng. Rep. 1047, 1049 (Ex. 1856).

prudence is in a sense a virtue concept, like honesty or courage.<sup>73</sup> To be prudent is to be appropriately cautious in one's action and one's selection of courses of conduct. As I have elsewhere suggested, Feldman is not quite right to depict the "prudence" of negligence law as a virtue, if by "virtue" she means an *excellence* of character; negligence law plainly does not aim so high as to require defendants to excel. This is indeed the point of saying that negligence law requires, in most cases, only *ordinary* care (rather than extraordinary care). It is also the point of saying that it is only required that the person have acted as a "*reasonably* prudent" person would, not as a *perfectly* prudent person would or as person would if she were an exemplar of prudence. I have elsewhere contrasted my view with Feldman's by saying that the reasonably prudent person possesses something closer to *competency* than a *virtue*; we are looking for conduct that would pass the test for a driver's license, not conduct that would qualify for a defensive-driving medal. With this in mind, I shall call my account a "social-competency" account of due care in negligence.

The place of prudence in negligence law renders the analysis complex because some part of being prudent is curtailing one's conduct appropriately in connection with potential risks. To the extent that this is true, it is unsurprising that the concept of a reasonably prudent person is denoted by the more concise phrase "reasonable person." However, this hardly shows that the absence of due care should be analyzed by reference to whether the degree of risk generated, under the circumstances, satisfies a criterion of reasonableness understood as optimality or all-told justifiability. It actually tends to show the opposite: that where "reasonable person" is the operative phrase, the law really is directing factfinders to consider how a certain kind of person conducts himself or herself, and it is a person who displays a moderate level of care (not necessarily an optimal level).

### B. *Performance and Precautions*

A second challenge asserts that the account I put forward works especially well for what might be called "performance" cases of negligence, rather than "precaution" cases. "Negligence" or "carelessness" sometimes denotes a substandard performance or execution of an activity, and when that activity carries risk, substandard or negligent performances of it generate more injuries. But "negligence" and "carelessness" sometimes denote a failure to take sufficient precautions in one's activities. Here an

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<sup>73</sup> Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1434 (2000).

actor has failed to take measures that would be appropriate for reducing the risks, measures that a reasonably prudent person would be expected to take.

Evaluation of performance by comparison to a person being reasonably careful or reasonably prudent seems intuitively comfortable. An image of a competent performer comes to mind, and the juror is able to compare the defendant to that actor. Where the asserted negligence lies in a failure to take precautions, however, the image of the reasonably careful person under the circumstances may not provide much help. More precisely, if it does help, it is not principally by virtue of a sort of gestalt sense of what the conduct of such a person would be like. Rather, it would engage the judgments that might be exercised by such person regarding which precautions to take. The judgments in question will no doubt concern, at least to some extent, what kinds of risks need to be minimized, which sorts of precautions are well suited to doing so, at what cost and with what urgency, and so on.

### C. Returning to Unreasonable Risks

Much of the doctrinal writing on negligence law over the past century has focused on levels of risk rather than on kinds of persons, leading us to look at “reasonable risk” and “unreasonable risk” in the first instance, rather than “reasonably prudent person,” “reasonably careful person,” “reasonable person,” or “unreasonable person.” The *Sleight of Hand* critique, rehearsed in Part V, showed that jury instructions pervasively utilize “reasonably prudent person” or “reasonably careful person,” and do not make reference to the reasonableness or unreasonableness of risk. I gave these instructions a central place in determining the content of the positive law. I stand by that assertion as a substantive matter and I largely stand by it jurisprudentially and methodologically. Nonetheless, I concede that a critic could fairly respond as follows: jury instructions are not all there is to the common law, and a sufficiently broad role of concepts in judicial and lawyerly discussion of an area of the law can actually constitute part of the law. The place of unreasonable risk in negligence theory and negligence discourse has reached this level. It cannot be ignored, but it must be explained, accounted for, and integrated into an account of breach.<sup>74</sup>

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<sup>74</sup> Gregory Keating’s commentary at the Symposium played a large role in persuading me of this point.

