

CUSTOM, NON-CUSTOMARY PRACTICE, AND NEGLIGENCE

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The forms of evidence that are considered relevant to the negligence question both reflect our understanding of what negligence is and influence that understanding. They tell us what to consider and what to ignore in thinking about negligence. One such form of evidence concerns custom. The custom rule tells us when we can get a reasonable care “ought” from the “is” of custom.¹ Admitting custom evidence implements the idea that recurring patterns of conduct have a bearing on what constitutes reasonable care. In contrast, evidence of the incidence of practices that are not sufficiently widespread to qualify as customs is not admissible. In de-emphasizing the importance of patterns of conduct that regularly recur but are not as widespread as customs, the practice rule treats each negligence case as more nearly unique, and leaves greater room for the risk-benefit and reasonable prudence conceptions of negligence to operate. These different perspectives typically are not mutually exclusive. In many negligence cases there is evidence and there are arguments from each perspective. But the different perspectives reflect, and in negligence litigation are likely to lead to, different emphases.

The rule regarding evidence of compliance with and departure from custom is well-settled. The new Restatement of Torts, for example, sets it out with admirable clarity. Evidence of an actor’s compliance with custom is admissible for use defensively (as a “shield”) to show reasonable care, and evidence of an actor’s departure from custom is admissible for use offensively (as a “sword”) to show negligence. But neither form of evidence is conclusive. The finder of fact may determine that an actor who complied with custom was negligent, or that an actor who departed from custom exercised reasonable care.²

In a classic article nearly seventy years ago, Clarence Morris articulated the arguments for the custom rule.³ Although the role played by custom in tort law has received a bit of attention from legal scholars over the past two decades,⁴ the custom rule itself has not been

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¹Cf. John R. Searle, *How to Derive “Ought” from “Is,”* 73 PHIL. REV. 43 (1964).

²RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §13 (Proposed Final Draft No. 1, 2005).

³Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942).

⁴See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 131-33 (1987)(arguing that the law should treat custom differently in high and low transactions cost situations); Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992) (contending that custom should govern situations in which transactions costs are low); Steven Hetcher, *Creating Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1 (1999)(examining, among other things, the sources and functions of customs); Steven Hetcher, *The Jury’s Out: Social Norms’ Misunderstood Role in*

carefully examined since Morris wrote. Indeed, it is a testament to the clarity of his insights that many of the Comments to §13 of the Third Restatement, which states the custom rule, echo what Morris had to say about the rule.

Morris's arguments, and the arguments of those who have followed him, are accounts of the "affirmative" side of the custom rule. These arguments concern the justifications for admitting custom evidence. They identify the inferences that may be drawn when evidence of compliance with or departure from custom is admitted, and explain how these inferences might properly influence resolution of the negligence issue. In addition, however, there is a "negative" side of the custom rule. The rule not only expressly dictates the admission of custom evidence, but also implies, at the least, that evidence of the incidence of compliance with or departure from a practice that is not sufficiently widespread to constitute a custom (what I will call "practice evidence") is not categorically admissible. And the custom rule may well go further. It may imply that practice evidence is categorically inadmissible.

It is true that not every statement, and certainly not every normative statement such as the custom rule, necessarily implies its converse. "You should bring an umbrella when rain is forecast" does not imply "You should not bring an umbrella when no rain is forecast." But the custom rule's reason for being is not obvious unless that purpose is at least partly to imply something about the inadmissibility of practice evidence. Otherwise, it would seem unnecessary to have a *tort law* rule providing that a particular category of evidence that seems relevant on its face is admissible. The custom rule therefore appears to be designed not merely to confirm the admissibility of custom evidence, but also to deny the admissibility of practice evidence.

In this Article I will attempt to enrich our understanding of the custom rule, including what the rule may imply about practice evidence. I want to do this by examining precisely what makes custom evidence at least potentially probative of reasonable care, and by identifying two functions of custom evidence that have not been emphasized in previous work. First, custom evidence is not only directly relevant to the negligence issue, but can also perform a knowledge-building, or educational function. Custom evidence has the potential to acquaint the jury with unfamiliar fields of activity, to place the conduct of the parties in its proper social or economic context, and to help the jury get its bearings. Custom evidence informs the jury about what happens in the real world, and thereby may enhance the accuracy and reliability of jury decisionmaking. Second, admitting custom evidence may help to prevent the jury from drawing unwarranted inferences from the absence of such evidence. It prevents the jury from assuming that there is no settled way of doing things, for example, or that a patterns of conduct with which it is familiar is less widespread than is actually the case. In this sense the value of custom evidence lies not only in the valid inferences that this evidence supports, but also in the invalid inferences that such evidence forestalls.

Negligence Law, 91 GEO. L. J. 633 (2003) (identifying the different ways in which norms interact with the jury's role in negligence cases); Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285 (2008) (arguing that the admission of custom evidence in negligence, medical malpractice, and products liability actions inhibits innovation).

Interestingly, there is virtually no case law addressing the admissibility or inadmissibility of practice evidence. I will identify what I think are the reasons for this case law vacuum, and consider the arguments for and against permitting the introduction of evidence of the incidence of practices that are not widespread enough to constitute customs. Under certain circumstances practice evidence may also be probative of what constitutes reasonable care, and might serve the same educational and inference-forestalling functions that custom evidence serves. And admitting practice evidence might help to neutralize one of the disadvantages of the custom rule – its potential to discourage innovation. But admitting practice evidence would threaten to complicate negligence trials and could actually disadvantage the first actors to undertake innovations. The possible admissibility of practice evidence is therefore worthy of analysis in its own right.

Finally, precisely because negligence law permits the parties to deploy, and juries to consider, evidence and arguments based on the different perspectives that the custom and practice rules reflect, we have a conception of negligence that is often ambiguous. In a brief concluding discussion, therefore, I return to the contrast between the different sources of authority in negligence law, and try to tease out some of the broader implications of this contrast for our understanding of negligence.

I. CUSTOM

A custom is a widespread, and for some courts, nearly universal practice.⁵ The black-letter rule governing custom evidence has been enshrined in two Restatements and is a fixture in torts treatises and casebooks. But these sources contain little or no discussion of the operational role that evidence of custom plays in negligence trials. As torts teachers and scholars we tend to imply that the admissibility of custom evidence is substantively significant, focusing on the justifications for admitting custom evidence – on the inferences that a jury might reasonably draw from evidence of compliance with or departure from custom. But we tend to ignore the way the rule is implemented and actually figures in negligence trials.

The admission of custom evidence, however, may entail a good deal more than the simple presentation of that evidence through direct testimony. Because the impact of the admission of custom evidence on the conduct of a negligence trial may be significant, it will be useful to begin by identifying each step in the implementation of the rule. An appreciation of the way that custom evidence figures in negligence trials will set the stage for assessing the reasons we have a rule governing custom evidence at all and the arguments for the rule that we do have.

⁵DAN B. DOBBS, THE LAW OF TORTS §164 at 394 (2000), citing *Rentz v. Brown*, 464 S.E. 2d 617 (Ga. App. 1995).

When the plaintiff seeks to use custom evidence offensively because the defendant⁶ is alleged to have departed from custom, the steps in implementing the custom rule are as follows: as part of the plaintiff's case-in-chief the plaintiff introduces evidence (1) identifying the practice that it alleges is a custom; (2) that the practice is sufficiently widespread to constitute a custom; and (3) that the defendant departed from the alleged custom. This evidence might come from the same source, but is more likely to come from two or even three different sources. For example, the evidence in steps (1) and (2) usually, though not always, comes from an expert, whereas the evidence in step (3) is likely to come from a fact witness. The defendant is then entitled to cross-examine (4) the sole witness presenting the plaintiff's custom evidence or (5) additional witnesses if there is more than one witness.

As part of its case, the defendant is entitled to introduce evidence (6) that the practice in question is not a custom, (7) that the defendant did not depart from the practice in question, and (8) that even if the practice is a custom, and even if the defendant did depart from the custom, this departure was not negligent. The defendant's evidence also may come from both expert and fact witnesses. The plaintiff is then entitled to cross-examine (9) the sole witness presenting the defendant's evidence or (10) additional witnesses if there is more than one witness.

When the defendant alleges that it complied with a custom, analogous evidence is introduced, first as part of the defendant's case, and then in rebuttal testimony on behalf of the plaintiff.⁷ Moreover, it is possible that the parties will each seek to take advantage of the custom rule. That is, the plaintiff may contend that the defendant's conduct, whatever the plaintiff contends that conduct was, departed from custom, and the defendant may contend that its conduct, whatever the defendant contends that conduct was, complied with custom. In such instances there is competing testimony, possibly about both empirical facts and about the question whether there is a custom regarding whatever conduct occurred. This testimony is admitted as part of the plaintiff's case-in-chief, the defendant's case, and the plaintiff's rebuttal case.

Next, in closing argument, (11) counsel for the plaintiff and (12) counsel for the defendant are permitted to make reference to each of the above items of evidence and to argue

⁶Although evidence of compliance with or departure from custom may be used offensively or defensively by either the plaintiff or the defendant, the more common scenarios involve a plaintiff offering such evidence offensively to show the defendant's negligence or the defendant offering such evidence defensively to show reasonable care. For convenience, at various points in the remainder of the Article, I will refer to the plaintiff and the defendant in these scenarios, without intending to preclude those in which the plaintiff introduces custom evidence defensively or the defendant introduces it offensively.