## VII. THE HAND FORMULA REVISITED

A proponent of roughly the Hand Formula conception of breach could weave together the three criticisms of the moderation account and reconstruct a new Hand Formula account as follows:

*Negligence or breach is the failure to conduct oneself as a reasonably prudent person, i.e., a reasonable person, would conduct herself under the circumstances. The reasonable person standard merely guides us to whether the risk taken was unreasonable. A risk is unreasonable if reason would require that it be reduced by precautions or not taken at all. Put slightly differently, the question is whether the risk would be unjustifiable if not accompanied by certain precautions. The Hand Formula determines which precautions are required by reason (or required to render the activity justifiable). It is a function of its burdensomeness, the extent to which it diminishes the probability of losses, and the magnitude of the losses it makes less likely. Therefore, the Hand Formula determines which risks are unreasonable and which risks a reasonable person would have taken, and therefore determines how a reasonable person would have behaved. It captures the content of negligence, at least in the domain of precautions negligence; perhaps performance negligence comprises its own little niche. Reasonableness in negligence law is really about justifiability of risk, not about moderation of carefulness in the execution of risky activities. Whether to take the extra step of monetizing the Hand Formula, as Posner does, is a separate question.*

This is roughly the view taken by the Restatement (Third) of Torts,<sup>75</sup> and is in many ways today's conventional view of the breach standard in negligence law. As suggested in Part V, it not only fits poorly with jury instructions, the structure of duty, the concept of ordinary care, and numerous other features of negligence law, it seems to derive from the fundamental mistake of taking "reasonable" to be epistemic and adjectival, rather than moderation-based and adverbial. Nevertheless, the three challenges above point to shortcomings in the moderation-based account offered in Part V, drawing upon features of the language of reasonableness in negligence law that courts and scholars have taken seriously for over a century. Thus, while the Restatement may be incomplete and may indeed be remiss for ignoring various features of negligence doctrine, the Restatement view offers an integrated account of the core of negligence law, that pertaining to the negligent failure to take precautions. Or so the argument goes.

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<sup>75</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010).

The Restatement view sketched above links the reasonable person standard to the reasonableness of a risk and the reasonableness of taking (or not taking) a precaution of a certain kind. The actual substance of the standard travels down a chain that leads, ultimately, to a question about whether certain risks are unjustifiable absent certain precautions. The justifiability question is understood to be impersonal; we thus need, roughly speaking, an impersonal account of which risky (or risk-protective) actions are justifiable, in the sense of being in accordance with reason. Henry Terry offered a multifactor test to analyze the justifiability (and, in this sense, reasonableness) of such risks or actions. Learned Hand offered a simpler version, which happens to map neatly onto a utilitarian's expected utility principle for an aggregate group. Economically oriented thinkers like Posner have monetized that account.

Reasonableness in the sense of justifiability is, in a curious way, quite detached from persons. That is a further sense in which it is an objective idea; let us call this (in an admittedly imperfect phrase) the "impersonal" aspect of Hand Formula-based reasonableness. There are, on this view, actions or precautions that reason demands (or forbids). The reasonableness or justifiability of the risk attaches to it by virtue of its connection with some criterion or criteria of value. On the Restatement view, it is roughly a utilitarian, aggregative view of individual welfare. On the economic view, the aggregative view is specified further by reference to social wealth as the metric. It is by virtue of qualifying according to such objective criteria that the precaution (or risk) counts as reasonable, and, in turn, why it can be said that a reasonable person would take the precaution. Breaching the duty of care, on this view, is selecting an action or course of conduct that generates, all told, an unjustifiable level of risk to others. The action's generating a certain level of risk to others is what renders it below the line of acceptability because it is unjustifiably risky. There is a sense in which the attribute of the act that renders it negligent is quite detached from the actor who performs it. It is the impact on the balance of risk to the actor and others over benefit to the actor or others that determines whether the conduct has the quality of negligence. The reasonable person standard, on this view, is at best a heuristic device for ascertaining whether certain actions have the quality of generating unjustifiable risk. The quality itself is in an important sense impersonal, existing apart from any particular person, or even the idea of a reasonable person.<sup>76</sup>