⁷That is, the defendant would introduce evidence (1) identifying the practice that it alleges is a custom; (2) that the practice is sufficiently widespread to constitute a custom; and (3) that the defendant complied with the alleged custom. Plaintiff could then (4) cross examine the witnesses through whom such evidence was introduced. Thereafter the plaintiff would be entitled to introduce evidence that (5) the practice in question is not a custom and (6) even if the practice is a custom, and even if the defendant did not depart from the custom, following the custom was negligent. Thereafter the defendant could (7) cross examine the witnesses through whom this evidence was introduced.

the significance of this evidence to the jury.

Finally, there are jury instructions from the court regarding the significance of this evidence. If whether the practice in question is a custom is disputed, then in the majority of jurisdictions, where this a question for the finder of fact,⁸ or even in other jurisdictions where the issue is for the court but depends on the resolution of a question of fact, (13) there is likely to be a separate instruction regarding that dispute. And in such situations there is also an instruction indicating that (14) if the practice is a custom, then the evidence of the custom may be taken into account as the jury wishes, but if the practice is not a custom, then the jury should not consider the evidence regarding the practice. In a jurisdiction where the question whether a practice is a custom is a question for the court and its resolution does not depend on resolution of a question of fact, and the court has decided that the practice in question is a custom, there is an instruction similar to (14) above, indicating that the jury may take the evidence regarding departure from or compliance with custom into account as it wishes.⁹ On the other hand, if the custom evidence has been admitted provisionally or for a limited purpose, there may be an instruction (15) indicating that the practice about which evidence was introduced does not constitute a custom and that the evidence therefore should be considered only for the limited purpose for which it remains admissible or not at all.

This breakdown of the fifteen or more steps that may be required to implement the custom rule demonstrates that the rule does not simply dictate the admission of a simple form of factual evidence, such as whether the defendant ran a red light, or whether there was snow on the ground when the plaintiff fell on the defendant's sidewalk. Rather, the admission of custom evidence may have substantial and complex repercussions throughout a negligence trial. The fact that admitting custom evidence may have these repercussions may help to explain the existence of a separate rule confirming the admissibility of custom evidence.

Many other forms of evidence that may have similar repercussions, however, are not the subject of separate rules governing their admissibility. Rather, the admissibility of evidence that threatens to complicate the conduct of a trial is typically handled on a case-by-case basis. The mere threat that admitting custom evidence may complicate a negligence trial therefore does not seem sufficient to explain the existence of a separate rule governing custom evidence. To understand why we have a custom rule, we must look elsewhere. I think that there are two reasons for the rule's separate existence, each of which I discuss in the next Section.

A. Why Have a Custom Rule at All?

⁸See, e.g., *Askin v. Dalgarno*, 293 F.2d 424, 426 (10th Cir. 1961); *Sanders v. City of Chicago*, 714 N.E. 2d 547, 554-55 (Ill. Ct. App. 1997); *Dallas v. Otis Elevator Co.*, 552 A.2d 1109, 1113 (Pa. Super. 1989); *Walters v. Kellam & Foley*, 360 N.E. 2d 199, 216 (Ind. Ct. App. 1977); *Davis v. Gatewood*, 299 S.W. 2d 504, 509 (Mis. 1957).

⁹A number of states have pattern jury instructions regarding compliance with or departure from custom specifying precisely such an instruction. See, e.g., *California Civil Jury Instructions* 3:16; *New York Pattern Jury Instructions* 2:16.

Ordinarily we simply rely on general rules of evidence, in particular the rule that relevant evidence is admissible unless there is a specific reason for rendering the evidence inadmissible, to determine whether evidence that purports to prove or disprove negligence should be admitted.¹⁰ In contrast, what we think of as the rules of tort law typically do not merely confirm or provide for the admissibility or inadmissibility of evidence; instead they specify rules that determine or help to determine liability.

Even the few tort law rules that do deal with merely evidentiary issues are more directive than the custom rule. For example, unlike the rule regarding evidence of sudden emergencies or the rule regarding evidence of above-average skills and knowledge, the custom rule does not require that such evidence be “taken into account,”¹¹ as these rules require, but only permits the jury to take custom evidence into account if it wishes to do so. The jury may wholly disregard custom evidence without violating the custom rule. Similarly, unlike the rule governing an actor’s mental or emotional disabilities, which confirms the objective standard by providing that evidence of these disabilities may not be “considered,”¹² the custom rule does not seek to define an aspect of reasonable care by expressly rendering a category of evidence immaterial and therefore inadmissible, though this is of course precisely what it impliedly does in excluding evidence of the incidence of non-customary practices.

Why, then, does tort law have a separate custom rule that addresses a merely evidentiary issue? I think that the explanations for having a particular rule about custom, as well as for the distinctive form this rule takes,¹³ are both historical and substantive.

1. History. The historical explanation for having a separate, merely evidentiary rule about custom begins with the recognition that there was a time when the now-dominant custom rule had two competitors. Each of these rules addressed the significance of compliance with custom. As the Reporters’ Note to the Restatement Third’s section on custom indicates,¹⁴ one competitor was the rule that compliance with custom is conclusive on the issue of negligence. The leading case on the subject held that business custom was the “unbending test of

¹⁰See, e.g., FEDERAL RULES OF EVIDENCE, Rule 401 (all relevant evidence is admissible, with certain exceptions).

¹¹See RESTATEMENT THIRD, *supra* note 2, §9 (the existence of an unexpected emergency is a circumstance “to be taken into account” in determining whether an actor has exercised reasonable care); *id.*, §12 (above-average skills or knowledge are “to be taken into account” in determining whether an actor has exercised reasonable care). Interestingly, a Comment to §295A of RESTATEMENT SECOND does indicate that custom evidence is to be taken into account.

¹²See, e.g., RESTATEMENT THIRD, *supra* note 2, §11(c) (an adult actor’s mental or emotional disability “is not considered” in determining whether conduct is negligent).

¹³Distinctive, but not unique. See, e.g., *id.*, §16(a) (an actor’s compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent).

¹⁴RESTATEMENT THIRD, *supra* note 2, §13, Reporters’ Note, Comment b.

negligence.”¹⁵ Under this rule, proof of compliance with custom provided a safe harbor and resulted in a holding that the defendant was free from negligence as a matter of law.¹⁶ This rule was a feature of the strand of 19th century negligence law that tended to insulate defendants from under-all-the-circumstances liability for negligence, and so was often allied with assumption of risk in the “no breach-of-duty” sense of this concept.¹⁷

The other competing custom rule was that compliance with custom was irrelevant and therefore that evidence of compliance was not even admissible.¹⁸ As Richard Epstein has observed, a number of the cases that took this approach involved accidents between strangers, for whom the cost of transactions between these parties expressly or impliedly agreeing to be bound by a custom would have been high.¹⁹ Because an actor can more easily externalize risk to strangers than to those in a pre-existing relationship (where the cost of transactions leading to an optimal level of safety is less likely to be prohibitive), there is an argument for applying the safe-harbor rule to accidents between parties in a relationship, and the irrelevance rule to accidents between strangers.²⁰ The result would be that where the parties’ conduct reflected an assumption that customary conduct could be expected, custom would determine what constituted reasonable care. And where no such assumption was warranted, custom would have no bearing at all on the issue. But few cases applying either rule were ever sensitive to this distinction.²¹ Rather, each applied across-the-board.

¹⁵*Titus v. Bradford, Bordell & Kinuza Railroad Co.*, 20 A. 517, 518 (Pa. 1890).

¹⁶In addition to *Titus, id.*, see *Shadford v Ann Arbor Street Railway*, 69 N.W. 661 (MI. 1897). Before the celebrated case of *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), adopted the modern rule, there were even some Second Circuit decisions adopting the safe harbor rule. *See, e.g., Ketterer v. Armour & Co.*, 247 F. 921, 931 (2d Cir. 1917); *Adams v. Bortz*, 279 F. 521, 525 (2d Cir. 1922). For discussion, *see* Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 14-15 (1973).

¹⁷*See* KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 161-63 (3d ed. 2007); Stephen D. Sugarman, *Assumption of Risk*, 31 VALPARAISO L. REV. 833, 841-43 (1997).

¹⁸*See, e.g., Phoenix Assur. Co., Ltd. Of London v. Texas Holding Co.*, 252 P. 1082 (Cal. 1927); *Redfield v. Oakland Consolidated Ry.*, 43 P. 1117 (Cal. 1896); *Burke v. South Boulder Canon Ditch Co.*, 203 P. 1098 (Colo. 1922); *Jenkins v. Hooper Irrigation Co.*, 44 P.2d 829 (Utah 1896); *Bassett v. Shares*, 27 A. 421 (Ct. 1893); *Mayhew v. Sullivan Mining Co.*, 76 Me. 100 (1884).

¹⁹Epstein, *supra* 4, at 19-20.

²⁰*Id.* at 4-5. Epstein himself argues that strict liability should apply in the stranger cases, and for this reason would hold compliance with custom irrelevant in such cases.

²¹For at least a time, California applied the irrelevance rule to accidents involving strangers but the safe-harbor rule to accidents involving those in relationships. For instance, *Phoenix Assur. Co., Ltd. of London v. Texas Holding Co.*, 252 P. 1082, 1087 (Cal. 1927), distinguishes *Webber v. Bank of Tracy*, 225 P. 41 (Cal. 1924), on this basis. Similarly, Utah applied the rule in *Jenkins*, *supra* note 18, to accidents between strangers, but the safe-harbor rule to accidents involving those in relationships. *See Roth v. Eccles*, 79 P. 918 (Utah 1905). But these distinctive treatments long ago disappeared.

The custom rule as we now know it competed with the safe-harbor and irrelevance rules. The rule was reflected in a series of late 19th and early century cases²² and was most famously articulated in the canonical opinion by Judge Learned Hand in *The T.J. Hooper*.²³ Both competitors of the modern custom rule had strong outcomes. The safe-harbor rule was a *per se* no-liability rule. And the irrelevance rule precluded the jury from even considering custom. In contrast, the modern custom rule has what might appear to be a weaker outcome – it is merely evidentiary. But the modern custom rule actually originated as an outright rejection of both of the two rules that once competed with it, and in this sense has a stronger reason for being than appears on its face.

Interestingly, the two competitors of the modern rule said nothing about how to treat departures from custom. These rules addressed only the defensive use of evidence of compliance with custom, not the offensive use of evidence of departure from custom. Consideration is rarely given to the way the states that applied these rules treated the departure from custom. In safe-harbor states, where custom was the “unbending test of negligence,” it could easily have followed that, just as following custom constituted reasonable care as a matter of law, so departure from custom constituted negligence as a matter of law. But that was not the approach taken by the safe-harbor states. Rather, evidence of departure from custom was admissible but not conclusive. The Supreme Court of Pennsylvania, author of the rule that custom is the “unbending test of negligence,” held that custom was the “unbending test” only

to disprove negligence, and not to prove it. The party charged with negligence disproves it by showing that the tools he employed were those in general use in the business, but the converse does not follow. If it should be so held, the use of the newest and best machinery, if not yet generally adopted, could be adduced as negligence.²⁴

Other safe-harbor states followed Pennsylvania’s lead.²⁵ Thus, the safe-harbor rule differed from the modern custom rule when there was compliance with custom, but when there was departure from custom the rules were identical.

I have found no discussion or case law regarding the way the states that applied the irrelevance rule treated departure from custom. Here too there would have been some logic to a rule that, just as compliance with custom is irrelevant, so departure from custom is irrelevant. But I doubt that the irrelevance rule was applied to departure from custom. The purpose of the irrelevance rule was to prevent an industry from hiding behind its compliance with an obviously

²²See, e.g., *Wabash Railway Co. v. McDaniels*, 107 U.S. 454 (1882), *Texas & Pacific Railway Co. v. Behymer*, 189 U.S. 468 (1903); *Shandrew v. Chicago etc. Railway Co.*, 142 F. 320 (8th Cir. 1905).

²³60 F.2d 737 (2d Cir. 1932).

²⁴*Cunningham v. Ft. Pitt. Bridge Works*, 47 A. 846, 630 (Pa. 1901).

²⁵See, e.g., *Central Graneries Co. v. Ault*, 107 N.W. 1015, 1016 (Ne. 1906).

negligent custom.²⁶ Permitting a jury to consider a defendant's departure from custom would have been perfectly consistent with this purpose. Like the safe-harbor rule, then, the irrelevance rule differed from the modern rule in cases where there had been compliance with custom, but probably was identical to the modern rule when there was evidence of departure from custom.

There is a pretty clear normative reason, I think, that all three of these otherwise-different rules treated *departure* from custom in the same way. However the courts may have differed about the significance of the "average" conduct that constituted compliance with custom, they all would have thought that innovative conduct that was more careful than what was customary should be provable as such, and probably also thought that conduct not as careful as was customary – below-average conduct – was evidence of negligence.

Perhaps because the now-prevailing rule that evidence of both compliance with and departure from custom is admissible had only recently become dominant at the time that the First Restatement was published in 1934, the First Restatement was silent about custom. But the Second Restatement contained a straightforward Section addressing the subject and stating that the rule had by then become dominant, thus silently rejecting the two earlier, competing alternatives.²⁷ Including such a Section made sense in light of the need to relegate the two alternative rules to the historical dust heap. The subject of custom then became a fixture in the casebooks and treatises. When the time came, carrying forward the Restatement Second's treatment of custom into the Restatement Third was logical and uncontroversial. I recall no significant disagreement about or even discussion of the rule in either the Advisors' meetings or on the floor at the Annual Meetings. But because today the custom rule is uncontroversial and does not carry its historical significance on its face, the rule may seem less necessary, and less significant, than it actually is.

2. *Substance.* A second possible reason for including the custom rule in the Third (and before it the Second) Restatement is not merely to confirm that custom evidence is admissible, but also to identify evidence that is not admissible, or at least not categorically admissible, as custom evidence is. The custom rule does this only indirectly and by implication, but does it nonetheless. Though statements of the custom rule, and most discussions of the rule, do not say so, they imply that some version of the converse of the rule also applies. That is, the rule implies that evidence of the incidence of compliance with, or departure from, practices that are not sufficiently widespread to qualify as customs is inadmissible, or at least that such evidence is admissible only case-by-case upon a necessary showing of relevance. Evidently, practice evidence is thought not to have the same automatic probative value that results from the generality of compliance that characterizes customs.

²⁶As the court in *Mayhew*, *supra* note 18, put it, "The gross carelessness of the act appears conclusively on its recital."

²⁷RESTATEMENT OF THE LAW SECOND, TORTS, §295A. The only explanation for the addition of this Section that I have been able to locate in the ALI annals is a 1958 note that the Section is new. RESTATEMENT OF THE LAW SECOND, TORTS, Council Draft No. 4, §295A (November 4, 1958).

Given the historical explanation for the rule that I have just examined, it is not at all obvious that the original purpose of the custom rule was mainly to render practice evidence inadmissible. There is no discussion or reference in the leading cases of the time to any concern that practice evidence not be admitted. Rather, the rule appears to have been fashioned predominantly to ensure the proper treatment of custom evidence. In Part II, therefore, I will suggest that, given the history of the custom rule, we should be interested in the question whether, and under what circumstances, practice evidence might be admissible.

B. The Relevance of Custom

Precisely what makes custom relevant to what constitutes reasonable care? How is what is ordinarily done probative of what ought to be done? We need answers to these questions in order to understand the custom rule itself. In addition, in order to evaluate the implicit component of the custom rule, we need first to have on the table the arguments for the explicit component. That is, we need to know what makes custom evidence admissible, in order to identify the characteristics that practice evidence does and does not share with custom evidence. We will then be in a position to determine whether the exclusion of practice evidence that is accomplished by the custom rule makes sense.

1. The Traditional Account. In his classic analysis of the modern custom rule, Clarence Morris identified three arguments for admitting evidence of compliance with and departure from custom.²⁸ First, admitting evidence of compliance with custom cautions the jury that if it finds that an actor was negligent despite the actor's compliance with custom, the jury is in effect finding that an entire industry, and not a single actor, is behaving unreasonably. On the other hand, evidence of an actor's departure from custom assures the jury that in finding the conduct in question negligent it is not finding that the conduct of an entire industry is unreasonable. Second, evidence of an actor's compliance with custom acts as a check on the jury's hasty acceptance of experts from "esoteric" fields who are "prone to set impractical standards." Third, evidence of compliance with custom is some evidence of the lack of an opportunity to learn of other precautions that might have been taken.²⁹ And evidence of departure from custom demonstrates the opportunity to learn of a feasible precaution that might have been taken.³⁰ Thus, for Morris the arguments for admitting custom evidence turn on the way that this evidence cautions the jury about its task and provides a sense of whether an alternative to the conduct at issue was feasible.

It is interesting that neither Morris nor either of the Restatements that adopt the custom rule emphasize what would seem to be most straightforwardly probative about custom evidence – its tendency to show what constitutes reasonable care. Morris almost completely avoids making this point, asserting that his cautionary and feasibility arguments, which are a step or two

²⁸See Morris, *supra* note 3, at 1147-53.

²⁹*Id.* at 1147-49.

³⁰*Id.* at 1151.

removed from the ultimate negligence issue, identify the “only” ways in which evidence of conformity to custom is relevant.³¹ And while devoting five pages to its Comments about the custom rule, the Restatement Third’s only mention of the notion that custom is directly probative of reasonable care is the almost grudging statement that “‘ordinary care’ has at least some bearing on ‘reasonable care.’”³²

The two cases that are most closely identified with the modern custom rule also avoid stating forcefully that evidence of custom is directly probative of what constitutes reasonable care. In fact, *The T.J. Hooper* is best known for its dictum that a custom followed by a “whole calling” may itself be negligent³³ – a backhanded way of acknowledging that compliance with custom is evidence of reasonable care, if there ever was one. And Holmes’s famous line in *Behymer*, “What usually is done may be evidence of what ought to be done,”³⁴ actually reads in his opinion not like an affirmation of the probative value of custom evidence, but like a reluctant concession, made in the course of rejecting the defendant’s contention that its compliance with a custom constituted reasonable care as a matter of law. Understood in the context of that case, Holmes’s statement that what is usually done “may be evidence” of what ought to be done actually means “might be evidence” or “may well be evidence.”

Thus, at most it can be said that Morris, Hand, and Holmes conceded that evidence of custom is probative of reasonable care. They certainly did not strongly endorse this point. Part of the explanation for their posture, I think, is that they were reacting to a past in which application of the rule that custom was the “unbending test of negligence” by industrial defendants had sometimes been perceived as abusive. These jurists were therefore reluctant to provide an enthusiastic endorsement of the probative value of custom evidence, especially when this evidence was used defensively. Consequently, they did not build affirmative arguments or theory based on the notion that custom was directly probative of reasonable care, but simply accepted that this logically followed from the admissibility of custom evidence, even when it was used for defensive purposes.

When we move beyond these authorities and directly consider the probative value of custom evidence, however, it turns out that grappling with the distinction, and overlap, between average care (what is “usually done”), and reasonable care, becomes unavoidable.