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<sup>76</sup> In one sense, advocates of the Hand Formula conception of breach typically assess the probability that goes into the risk from the point of view of someone in the circumstances of the defendant, so it is perhaps not quite as impersonal as I have suggested. Nevertheless, this

The conception of reasonableness underlying the Hand Formula, as other scholars have pointed out, is one of instrumental rationality.<sup>77</sup> At least, it is instrumentalistic in the following respect: if we designate aggregate social welfare as an end, then reasonable risk is plausibly understood as a risk that is justifiable, all considered, because of its connection to the end, namely, aggregate social welfare. Reasonableness is an attribute of the precautions that are well designed to serve that end and unreasonableness is an attribute of risks that are not well designed to serve that end. That is part of why it is comfortable to translate the language of reasonableness and unreasonableness, here, to the language of justifiability and unjustifiability.

Of course, a huge qualification is necessary in order to make this work: the norm of instrumental rationality as to individuals is usually connected to the interests of the individual alone, not to the aggregate interests of the community. The Hand Formula and the Restatement view plainly consider the welfare of all persons. The question is whether the care taken by the defendant is well-suited to that goal. In this sense, the reasonableness view of negligence law, so conceived, is actually quite like the reasonable relatedness requirement of constitutional law. The standard looks to the connection between a purported course of conduct and a domain of public welfare.

#### VIII. THE MODERATION-AND-MUTUALITY CONCEPTION OF REASONABLENESS IN NEGLIGENCE LAW

##### A. *The Mutuality Conception*

Our review, in Part II, of reasonableness in the law included a two-part discussion of practical reasonableness and practical reason. One sort of reasonableness usage related to the rational pursuit of ends—in this case, aggregate welfare. Another sort of reasonableness use is found in a context of social interdependency. Reasonableness, in these cases, involves a sort of fair-mindedness and sensitivity to the actual and anticipated demands and needs of others. We called this a “mutuality-based” sense of practical reasonableness.<sup>78</sup>

An obvious question at this juncture is whether a rival, practical epistemic account of negligence can be generated through reasonableness in the mutuality sense. Recall that the Part VII reworking of the Hand formula was generated by reference to the concerns of Part VI.A, VI.B, and VI.C:

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particular tool is idealized to a significant extent, so that we are still looking at the risk created apart from the actor.

<sup>77</sup> See generally Keating, *supra* note 7.

<sup>78</sup> See *supra* Part II.

that reasonableness in negligence law was not simply an adverbial qualifier of the degree of prudence, but also stood (sometimes) for an attribute or attitude of persons (like *prudence* or *reasonable prudence*); that the *reasonably careful person* or the *reasonably prudent person* idea, conceived in terms of a moderate degree of carefulness, was not sufficiently illuminating as to negligence cases involving *precautions*, even if it was capable of capturing *performance*-oriented negligence cases; and that the language of reasonable and unreasonable risks, although not incorporated in jury instructions and perhaps not central to the idea of negligence originally, has evolved sufficiently in the discourse of scholars and courts regarding negligence doctrine that it is untenable to embrace a conception of reasonableness in negligence law that does not connect with levels of risk.

A mutuality-based conception of reasonableness can address the three concerns generated in response to the moderation view. First, note that the phrase “reasonably prudent person” and indeed the phrase “reasonable person” (as used in *Blyth*<sup>79</sup> and beyond) connotes a person with a positive attribute (if not quite a full-blown virtue). Of course, we are not making much progress, analytically, when we say that the reasonable person is the kind of person who is going to *be reasonable* and *act in a reasonable manner*. Nonetheless, these phrases arguably convey something like “sensible,” “moderate,” “constrained,” “not wholly insensitive to the demands of others,” “not wholly selfish and inconsiderate,” and “somewhat fair-minded.” The mutuality conception of being reasonable goes some distance in capturing these ideas. Reasonableness is both an attribute of a kind of person, here, and also a way a given person can conduct herself at a given time.