2. *The Normative Force of Custom.* Custom has normative force – that is, custom is probative of what constitutes reasonable care – only if what is usually done does in fact tend to be what ought to be done. The ambiguous language that we use to discuss admissibility,

³¹*Id.* at 1149.

³²RESTATEMENT, THIRD, *supra* note 2, §13, Comment b. Similarly, in his treatise, Professor Dobbs devotes only one sentence, albeit a thorough one, to this point. *See* DOBBS, *supra* note 5, § 164 at 396.

³³*See* *The T.J. Hooper*, *supra* note 17, 60 F.2d at 737.

³⁴189 U.S. at 470.

however, sidesteps this issue. Saying that custom is “evidence of reasonable care” or is “relevant to reasonable care” means only that evidence of custom is potentially probative of reasonable care, not that it is always probative in the sense of always having some weight, always having normative force.

In contrast, recall Sections 9 and 12 of the Restatement (Third), which come very close to directing that evidence that there was an emergency, or that an actor possessed above-average skills or knowledge, always be given weight, by requiring that these facts “be taken into account.”³⁵ If the existence of an emergency or of an actor’s above-average skills must “be taken into account,” then they would seem always to have some normative force. But neither the custom rule nor the Restatement Third’s formulation of that rule require that the existence of a custom “be taken into account.” Custom evidence must be admitted, but then it may nonetheless be disregarded. If the difference among these formulations is anything more than an accident of phrasing, then it appears that the jury is permitted to get a reasonable care “ought” from a customary “is,” but not because custom always has at least some normative force. Whether evidence of any particular custom is at all probative of reasonable care is apparently an issue unique to each case and to be decided by the finder of fact.

So the question is, precisely how is custom evidence probative of reasonable care? If a jury is considering custom evidence, on what basis might it conclude that evidence of custom is in fact evidence of reasonable care? First, a certain amount of authority tends to accompany any widespread agreement about something. The fact that most people behave in a particular way might therefore be thought to have some weight behind it by the sheer force of numbers. Second, as a matter of actual experience, customary ways of doing things might be considered reasonable. Jurors might reflect on their own lives and conclude that, more often than not, the way people do things is reasonable. Third, it is a common moral intuition that, other things being equal, it is unfair to punish someone for doing what everyone else does. Since complying with a custom involves doing what most everyone else does, evidence of compliance with custom calls on this moral intuition.

All three of these explanations ground reasonable care on average care, identifying the former with the latter. They seek to persuade the jury to base the negligence determination on what might be called “normative experience.” Interestingly, there is more in the standard negligence trial than might be supposed that encourages the jury to identify reasonable care with average care in just this experiential way. First, the more evidence there is in a negligence trial regarding custom, the greater will be the inclination of the jury to focus on what is usually done – on average care. And since in most jurisdictions whether a practice constitutes a custom is itself a question of fact,³⁶ in some cases there will be considerable evidence about custom. Moreover, evidence of what is usually done is concrete, whereas testimony about what ought to be done (at least when custom evidence is used defensively) is likely to be more abstract, and therefore less

³⁵See text at note 8, *supra*.

³⁶See cases cited *supra*, note 8.

salient, when the time comes for jury deliberation.

Second, many states' jury instructions first define negligence by ambiguous reference to "ordinary care," and only then go on to explain that ordinary care should be understood as the degree of care that would be exercised by the reasonably prudent person.³⁷ California, for example, instructs juries that "Ordinary or reasonable care is that care which persons of ordinary prudence would use. . ."³⁸ The Idaho instruction provides that "It was the duty of the defendant before and at the time of the occurrence, to use ordinary care. . ."³⁹ And in Maryland the jury is told that "Negligence is doing something that a person using ordinary care would not do, or not doing something that a person using ordinary care would do. . ."⁴⁰ Especially if the trial that jurors have just witnessed has emphasized what is customary, or average conduct, the phrase "ordinary care" in the standard instruction is likely to lead at least some jurors to believe that negligence is the failure to exercise an average amount of care. The standard instruction on custom is designed, among other things, to neutralize this effect, by indicating that custom is only relevant, and not conclusive, on the issue of what constitutes reasonable care.⁴¹ However, because the initial instruction on the meaning of negligence as "ordinary care" typically precedes an instruction that evidence of compliance with or departure from custom is not conclusive, the ordinary care instruction will often have more primacy in jurors' minds than the instruction on custom.

Finally, when they are familiar with a field of activity, jurors cannot help but consult their own experience in deciding whether an actor was negligent. That experience is likely to involve what jurors consider to be average behavior, as well as behavior that they consider below-average. It is effectively impossible for trial procedure or jury instructions to prohibit jurors from considering their own experience with what is usually done in their deliberations.

An alternative to reliance on these different forms and sources of normative experience to support the contention that a particular custom has probative value is to justify the custom in some manner -- to evaluate it in order to persuade the jury that the custom is reasonable. What is interesting about this approach is that it tends to leave experience, and therefore custom itself, behind. When the issue is whether a custom is justified, the negligence determination is made by

³⁷Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI. KENT L. REV. 587, 595, 625-82 (2002); Benjamin C. Zipursky, *Sleight-of-Hand*, 48 WILLIAM & MARY L. REV. 1999, 2014-18 (2007).

³⁸Cal. B.A. J. I. Civ. 3.10 (8th ed. 1994 & Supp. 2002).

³⁹Idaho I.D. J.I. Civ. 200 (1988).

⁴⁰Md. M.P. J. I. Cov. 19:1 (3d ed 1993 & Supp. 2001).

⁴¹For example, the New York instruction on custom provides, among other things, that ". . . a general custom or practice is not the only test; what you must decide is whether, taking all the facts and circumstances into account, defendant acted with reasonable care." N.Y. Pattern Jury Instruction, Civil 2:16.

applying the reasonably prudent person standard, or by reference to a risk-benefit test.⁴² Custom then either passes the reasonableness or risk-benefit tests or it does not.

The law's ambivalence about what constitutes negligence is further reflected in the fact that the jury is free to use each of these approaches in making the negligence determination.⁴³ Custom may be given weight by some metric (or none) of the jury's choice, and considered together with whatever inferences the reasonable person and risk-benefit tests support. The normative force of custom is then considered alongside these other incommensurables in making the negligence determination.

3. Administrative Costs and the Custom Rule. In recent years the most significant enrichment of traditional custom analysis has come in the form of a series of explanations for the reasons that customs arise. The most prominent explanation depends on the distinction to which I have already referred, between situations in which transactions cost are low and those in which they are high, typically relational as opposed to stranger-to-stranger accidents.⁴⁴ Other things being equal, a custom that arises when the parties are in a relationship is more likely to be optimal than a custom that risks injury to strangers. The rationale for this distinction is the familiar Coasian insight that the parties to a relationship may bargain about the precautions they will take, and that such bargains have the potential to optimize risk.⁴⁵ In contrast, when the principal risk of an activity is to third parties, a custom is more likely to externalize risk to these parties.

There are two additional explanations for the rise of customs that are relevant here.⁴⁶ Sometimes customs emerge merely as conventions, because it is important for those affected by a particular form of conduct to coordinate their behavior in some way or other. It is safer for everyone to drive on either the left or the right side of the road, for example, although there is nothing inherently safer about either custom.⁴⁷ Or a custom may arise for information-reducing

⁴²See DOBBS, *supra* note 5, §165 at 400 (the proponent of custom evidence may attempt to show that the custom has been justifiably adopted, because the risks it poses are outweighed by its benefits, and the opponent of that evidence may attempt to show that the custom is too risky – that it does not satisfy a risk-benefit test).

⁴³Even the RESTATEMENT THIRD, which comes close to adopting the risk-benefit approach, indicates only that risk and benefit are the “primary factors” in ascertaining whether conduct is reasonable. RESTATEMENT THIRD, *supra* note 2, at §3.

⁴⁴LANDES AND POSNER, *supra* note 4, at 32-33; Epstein, *supra* note 4, at 7. See also ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (explaining how utilitarian norms arise among neighbors).

⁴⁵Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

⁴⁶See Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 42-55 (1999).

⁴⁷ERIC A. POSNER, LAW AND SOCIAL NORMS 117-78 (2000); Hetcher, *supra* note 46, at 56.

reasons. An existing practice may simply become a reference point that others adopt in order to save the cost of independently determining what practice to follow. The practice may then become entrenched, because of the collective-action problem arising from the fact that it is not worthwhile for any individual actor to invest what may be necessary to identify a safer, reasonable precaution.

These are analytically important insights, but they have played virtually no role in shaping the custom rule. The rule applies equally to relationship and stranger cases, and it applies whether a custom has arisen because it is considered by those who have adopted it to optimize risk, because it is a focal point for coordinating behavior, or simply because its availability reduces information costs even though it may not be the most reasonable practice. The reason recent academic insights about these different functions of custom have not affected the rule, I think, is that the administrative costs of taking these insights into account would be excessive. A custom that has arisen because those who follow it believe that it optimizes risk, or because it serves to coordinate behavior, may well be more probative of what constitutes reasonable care than a custom that is followed simply because others follow it. But it would be time-consuming and costly to have a rule that made the admissibility of custom evidence, or the legal significance of that evidence, dependent in every case on fact-finding about what function a particular custom served.

Similarly, in general, evidence of departure from custom is probably more probative than evidence of compliance. An entire industry may well be negligent, but it would be rare indeed for an entire industry to exercise more care than is reasonable. Self-interested actors tend not to invest more in safety than they expect those with whom they deal or the law require. So evidence that a defendant exercised less than an average amount of care is likely to be pretty probative of negligence. There is therefore a potential argument for privileging evidence of departure from custom over evidence of compliance with custom. Some actors who depart from custom, however, do so not by exercising less care than is customary, but by exercising a different form of care than is customary. Evidence of sub-conformity is likely to be more probative of the failure to exercise reasonable care than evidence of non-conformity.⁴⁸ But applying this distinction between sub-conformity to custom and non-conformity with custom would be necessary to invoke a rule that privileged evidence of certain forms of departure from custom over others, and it would be administratively costly to draw this distinction in every case.

Therefore, instead of fine-tuning admissibility determinations based on the comparative probative value of different forms of custom evidence in all these different settings, we have adopted a bright-line rule presupposing that, on balance, custom evidence is more likely than not to be at least modestly probative of an issue or issues relevant to what constitutes reasonable care. Then, in situations in which the other party has evidence tending to refute this permissible inference – including evidence of the sort that I have just identified – this party's evidence is also likely to be admissible. It is open to the plaintiff to prove, for example, that the custom followed

⁴⁸See Morris, *supra* note 3, at 1152.

by the defendant is one that simply saved everyone the cost of determining the best way to behave and that the “whole calling” had thereby “unduly lagged in the adoption of new and available devices.”⁴⁹ And it is open to the defendant to prove that the precaution it employed is more cost-effective, all things considered, than the customary precaution, and that, in addition, the customary practice is the one that is negligent.

In short, the administrative costs that would be entailed in requiring evidence of the functions of customs lead negligence law to set the custom rule at a high level of generality, without reference to these functions. But negligence law permits the parties to introduce evidence of the function of the custom at issue in order to show that the custom is not in fact probative of reasonable care, or not as probative as might otherwise appear.

C. Additional Arguments for the Relevance of Custom

Two additional arguments regarding the custom rule that go beyond the traditional accounts and beyond more recent scholarship are worth exploring. Each further supports the rule. The first argument is that evidence of custom helps to educate, or orient the jury to the field of activity at issue. The second argument is that admitting evidence of custom serves to preempt the jury from drawing unwarranted inferences from the absence of such evidence.⁵⁰

1. Educating the Jury. Custom evidence has a potential educational value – both for the party introducing it and for the legal system’s interest in reliable, accurate decisions – beyond any immediate or direct relevance of such evidence to the reasonable care issue. Custom evidence may orient the jury to that field, provide the jury with some of the specialized knowledge possessed by those within the field, give the jury a “feel” for the way activity in the field is conducted, and increase the jury’s level of confidence about its ability to judge the conduct at issue.⁵¹

A trial with no evidence about how others engage in the same activity as the defendant

⁴⁹See *The T.J. Hooper*, *supra* note 23, at 739.

⁵⁰A third argument that is occasionally made concerns the role of custom in inducing reliance. The amount of care that is reasonable may depend on the level of care that is typically taken by others. Custom that induces, or may induce, reliance is relevant because the level of care that is reasonable for a potential injurer to take depends on the level of care that potential victims take. The RESTATEMENT THIRD makes this point cryptically, indicating that when there is reliance on a custom then the custom “establishes the standard by which those engaging in the activity assume they are bound.” RESTATEMENT THIRD, *supra* note 2, §13, Comment d. The important point, however, is not that reliance by potential victims creates an awareness on the part of potential injurers that they are “bound” by the custom relied upon. The point is that if reliance results in less care by potential victims, this may make it unreasonable for potential injurers to depart from the custom in question.

⁵¹Admittedly, delineating the risks and benefits posed by an activity may also involve describing an activity and thereby educating the jury about it. But custom evidence is necessarily grounded in experience and therefore is always concrete and educative. In contrast, when risk-benefit evidence is hypothetical and abstract rather than concrete and experience-based, it is likely to have much less educational value than custom evidence.

would be curiously devoid of information that would be considered relevant to decisionmaking in almost any other context. When there is no relevant custom, that itself may help to educate the jury. And when there is a customary way of conducting an activity, a trial without such evidence would differ fundamentally from the educational process that typically leads to non-adjudicative decision making. By enhancing the jury's knowledge and understanding of the setting in which the kind of conduct that is alleged to have been negligent ordinarily occurs, custom evidence increases the similarity of the negligence decision to other forms of decisionmaking.

2. *Forestalling Unwarranted Inferences.* A second argument that extends beyond existing accounts of the custom rule is that admitting custom evidence may help to forestall the jury from drawing invalid or unwarranted inferences resulting from or based on the absence of such evidence. The arguments in the case law and in the scholarly literature about the value of custom evidence all are based on the role played by custom evidence once it is admitted. They emphasize the advantages of admitting custom evidence, by reference to the inferences a jury is permitted to draw from this evidence. These inferences (for example, that an entire industry does or does not behave in a particular way, or that certain precautions are feasible), so the arguments go, usefully help the jury to determine whether compliance with or departure from custom constituted reasonable care.

None of these arguments, however, makes any reference to what would happen if custom evidence were not admissible. I want to consider the argument that, in the absence of such evidence, the jury might draw inferences that would be unwarranted. To appreciate how this might occur, it is useful to picture a negligence suit without custom evidence. The jury in a case in which there is no evidence of custom (either because there is no relevant custom or because, hypothetically, custom evidence is inadmissible) will be instructed to consider only the evidence introduced at trial, which is likely to be directed at the risks and benefits of the act or activity at issue and the risks and benefits of alternative, untaken precautions. But unless the accident at issue involves practices and circumstances so esoteric that jurors have no familiarity whatsoever with them, jurors are likely to speculate about how other actors or firms in the industry behave, based in part on their own casual observation or anecdote. These speculations, however, may be inaccurate.

On rare occasions, the jury might also draw unwarranted inferences based on inaccurate suppositions about the law governing the admissibility of custom evidence. For example, a jury might suppose that only evidence of compliance, or only evidence of departure, is admissible, and in the absence of what it supposes is the admissible category of evidence, incorrectly infer that there has not been compliance with or that there has not been departure from custom. The negligence determination might then be influenced by the unwarranted inference. I doubt that this would often occur; juries probably do not think much about the law governing evidence that is not admitted. But because we do have the custom rule, we do not need to worry about how often it might occur.

Other things being equal, it is preferable not to have the jury base its decision on these possibly-inaccurate observations of the world or inaccurate assumptions about the law. One way

to attempt to avoid this is to instruct the jury not to consider any facts not introduced into evidence, and not to draw inferences from the absence of evidence. But that approach is at least sometimes unrealistic, because jurors cannot always completely set aside their own experience or ignore the fact that certain evidence has not been introduced. And even if it could be followed, such an instruction is one sense undesirable, since there are certain facts within the jury's knowledge that it is perfectly appropriate to consider – the laws of gravity, the effect of weather on behavior, how people generally act in emergencies, and many others. Of course, the alternative to an instruction directing the jury not to draw inferences from facts not in evidence is to allow the introduction of evidence about which the jury might otherwise speculate – in this instance, evidence about custom. Thus, there is at least a plausible argument that custom evidence is admissible not only because of the inferences that such evidence supports, but also because of the inaccurate inferences that might be drawn in the absence of such evidence, or from the absence of such evidence.

II. NON-CUSTOMARY PRACTICE

Having identified the arguments for the custom rule, we can now consider its converse, which concerns practices that are not widespread enough to qualify as customs. Of course, evidence of the availability of an untaken precaution is almost always admissible in a negligence action, to show what should have been done. Unless the practice of taking the precaution is sufficiently widespread to qualify as a custom, however, evidence of the incidence of the practice – *of how many actors follow the practice* – is not admissible.

There are in theory two ways to understand this implication of the custom rule. The strong version is that practice evidence is categorically inadmissible when this evidence is offered to show what constitutes reasonable care. The weak version is that practice evidence is not categorically admissible, but that it is not categorically inadmissible either. Rather, such evidence is admissible when it is relevant, as demonstrated by the party who offers the evidence, case-by-case. Interestingly, there is little case law reflecting either version of the practice rule, and virtually no case law approving the admission of practice evidence.

At first glance one might think that the almost complete absence of case law on the issue would be substantial evidence of the existence of the strong version of the practice rule. After all, the absence of any case law permitting the introduction of such evidence under at least some circumstances suggests that it is categorically inadmissible. Ultimately, I think that this is the correct conclusion: the strong version of the practice rule is in force. But the basis for this conclusion is not as straightforward as it might seem, because there are a number of plausible reasons for the absence of case law about practice evidence that do not depend on the existence of either the strong or the weak version of the practice rule.

A. Why There Is So Little Law about Practice Evidence

The most striking thing about the law governing what I have been calling the converse of the custom rule is that there is almost none of it. There are very few reported cases in which the

courts have squarely held that evidence of the incidence of a practice that is not widespread enough to constitute a custom is, or is not, admissible.⁵² There are of course many cases in which the party offering evidence of the incidence of a practice unsuccessfully contended that the evidence proved that there was a custom. But the proponents of the putative custom evidence in these cases did not make the contention, at least none reflected in the opinions, that such evidence would be admissible even if it was about a mere practice that was not widespread enough to qualify as a custom. Rather, they seem to have accepted the proposition that if a practice did not qualify as a custom, then evidence of the incidence of the practice was not relevant to the negligence determination.⁵³ It is true that there is a small handful of cases in which evidence of practices that did not qualify as customs was admitted, apparently because the proponents of the evidence did argue that the evidence should be admitted even if it did not qualify as customary. For example, in a case that has become prominent in the casebooks, *Andrews v. United Airlines*, evidence that some other airlines had retrofitted their overhead bins with baggage nets was admitted.⁵⁴ But this scattering of cases is not large enough to amount even to a minority approach to the issue.