There are, indeed, philosophical debates over whether this attribute (which most of us find appealing in others) is plausibly counted as an epistemic power. There are also debates over whether it is actually *true* to say that each person has a *reason* to take others’ needs seriously.<sup>80</sup> My point here is not about moral philosophy but about legal language and legal concepts. The suggestion is that the phrases “reasonable person” and “reasonably prudent person” and the concept of a reasonable person connect with a conception of reasonableness as the capacity to constrain one’s behavior and choices in a manner that is not wholly insensitive to others’ needs and wishes, but rather displays some sense of mutuality. Put

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<sup>79</sup> *Blyth v. Birmingham Waterworks Co.*, 156 Eng. Rep. 1047, 1049 (Ex. 1856).

<sup>80</sup> See SCANLON, *supra* note 4 (offering a detailed philosophical account of why the impact of a person’s actions on others can provide a reason for that person to refrain from performing that action).



somewhat differently, the common law of negligence entrenches the principle that being reasonable requires constraining one's conduct by reference to the perils one creates for others.

The mutuality sense of reasonableness also connects nicely with the idea that many questions regarding whether a person was negligent involve inquiries into whether appropriate precautions against injuring others were taken. A person who is reasonable in the mutuality sense and acts reasonably will choose to constrain his or her behavior in some fashion so that it is less likely to injure others. Conversely, to fall below the standard of behaving as a reasonable person would behave—to behave unreasonably—is commonly a matter of pursuing one's own chosen activities with inadequate concern for their impact on others. Consider a landowner who believes the noise from his neighbors' wedding for their daughter warrants an award of damages because it interferes with his quiet midnight gardening. A reasonable landowner would have to tolerate one night's noise for a wedding. A person must sometimes clip the edges of his own desire for quiet solitude. Being reasonable requires a curtailment of what one might really want in order to accommodate others' legitimate interests. Similarly, a person's desire to get to the fast food restaurant before it closes or to feel the wind rushing through her hair cannot necessarily be fully indulged. It must be clipped back, at times, in light of the risk to others' physical well-being that comes from fast driving. The precaution of slowing down is what being reasonable requires, in such an example.

The language of unreasonable risks is in many ways simply the flip side of the reasonableness of taking precautions. Where being reasonable demands curtailment of the satisfaction of one's own desires by precautions (or desisting altogether), in light of the dangers to others, that is simply an instance of the unconstrained activity carrying an excessive risk of injury to others. To take such risks in order to satisfy one's own desires is to be unreasonable in the mutuality sense.<sup>81</sup>

The mutuality conception of reasonableness is superior to the Hand Formula view in responding to the three concerns raised in Part VI. This is for several reasons, but for one above all: it takes seriously the concept of the reasonable person (or the reasonably prudent person) in a way that the Hand Formula view simply does not. The Hand Formula view does not even consider the question of what a reasonable person is, or why we would

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<sup>81</sup> Not all negligent behavior involves a failure of reasonableness in the mutuality sense. Negligence law also includes a notion of contributory negligence, which involves an inadequate sense of the risks one is taking with respect to oneself. Those who are unreasonable in this way are of course "imprudent" in the most literal sense.

want to use the idea of a reasonable person in determining whether the defendant was negligent. It is only concerned with the right or appropriate level of risk—which it defines by reference to aggregate utility (or wealth). As discussed above, the concept of reasonable risk is detached from anything relating to a reasonable person.<sup>82</sup> Of course, the reasonable person does enter the story, but only in a way that is reverse-engineered. The reasonable person is one who would not take unreasonable risks, and unreasonable risks are given content independently.

A second reason for the superiority of the mutuality conception pertains to the duty element of the tort of negligence and to the basic idea of a duty of care. The breach element of negligence law is not standalone; it is the breach of a duty of care that the defendant owes to the plaintiff. That is the point of Chief Judge Cardozo's *Palsgraf* opinion.<sup>83</sup> In several articles and a book, John Goldberg and I have emphasized the relationality of duty and breach and the centrality of the breach–duty nexus in the analytical structure of negligence law.<sup>84</sup> From *Heaven v. Pender*<sup>85</sup> to *MacPherson v. Buick*<sup>86</sup> to *Tarasoff v. Regents of the University of California*,<sup>87</sup> a core idea of negligence law is that each of us owes a duty to other individuals to be vigilant of their well-being. The duty of care is universal in the sense that the duty not to batter other persons is universal; it is owed to every other person, regardless of status or prior relationship. When we require people to *be reasonable*, we are requiring them to constrain their conduct by reference to its potential impact on other individuals. The connection between the reasonable person and a relational duty of care is lost in the Hand Formula conception.