There is so little law on the issue, I think, because litigants do not often seek to have practice evidence admitted in the same way that custom evidence is admitted. Otherwise there would be a body of appellate decisions addressing the admissibility of practice evidence. Litigants would long have been testing and probing the boundaries of the rule precluding practice evidence, and either being repeatedly rejected outright at the appellate level, or being successful in establishing at least some sense of the contours of and limitations on the admission of practice evidence. We would know pretty clearly whether practice evidence was categorically inadmissible, whether it was admissible as long as it was relevant in the particular case in which it was offered, or whether there were rules at some intermediate level of generality about the admissibility of practice evidence. Instead, there is almost no case law expressly governing the proper treatment of practice evidence.

There are at least five reasons why litigants, apparently, do not press the issue. First, there are not as many situations as might be supposed in which it would be useful to introduce practice evidence in order to show reasonable care. Second, the litigation risks to a party sponsoring practice evidence frequently would outweigh the potential benefit that the party would derive from introducing such evidence. Third, in those instances in which a practice is

⁵²For three of the few straightforward holdings that such evidence is not admissible, see *Jones v. Jitney Jungle Stores of America, Inc.*, 730 So. 2d 555 (Miss. 1999); *Renz v. Brown*, 464 S.E. 2d 617 (Ga. Ct. App. 1955); and *Garthe v. Rupert*, 190 N.E. 643 (N.Y. 1934).

⁵³This rule of law is set out clearly in *DOBBS*, *supra* note 5, §165 at 400-03 (2000).

⁵⁴24 F.3d 39, 40 (9th Cir. 1994). It is not clear from the opinion in *Andrews* whether the evidence that “some” other airlines was admitted to show the frequency with which other airlines took this precaution or merely to show that the availability of this precaution. *See also* *Schillie v. Atchison, Topeka, & Santa Fe Ry.*, 222 F.2d 810 (8th Cir. 1955); *Lee v. Pennsylvania R. Co.*, 192 F.2d 226 (2d Cir. 1951); *DeLibero v. Q Clubs, Inc.*, 956 So.2d 1286 (Fla. App. 2007).

arguably widespread enough to constitute a custom, evidence of the incidence of the practice is likely to be admitted conditionally anyway, as relevant to the question whether the practice is a custom. Even if it later turns out that the practice is not a custom, the conditional admission will have acquainted the jury with the existence and incidence of the practice. Fourth, sometimes it is possible to circumscribe the asserted geographical or industry-specific scope of what amounts to a mere practice, thereby characterizing the practice as a local custom, and admit it as evidence of custom. Finally, even when practice evidence would benefit a party, and even when it is not admitted as relevant to the putative existence of a custom, often there is an alternative, “backdoor” basis for admitting such evidence that does not violate the custom rule and that can be used as the vehicle for introducing the evidence. In these situations, there is no need to press the issue of whether practice evidence is directly admissible. For all these reasons, the question whether practice evidence is admissible to prove reasonable care rarely is squarely raised, and therefore simply does not find its way into appellate decisions.

1. A Limited Number of Situations in which Practice Evidence Would Be Useful. I suggested above that litigants introduce custom evidence in order to take advantage of the “designation effect” of such evidence. That is, the effect of designating a particular form of conduct as customary is to strengthen the contention that the conduct constitutes reasonable care. The designation effect results from the normative force of a form of conduct being customary – from the fact that most people follow the custom.

The admission of practice evidence might produce a similar, though more limited, designation effect. When only one or a few actors follow a practice, however, that fact will have little or no normative force. Therefore, even a limited designation effect could be produced only when the evidence showed that a significant number of actors – even if not a majority – followed the practice in question. And that is likely to occur less frequently than might be supposed. For example, situations in which there are two or three practices, each followed by a substantial number of actors but with none of the practices being dominant, probably are rare. Similarly, it would be unusual for most of those in an industry each to follow a different practice, but for one practice to be followed by a plurality, though not a majority, of actors.

Although these situations are likely to be rare, it is more common for a substantial number of actors to take a particular precaution while the majority does not. A limited designation effect might well be available if practice evidence were admissible in this situation. But notice that this situation actually involves a custom followed by the majority – a custom of not taking the non-customary precaution. For example, suppose that 30 percent of all fitness facilities maintain automatic external defibrillators (AEDs) on their premises to combat cardiac arrest. As this new technology is introduced, during the period of transition some actors have adopted the new technology but most have not. This was the very pattern reflected in *T. J. Hooper*, in which some tugs in the 1920s carried radio sets but the defendant did not.⁵⁵ Because

⁵⁵Note that the structure of the situation is the same when there is already an affirmative precaution that is customarily taken – for example, having radios – but there is an additional practice that is not, or is not yet, customary, such as also having a global positioning system (GPS) on board.

these particular situations do arise more frequently than the others I envisioned, we must seek other explanations for the absence of case law addressing the admissibility of practice evidence in these situations.

2. *The Risks of Sponsoring Practice Evidence.* There are risks entailed in sponsoring practice evidence even when it does exist, as in situations involving innovation. Consider the case I posed above, in which a minority of fitness centers maintain Automatic External Defibrillators. In cases in which the defendant did not have an AED, the risk to the plaintiff of using practice evidence offensively is significant. If the plaintiff's contention is that the defendant was negligent in not having an AED, evidence that only a minority of fitness centers have adopted this technology will be of uncertain benefit to the plaintiff. On the one hand, the evidence that some fitness centers have AEDs may add credibility to the plaintiff's contention that the defendant should have had one. On the other hand, the contention that reasonable care requires having an AED may be undermined by a showing that only a minority of fitness centers have them. The custom in the industry actually is not to have an AED; the defendant is likely to rely on this custom defensively, and may even attempt to underscore its position with the plaintiff's own practice evidence, by noting how few actors have AEDs. In such situations, the plaintiff may consider himself to be better off simply contending that reasonable care requires the adoption of the new technology, without introducing evidence of how many actors within the industry have already adopted it, especially if his prospects for success are strong and the admission of practice evidence might constitute reversible error on appeal.

Conversely, a defendant who had in fact maintained an AED on its premises might consider introducing practice evidence defensively. But in this situation there is little chance that the defendant would conclude that it should attempt to do so. First, when the defendant did maintain an AED on its premises, the plaintiff is likely to contend that the defendant was negligent in failing to take some other precaution or action that would have prevented harm. The presence of the AED will therefore be irrelevant. Only in the unusual case in which the plaintiff alleges that the overall level of safety at the defendant's premises was deficient, or that the innovation itself is riskier than its predecessor, would the fact that the defendant had an AED become even arguably relevant. Second, as I have indicated, in these situations there is actually a custom in the industry of not having AEDs. The defendant might attempt to show that it was in the vanguard of using this new technology, but because only a minority of the industry has adopted the AED technology, there is a risk that this evidence actually will lead the jury to conclude that reasonable care does not require having an AED. The defendant might well do better simply to introduce evidence that it had an AED, together with evidence of the benefits of having one, without the added evidence that only a minority of the industry has adopted the new technology.

3. *Admission of Practice Evidence as Conditionally Relevant to the Existence of a Custom.* I noted earlier that in the majority of jurisdictions, whether a practice is sufficiently widespread to constitute a custom is a question of fact for the jury. There are likely to be some cases in which a practice is sufficiently widespread for the parties to have legitimate arguments about whether it is a custom. It follows that in any case in which a litigant can defeat a motion *in*

limine or objection at trial on the ground that evidence of the incidence of a practice could support an inference that the practice constitutes a custom, evidence of the practice and its incidence will be admitted as conditionally relevant. In fact, in such situations incidence evidence is likely to be admitted twice – first by its proponent, and then by its opponent, whose evidence presumably will be that the practice is not as widespread as its proponent contends. It is true that the jury will be instructed that this evidence is only conditionally relevant, and that if it finds that the practice is not a custom, then it should ignore the evidence of its incidence. But at this point the cat will be out of the bag.

4. *Practices as Circumscribed Customs.* A custom is a practice that is very widespread – in the view of some courts, nearly universal. But what is the relevant geographical, demographic, or industrial universe? On this issue custom law is largely silent. Consequently, it may be that practices that are nearly universal in a limited area or within a limited group of similar actors, even if they are not followed elsewhere or by others, occasionally qualify as customs. A practice that is followed widely in Detroit but not in the rest of Michigan might qualify as a Detroit custom. A practice followed by most carpenters but not by most cabinetmakers might qualify as a carpenters’ custom. Practice evidence of this sort, therefore, may sometimes be admitted as evidence of a circumscribed custom.

5. *“Back-Door” Routes to the Introduction of Practice Evidence.* In the unusual case in which a party does want to bring practice evidence to the jury’s attention, at least four other, “backdoor” bases for introducing such evidence are sometimes available. First, a plaintiff wishing to use practice evidence offensively may be able to introduce the evidence through an expert testifying as to the basis for his opinion. At the discretion of the trial court, an expert testifying that the defendant should have adopted a particular precaution, for example, may be allowed to indicate that one of the bases for his testimony is the fact that a substantial group of other actors takes that precaution.

Second, if the defendant wishes to show that the practice which the defendant’s expert recommends is followed by only a minority of the industry, he is likely to be able to bring this out in cross-examination on the ground that this evidence goes to the expert’s credibility.

Third, evidence of the availability of a precaution is admissible to show that taking the precaution was feasible and that the defendant should have known about it, and evidence of availability (especially given the “should have known” dimension of availability) will often involve evidence that a substantial number of other actors take the precaution. To avoid admission of practice evidence on this basis, the defendant may have to stipulate to the feasibility of the plaintiff’s proposed precaution.

Finally, practice evidence is admissible to prove foreseeability. The plaintiff must show that the harm he suffered resulted from a risk that made the defendant’s conduct negligent. Ordinarily this involves showing, among other things, that the risk was reasonably foreseeable. If some others take a particular precaution that the defendant did not take, and they take it in order to avoid causing the type of harm that the plaintiff suffered, then evidence to this effect will tend

to show that the harm the plaintiff suffered was reasonably foreseeable.⁵⁶

The availability of these basis-of-opinion, credibility, feasibility, and foreseeability routes to admitting practice evidence, if not routinely available then certainly available with at least some frequency, substantially reduces the need for directly confronting the question whether such evidence is admissible on the ultimate issue of reasonable care.

B. Arguments for Admitting Practice Evidence

Once we recognize that there are only a few situations in which there is likely to be meaningful practice evidence, that even in these situations there would be risks to introducing such evidence, and that practice evidence can often be introduced through the backdoor, it should not come entirely as a surprise that there is virtually no case law addressing the admissibility of practice evidence. Nonetheless, there may be situations in which a party does wish to introduce practice evidence and cannot introduce it through the back door. In any event, if it is desirable not to categorically exclude such evidence, doing so in straightforward fashion is preferable to the inconsistency and subterfuge entailed in the back door approaches to admitting it.

I suggested above that the situation in which litigants are most likely to wish to introduce practice evidence are those in which an innovation has been introduced but has not yet become customary. In this section I consider the arguments for permitting the introduction of practice evidence under ordinary standards of relevance. In the following section I consider the arguments against taking such an approach.

1. Proving Reasonable Care. To the extent that what people sometimes do has a bearing on what people ought to do, evidence of the incidence of a practice may help to demonstrate what constitutes reasonable care. Practice evidence might be used offensively by the plaintiff, for example, to buttress the contention that a customary form of conduct (i.e., not following the practice) is negligent. The fact that some actors take the precaution that the plaintiff contends the defendant should have taken is arguably more probative of what constitutes reasonable care than evidence about the precaution alone. In the same way, the defendant might use practice evidence defensively, to demonstrate that there is more than one reasonable form of the conduct at issue. Thus, whereas custom evidence provides the jury with a basis for finding that there is only one reasonable way to conduct oneself in the face of the risk at issue, practice evidence may provide the jury with a basis for finding that there is more than one such reasonable form of conduct.

In addition, in the absence of practice evidence, the jury may be forced to assess the reasonableness of the defendant's failure to take the plaintiff's proposed precaution without any appreciation of the fact that it is resolving a difference of opinion within the relevant industry as

⁵⁶For discussion of the admission of practice evidence for limited purposes, see DOBBS, *supra* note 5, §165 at 401-02.

to the appropriate precaution to take. Just as custom evidence performs this sort of cautionary function in the way that Morris long ago identified, practice evidence might perform an analogous cautionary function.

For example, suppose that the plaintiff contends that trucks that break down on highways at night should pull onto the shoulder and place flares behind the truck in order to warn approaching vehicles.⁵⁷ The defendant instead placed strobe lights behind its truck. The plaintiff's contention is that flares provide the necessary warning to approaching traffic without the tendency of strobe lights to cause drivers to steer toward them, thus increasing the danger of collision. The defendant contends that a considerable number of truckers use strobe lights because, regardless of whether strobe lights have this tendency, the fact that they pulsate provides an additional alert that on balance makes them more effective than flares.

Such evidence shows, among other things, that the defendant is not alone in using strobe lights – that it took a precaution that some others also take. In the absence of such evidence, the jury has no way to know whether the use of strobe lights is an idiosyncratic practice or one followed by at least some other truckers. In addition, arguably it is relevant for the jury to know that there is a difference of opinion, not just among experts, but among truckers themselves, about the right way to handle breakdowns. This is true whether or not the use of flares is widespread enough to amount to a custom. In the absence of practice evidence the jury will not know that it is considering the issue in the face of a significant difference of opinion within an industry or field of activity regarding which practice constitutes reasonable care, or whether both practices are reasonable.

2. *Educating the Jury.* Practice evidence may help to educate the jury in much the same way that custom evidence educates. Such evidence may offer the jury a perspective on the field of activity in question, provide the jury with the specialized knowledge of those who are within the field, or give the jury a “feel” for the way an activity in the field is conducted. Such evidence may increase the jury's level of confidence about its ability to judge the conduct at issue.

In contrast to the treatment of practice evidence in mainstream negligence cases, in products liability actions, evidence analogous to non-customary practice evidence is indisputably admissible, at least partly for educational reasons. In design defect litigation, for example, except in unusual cases, the plaintiff must prove that there was a reasonable alternative to the design adopted by the defendant.⁵⁸ In adducing such proof, the plaintiff is entitled to show the designs that others have adopted, whether or not such designs are so widespread as to amount to a

⁵⁷In practice, federal statutes and regulations, rather than the common law considerations in this hypothetical, address much of the conduct of trucks on the highways.

⁵⁸RESTATEMENT OF THE LAW (THIRD), TORTS: PRODUCTS LIABILITY §2(b).

custom.⁵⁹ Sometimes a different design transforms one product into what is arguably a different one, but this is a matter of degree and, sometimes, semantics. For all intents and purposes, evidence of a reasonable alternative design that is actually in use is evidence of a non-customary precautionary practice. On a narrow view of the issue, evidence that there was a reasonable alternative design goes only to the feasibility of taking an alternative precaution. But the Products Liability Restatement makes it clear that evidence of a reasonable alternative design may be considered in connection with the “broad range of factors” that bear on whether the omission of a reasonable alternative design renders a product defective.⁶⁰ And although the Restatement does not expressly state that evidence of the incidence of products incorporating the alternative design is admissible, it implies as much.⁶¹ Evidence of a reasonable alternative design in a product liability case is thus the functional equivalent of the practice evidence.

Similarly, in medical malpractice, evidence of compliance with non-customary practices, if they reflect a “respectable minority” school of thought, is not only admissible, but in some states is conclusive. Testimony showing that, even if a majority follows another practice, a considerable number of physicians, sufficient to create another school of thought, follow the practice that the defendant followed, is commonly admitted.⁶² This too is evidence of non-customary practice.

The characteristic that products liability and medical malpractice cases share, of course, is that they are routinely complex and likely to involve technical issues with which jurors have no expertise, personal knowledge, or even familiarity. Among other things, admitting practice evidence in such cases performs an educational function by helping to inform the jury about these issues. Products liability and medical malpractice cases, however, are not the only forms of modern tort litigation that involve complex, technical issues with which the jury is unlikely to be personally familiar. Cases involving building construction, transportation, mining, and waste disposal, to name only a few categories, are likely to be every bit as complex, technically difficult, and to involve conduct outside of jurors’ personal experience and knowledge. Therefore, the notion that the special treatment of practice evidence in products liability and medical malpractice is justified by the greater average complexity of issues in these field if it was ever defensible, is less defensible than it once was.

⁵⁹*Id.*, Comment d. (“How the defendant’s design compares with other, competing designs in actual use is relevant to the issue of whether the defendant’s design is defective”); *id.*, Comment f. (“Furthermore, other products already on the market may serve the same or a very similar function at lower risk and comparable cost. Such products may serve as reasonable alternatives to the product in question”); *Linegar v. Armour of America, Inc.*, 909 F.2d 1150 (8th Cir. 1990) (“The Missouri Highway Patrol could have chosen to buy, and Armour could have sold the Patrol, a [bullet proof] vest with more coverage”). See also, David A. Urban, *Custom’s Proper Role in Strict Liability Actions Based on Design Defect*, 38 U.C.L.A. L. REV. 439 (1990).

⁶⁰RESTATEMENT OF THE LAW (THIRD), TORTS: PRODUCTS LIABILITY, §2, Comment f.

⁶¹*See id.*, Illustration 8.

⁶²*See, e.g., Jones v. Chidester*, 610 A.2d 965, 969 (Pa. 1992); *Katsetos v. Nolan*, 368 A.2d 172 (Conn. 1976). *See also* DOBBS, *supra* note 5, §242 at 634.

3. *Forestalling Unwarranted Inferences.* Just as is the case with custom evidence, if evidence of the incidence of a practice that is common but not sufficiently widespread to be “customary” is not admitted, the jury might call upon its own inaccurate understanding of incidence of the practice and alternatives to it in order to assess the conduct in question. Or the jury might draw unwarranted inferences about whether others follow a particular practice, based on jurors’ inaccurate assumptions about the law governing the admissibility of evidence regarding the practice. Jurors might suppose, for example, that evidence of compliance with a practice followed by a plurality of others would be admissible, and infer in the absence of such evidence that the defendant’s conduct was idiosyncratic. Like the admission of custom evidence, then, admitting practice evidence could reduce the risk that juries would draw unwarranted inference in the absence of such evidence.

3. *Reducing Disincentives to Innovation.* To the extent that the normative force of custom affects the outcomes of negligence cases, there is a risk that the custom rule creates a disincentive to innovation. A defendant who considers shifting from a customary precaution to a new precaution must anticipate that its chance of being held liable for negligence will probably increase if it follows a non-customary practice, because it has surrendered the halo of potential protection that the custom rule affords.