Third, utilizing the mutuality conception of reasonableness for precaution-oriented negligence cases meshes well with the moderation conception that best captures performance-oriented cases. I have suggested above that the consistency of jury instructions, the requirement of ordinary (as opposed to extraordinary) care within those instructions, and the adverbial use of “reasonably” to modify “prudent” or “careful” all point to an understanding of “reasonable” that involves a contrast with excessive-

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<sup>82</sup> See *supra* Part III.

<sup>83</sup> See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928).

<sup>84</sup> See generally JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTION TO U.S. LAW: TORTS (2010); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

<sup>85</sup> See 11 Q.B.D. 503 (1883).

<sup>86</sup> See 111 N.E. 1050 (1916).

<sup>87</sup> See 551 P.2d 334 (1976).

ness.<sup>88</sup> That is what was meant by calling the theory moderation-based. The Hand Formula conception, by contrast, is intrinsically optimizing, and understands reasonableness in a manner that relates to justifiability, not excessiveness. While the mutuality conception also seizes upon a quasi-epistemic conception of reasonableness, it coheres nicely with the moderation conception. Both the idea of the “reasonably prudent person” at the core of the moderation conception and the idea of the “reasonable person” at the core of the mutuality conception are authentic and non-reductive conceptions of a kind of person; the Hand Formula conception of a reasonable person is simply reverse-engineered from the idea of reasonable risk. There is a close connection between the baseline idea that one must at least use ordinary care toward others (within the moderation conception) and the idea that a sense of mutuality and a recognition of the other person’s needs are laudable attributes of a person (within the mutuality conception). Moderation and mutuality go hand in hand in the reasonable person. Perhaps this is part of why we have seen so much slippage in the language of negligence law between “the reasonably prudent person” and “the reasonable person.”

Finally, it is a merit of the moderation-and-mutuality conception that it makes room for the possibility that judges and jurors in negligence cases might sometimes want to reason in ways that resemble the Hand Formula or a cost-benefit calculus. The Hand Formula conception, by contrast, does not in any way lead to a mutuality conception. A reasonable person, in the sense of one who is alive to the ramifications of his or her conduct and constrains it accordingly, will surely have to make decisions sometimes about which precautions to take. As I have elsewhere recognized,<sup>89</sup> the Hand Formula factors will typically be highly relevant factors (although not the only ones) in such a decision, so it would hardly be surprising that who were reasonable persons (in the mutuality sense) would often be drawn to thinking in this manner.<sup>90</sup> Relatedly, consider the factfinder trying to ascertain whether a defendant behaved as a person with a sense of mutuality would behave. Such a factfinder might well think it illuminating to see where those factors would lead someone trying to be reasonable. It is not surprising that the Hand Formula itself derived from a domain of law—admiralty law—where there are bench trials and judges consequently must

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<sup>88</sup> See *supra* Part V.

<sup>89</sup> See *supra* Part VI.A.

<sup>90</sup> See Zipursky, *supra* note 10, at 2022-26 (explaining the place for the Hand Formula factors within a broader conception of the reasonably prudent person standard).

explain their conclusions on whether the defendant behaved as a reasonable person.

B. *The Overdemandingness of the Hand Formula Conception of the Duty of Care*

Whether one accepts a mutuality-and-moderation conception of reasonableness, as I have suggested, or the Hand Formula conception, as Posner has argued for, has major implications for many areas of tort doctrine. Here, I want to call attention to a subtle but nonetheless profoundly important difference between the Posnerian interpretive view of the negligence standard and that which I have put forward as the authentic analysis. It is a difference that is quite ironic at first blush: Posner's account of the negligence standard is in some respects *more* demanding of our considerateness for others' safety than what I believe the law of negligence actually demands. The Hand Formula, given a Posnerian turn, requires that every person take precautions up to the point at which the safety improvement they provide is offset by its cost. In many scenarios, this will require a very great investment in safety; in other cases, the Hand Formula may require rather small investments in safety.

Imagine a person who owns an all-wheel drive SUV, parked in his garage, and a brand new rear-wheel-drive sedan, parked on the street. He realizes it would probably be somewhat safer to drive the SUV, given the rainy weather conditions, but he is too lazy to switch cars and he feels like driving his new sedan anyway. Alas, a cyclist pulls out from behind a truck. The driver swerves, but hits the cyclist nonetheless. When we invite the jury to think about whether the driver was negligent, we simply want to know about how carefully he was driving and how capably he responded in that moment. Assuming a Hand formula account could accommodate these questions, it would add another factor: if a plaintiff could argue that the SUV would have avoided the accident and that the minimal burden of switching cars would have warranted the change on a rainy night, that would generate a plausible argument for breach.

But negligence law—at least as to ordinary people—is significantly less demanding than that. A reasonably prudent person would not think it necessary to take every last cost-efficient precaution and would not think it necessary to alter his automobile choice based on the risks to others. The argument that, if the SUV really would have reduced the risk of accident, his duty of care required him to switch cars has more than a touch of unreality. Reasonable people make such choices all the time, and a plaintiff's lawyer would be unlikely to suggest otherwise to a jury.

For a simple reason, negligence law imposes a more modest duty of care than Posner imagines. Posner is of course a Holmesian who insists on seeing the law through the eyes of the Holmesian bad man.<sup>91</sup> To say that there is a duty of care from one person to another is, essentially, to recognize that there is the possibility of liability running from one to the other if the second is able to prove that the first acted in a negligent manner and thereby injured him or her. Our common law of negligence, by contrast, treats the duty of care as an actual *duty*—something members of our community (as a general matter) actually understand themselves to be morally bound to concern themselves with.<sup>92</sup> We, as a society, *expect* those taking the driving wheel to be reasonably careful, and when we take the wheel, we know we are expected to be reasonably careful. The aspiration of our negligence law is to shield individuals from liability for the accidents they cause unless they had failed to live up to their duty to be careful towards others. Part of the reason an injured person has a claim against a driver is that the driver breached this duty—he or she was not living up to the duty to be reasonably careful. That is what we mean when we say the driver was negligent.

A Posnerian conception of negligence is thus in many circumstances more apt to yield the conclusion that a defendant was negligent. The bar for reasonable care conceived as optimal care is, in many cases, higher than ordinary care as I have explained it. My point is that few people, in their heart of hearts, actually think that they *owe* optimal care to others as a primary duty of conduct, even if they do not believe that they are, from a moral point of view, free to act in a manner that is heedless of others' interests.<sup>93</sup> This does not matter to Posner because the assertion that there are duties is just the correlative of the assertion that there is liability; it has no larger implications about how one is obligated to treat others. If, however, one understands the assertion that there is a duty to behave a certain way as, in part, an interpretation of only partially articulated standards of conduct that actually animate the way people think and feel about their obligations to others, then the idea that one's duty of care

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<sup>91</sup> See generally Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 993 (1997).

<sup>92</sup> John Goldberg and I have put forward an extended view on the nature of the duty of care in negligence law, and have done so in tandem with a critique of the instrumentalist view running from Holmes through Prosser to Posner. Goldberg & Zipursky, *supra* note 84.

<sup>93</sup> Here, I mean to be making a point analogous to Hume's observation that we have some natural generosity for others, but it is somewhat limited. DAVID HUME, A TREATISE OF HUMAN NATURE 602-605 (P.H. Nidditch & L.A. Selby-Bigge eds., Oxford Univ. Press 2d ed. 1978) (1739-1740).

reaches all the way to optimal care is quite implausible and disorienting. A conception of the content of the duty of care that is such a poor fit with our conventional understanding of what we owe to others (by way of care) is like a self-verifying prophecy: to the extent that we remake negligence law as a domain that does not mesh with ordinary understanding, the easy understanding of moral norms as having legal significance begins to fade away.

### C. Reasonableness and Contractualism

Two of the most important critiques of Posner of the past two decades were written independently by Gregory Keating<sup>94</sup> and Arthur Ripstein<sup>95</sup> in the late 1990s. The tort theory work of both has influenced my own. Moreover, each advanced, prior to my own work on breach, an account of reasonableness in negligence law that draws from a Rawlsian idea of reasonableness rather than instrumental rationality. To this extent, Keating's and Ripstein's work on reasonableness is, at the very least, a precursor to my own. Nevertheless, it is crucial to see that there are fundamental differences between the account I have put forward here and that which Keating and Ripstein have offered.

Keating's work is most plainly distinct from my own because he expressly offers his Rawlsian view as an interpretation of the Hand Formula, rather than rejecting the Hand Formula altogether, as I have done. He accepts the Restatement (First) and (Second) move of treating the breach question as one about unreasonable risk, even while he rejects the social aggregative account of how one ascertains what is an unreasonable risk. Roughly speaking, Keating believes that an aggregative social welfare function of the sort put forward by Posner is better at capturing what rationality (as instrumental rationality) requires than it is at capturing what reasonableness requires. A Rawlsian framework of reciprocity, equality, and fairness lies at the foundation of what reasonable persons would expect a legal system to secure for them. Such a framework, translated to accident law, would be committed to protecting bodily integrity and liberty sufficiently to permit each individual to pursue his or her own conception of the good. In many scenarios, however, bodily security is strongly protected in a manner that is difficult to represent in a Posnerian or utilitarian version of the Hand Formula. Just as Rawls's maximin principle ends up producing the difference principle, which shields the well-being of the least well off, so

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<sup>94</sup> Keating, *supra* note 7.

<sup>95</sup> ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* (1999).

Keating's account shields basic goods in a manner that is distinctively non-aggregative and non-utilitarian. In this way, he depicts negligence law as prioritizing bodily security in a categorical manner, as against dollars and cents.

Keating's account suffers from many of the flaws of Posner's, insofar as each is an interpretation of the Hand Formula account of reasonableness. The problem is that the Hand Formula itself is centered on risk level and, as argued earlier, is therefore quite detached from persons. What I have argued above, however, is that negligence law itself does not work this way. It entrusts juries with a reasonable person standard in order to guide them to a question of how a certain kind of mutuality-respecting individual incorporates the potential well-being of others into his or her decisions. We are, in effect, asking juries to make a value judgment, but not one about which risks ought or ought not be taken. It is a value judgment about what a person who displayed appropriate care to others, at some level, would do and think right to do to diminish the risk to others. Although centered, in some way, in social mores, the question is really a moral one about what care we owe others. Keating's is quite different; it is ultimately a political philosophical question about how a set of legal norms constraining risk-taking activity (and allocating the costs of accidents) secures a system of primary goods within which individuals can create their own lives. My principal complaint is not to the normative vision, but to the interpretive power of the account. It simply does not describe what the law asks juries and judges to focus upon, in the first instance: whether ordinary care was taken.<sup>96</sup>

#### IX. CONCLUDING REFLECTIONS ON REASONABLENESS, REALISM, AND DOCTRINALISM

This Article puts forward both a negative and a positive thesis about reasonableness in negligence law. The negative thesis is that neither the Posnerian version of the Hand Formula nor a softened Restatement version comes close to capturing the idea of reasonableness in negligence law. This is for numerous reasons, but perhaps above all because reasonableness in negligence law serves to focus factfinders on a kind of person—whether a reasonably prudent, a reasonably careful, or simply a reasonable person—and not on an attribute of a risk level. In doing so, the Hand Formula has

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<sup>96</sup> Ripstein's Rawlsian account, unlike Keating's, is not centered upon an interpretation of the Hand Formula. However, it is not principally put forward as an account of what factfinders are instructed to think about in negligence cases; it is put forward as a way of conceptualizing the domain of rights that tort law (not just negligence law) protects.

led many scholars and some judges to miss the core idea that negligence aims to capture a rather modest moral principle that each of us owes a duty of ordinary care to others, and that liability in negligence is premised on a failure to live up to that duty. By shifting to an issue of justified risk level, the Hand Formula loses touch with this principle. The central critical point is not normative but interpretive: the language and ideas of negligence doctrine regarding reasonableness actually lead somewhere and capture some concepts—they are not simply an invitation to ruminate about optimal risk levels.

The positive thesis has admittedly evolved in fits and starts, but in the end, is not really so complicated. Reasonableness in negligence law relates both to the idea of moderate care and to the idea of mutuality as to others' needs. *Moderation and mutuality* is the watchword of negligence law. A very large aspect of negligence law literally focuses juries on whether a defendant acted as a "reasonably prudent person" would act under the circumstances. This instruction unpacks a conception of ordinary care, and while it aims to eliminate incompetent driving and incompetent performance of one's risky activities, it does not demand optimal performance or extraordinary care. In this sense, we demand of others that they moderate their risky activities and act in a reasonably careful—quite careful—manner.

Another aspect of negligence law is not fully captured by the adverbial, non-excessive version of reasonableness, because sometimes negligence law is really asking what a reasonable person would do, and we are not adequately guided by any preconceptions of what a reasonably careful performance of one's activity would look like. These cases do involve at least a quasi-epistemic conception of reasonableness, as the Posnerian argument suggests, but it is not one of instrumental rationality—it is one of a partially social conception of reasonableness. The mutuality conception of reasonableness is found in other parts of the law—such as nuisance law—and throughout ordinary conversation as well. A reasonable person in this sense is not wholly insensitive to the fact that, like her, others have wishes, desires, demands, and needs. She has a sense of mutuality. This is a significant part of what the reasonable person or the reasonably prudent person standard highlights, and it is in this frame of mind that we ask what precautions a reasonable person would have taken or whether the risks taken were unreasonable. Together, moderation and mutuality come close to capturing the place of reasonableness in negligence law.

This article began with a broad-ranging survey of the many senses of "reasonable" and its cognates in the law, the functions that such terms can play, and the unclarity and uncertainty that comes with the great variety



and nonspecificity of meanings of “reasonable” and its cognates. One would wish, of course, for far greater clarity in that section of the article, just as one would wish for a more singular and crisp account of reasonableness in negligence law. But a central assertion of the first Part of the article was that it would simply be an error to infer from the variety of “reasonableness” uses, the vagueness of “reasonable” and its cognates, and the capacity of “reasonable” to serve as a kind of open-ended site of lawmaking in some areas of the law that “reasonable” and “reasonableness” are simply open-ended terms inviting a normative theorist or an ambitious judge to jump right in and turn theories into law.

The two Parts of this Article fit together in two different ways. Most obviously, of course, we utilized parts of our survey in Parts I through III in exploring negligence in the second half. But there is a second connection, for it is plausible to think that the rise of the Hand Formula in negligence law is owed, in significant part, to the false inference from the variety and vagueness of “reasonableness” meanings that the word “reasonable” is meaningless altogether. The vacuum of meaning wrongly believed to exist in the reasonableness of negligence law perhaps drew in a clear-seeming instrumentalist vision like Hand’s, and an economic variation from Posner as well.

The pliability and vagueness of normative language in the law has of course long been a motor driving Legal Realism—at least since Holmes’s classic solicitation of cynical acid in *The Path of the Law*.<sup>97</sup> Yet it is also fair to say, as Holmes surely recognized, that the comfort of special words with legalized meanings presents both a powerful draw to doctrinalism, and a dangerous risk of formalism. Those of us who belong to the cast of the “New Doctrinalists” would like to think it is possible to avoid the more egregious aspects of the Legal Realist’s linguistic skepticism without sinking into rigid doctrinalism. Being thoughtful about reasonableness in the law is a good place to start.

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<sup>97</sup> See Holmes, *supra* note 91, at 995 (“You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.”).