In response to this concern, Gideon Parchomovsky and Alex Stein recently have argued that the custom rule should be abolished in order to eliminate the disincentive to innovation that the rule creates.⁶³ In their view the risk-benefit test should be the exclusive means of determining negligence. Alternatively, they suggest, special boards of industry experts should be established to approve or disapprove scientific and technological innovations. Courts would then recognize the findings of such boards and accord a board’s approval of an innovation a status equivalent to a custom.⁶⁴

The chief problem with this proposal, of course, is that it would relinquish the benefits of custom evidence. Relying instead on risk-benefit evidence as the basis for the negligence determination, as Parchomovsky and Stein propose, would forego the probative value of custom evidence, deprive the jury of the educational benefits of custom evidence, and permit the jury to draw unwarranted inferences from the absence of such evidence.

Nor is creating special boards to assess innovative practices a workable solution. Not only would such a procedure be potentially cumbersome, since the party who disagreed with a board’s finding would undoubtedly introduce expert evidence disputing the finding. In addition, as has been recognized in connection with the proposed court-appointment of experts, everything would turn on who was chosen to serve on a board, since most experts are not and could not be truly “neutral” – they have a prior point of view about their area of expertise that is almost certain to

⁶³Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 310-12 (2008).

⁶⁴*Id.* at 312-314.

influence the opinions they give in court or to the court.

The question is whether, as an alternative, the much simpler and straightforward solution of admitting practice evidence could sufficiently reduce the anti-innovation bias of the custom rule. Just as custom has normative force, so certain forms of practice have at least some of the same force. What a substantial number of people do, even if not a majority, and even if a majority does otherwise, is in general likely to be more probative of what constitutes reasonable care than what one person does. Admitting practice evidence, when the evidence shows that the defendant is not idiosyncratic, would therefore help to reduce the anti-innovation bias of the custom rule.

Many innovations begin, however, with only one actor departing from custom. Permitting a plaintiff to introduce practice evidence offensively, to show that the defendant's conduct was idiosyncratic, would discourage innovators even more than the current custom rule discourages them. Such evidence would show not only that the defendant departed from custom, but also that its departure was wholly idiosyncratic.

One solution to this problem might be to permit the use of practice evidence defensively but not offensively. Under this approach there could never be a showing by the plaintiff that the defendant was idiosyncratic. Once there was a substantial minority of actors following an innovative practice, however, innovators would have the option of introducing practice evidence defensively, to show that they exercised reasonable care. As result, potential defendants would not be discouraged from innovating by the threat that they would be proved to have been idiosyncratic through the admission of practice evidence. Rather, they could decide whether and when to introduce practice evidence. This approach would provide innovators with a way to partially counterbalance the anti-innovation bias of the custom rule, without subjecting them to the additional bias that could otherwise be produced by rendering practice evidence admissible against them.

Such an approach, however, would run contrary to the generally accepted proposition that relevant evidence is relevant evidence, regardless of who sponsors it. In addition, not all idiosyncratic actors are innovators. In fact, some are laggards. A rule that made practice evidence admissible defensively but not offensively would prevent a plaintiff from showing directly the extent to which the defendant was a laggard. Custom evidence would be admissible to show that the defendant had not adopted a customary precaution, but practice evidence would not be admissible to show that the defendant was the only actor or one of only a few actors that had not yet adopted the precaution. However, since this is how things operate now under the custom rule – the plaintiff is entitled to prove that the defendant departed from custom, but not that the defendant is the only actor who departs from custom -- it is difficult to see how plaintiffs could reasonably complain about this asymmetry.

In short, making practice evidence admissible defensively but not offensively, or generally admissible, would seem to be preferable to repealing the custom rule or to establishing a regime of scientific and technology boards whose findings could be used to counterbalance custom evidence. As a way of dealing with the anti-innovation bias of the custom rule, Parchomovsky

and Stein's proposals probably are overkill. We might well be able to retain the benefits of the custom rule, but reduce some of its anti-innovation effect, simply by making practice evidence admissible.

4. *Jury Instructions.* Custom evidence has a dual function. First, once a practice qualifies as a custom, it is potentially probative of what constitutes reasonable care. The designation of a practice as a custom provides a basis for the jury to conclude that what usually is done is what ought to be done, for the reasons I discussed in Part I. Second, by making reference to custom evidence, the typical jury instruction on custom emphasizes to the jury the potential probative value of this evidence. Other things being equal, this emphasis is likely to increase the probability that the jury will conclude that compliance with the custom does constitute reasonable care.

How should jury instructions handle the corresponding issue regarding the significance of practice evidence? One approach would simply be to ignore it. This would still permit the parties to make reference to the evidence in closing argument. But this could leave the jury uncertain about what to make of practice evidence, and could lead the jury to draw inferences from this evidence that are not warranted. A preferable approach, I think, would be to instruct the jury that, if it finds that a practice is not widespread enough to constitute a custom, and even if the jury finds that the custom is not to follow the practice, the jury is entitled to take the incidence of the practice into account in deciding what constitutes reasonable care. In effect, the practice instruction would constitute a minor modification of the custom instruction, when the custom instruction is given. Correspondingly, the jury would be instructed that if it finds that there is no applicable custom, it may take into account the evidence of the incidence of a relevant practice or practices that has been introduced in deciding what constitutes reasonable care.

The availability of such an instruction, while not absolutely necessary, would clarify the potential significance of practice evidence to the jury, and create a link between the practice evidence itself, the closing arguments of counsel, and the jury's understanding of the nature and scope of its task.

C. The Arguments against Admitting Practice Evidence

Based on the analysis thus far, there are plausible arguments for a rule that evidence of compliance with or departure from a practice should not be automatically inadmissible. But there are also arguments against permitting the introduction of practice evidence, even if it is sometimes potentially relevant. The Federal Rules of Evidence, for example, and the many state rules of evidence that follow the federal rules, provide that otherwise relevant evidence is admissible unless its probative value is "substantially outweighed" by potential prejudice, jury confusion, undue delay, or waste of time.⁶⁵ This test is applied on a case-by-case basis, but the values that it balances can also help us to analyze whether the current rule that practice evidence is categorically inadmissible should be set aside.

⁶⁵Federal Rules of Evidence, Rule 403.

1. *Prejudice.* Juries would be systematically prejudiced by practice evidence if they would tend as a general matter to give that evidence exaggerated weight. Some might argue that juries would systematically give defendants who followed a minority practice the benefit of the doubt, on the ground that there was a genuine difference of opinion among relevant actors about the kind and amount of care that is appropriate under the circumstances. This might result in considerably more defense verdicts than there would be in the absence of practice evidence altogether. If this occurred it would benefit innovators, but it would also benefit laggards. On the other hand, there is also a risk that admitting practice evidence would especially prejudice idiosyncratic defendants and that the threat of this prejudice might inhibit innovation, as actors considered but rejected the possibility of experimenting with new precautions, because of the threat of negligence suits focusing on their idiosyncratic conduct.

It is unclear whether a jury instruction could help to neutralize these forms of prejudice. For example, the jury could be instructed that the existence of a genuine difference of opinion among relevant actors about what constitutes reasonable care does not necessarily show that those who follow the minority practice have exercised reasonable care, and that the mere fact that the defendant is the only actor who follows a particular practice does not necessarily mean that the defendant was negligent. This sort of instruction would be analogous to the jury instruction that neither compliance with nor departure from custom is conclusive. But since we do not know how effective this instruction is in custom cases, we cannot know how effective its analog would be in practice cases.

2. *Confusion.* Jurors might sometimes be confused by practice evidence. But such evidence might also help to dispel confusion. There is certainly no evidence that jurors are confused by evidence about custom. So the question is whether they might nonetheless be confused by evidence about non-customary practice.

The answer might well be that practice evidence has the potential to create more confusion than custom evidence. If demonstrating that there are differences of opinion about how to engage in the conduct in question is in the interest of one of the parties, that party may wish to introduce evidence that multiple practices are followed. Whether or not there is an applicable custom, conflicting evidence about the nature of these different practices and the frequency at which they are followed, possibly from multiple witnesses, could easily produce confusion on the part of the jury.

On the other hand, practice evidence also has the potential to dispel confusion. As I argued above, the justification for admitting what amounts to practice evidence in both products liability design defect and medical malpractice litigation lies in the technical complexity of these two types of cases. Practice evidence helps to educate the jury about these fields of activity, providing information that would be unduly abstract or not admitted at all if such evidence were not admissible. Practice evidence could perform the same function in non-medical, non-products cases that are technically complex and involve fields of activity with which ordinary jurors are not familiar. The net effect of admitting practice evidence, therefore, might be to create additional confusion, or it might be to help dispel confusion.

3. *Waste of Time and Undue Delay.* The answer to the question whether the relevance of practice evidence would be substantially outweighed by the time factor also is unclear. We can take it as given that evidence about custom is admitted without unduly *wasting* time. But as I demonstrated in Part I, the admission of custom evidence is likely to involve much more than mere testimony from the proponent of that evidence. Admitting such evidence has repercussions for opposing testimony both about the existence of the custom *vel non* and the opposing party's compliance with or departure from it, for closing arguments, and for jury instructions. The same will be true for practice evidence. Indeed, admitting practice evidence may have more repercussions than admitting custom evidence, because there may be several different practices in existence. If demonstrating that there are widespread differences of opinion about how to engage in the conduct in question is in the interest of one of the parties, that party may wish to introduce evidence that multiple practices are followed. In short, although admitting practice evidence may not be a *waste* of time, doing so will sometimes require a considerable *expenditure* of time, and that expenditure might well be considered an undue delay of time.

4. *Assessment.* My conclusion from this brief assessment of the probative value of practice evidence and concerns about potential prejudice, confusion, and undue delay is this: admitting practice evidence would promise generally moderate, but sometimes substantial advantages, at the cost of generally moderate, but occasionally substantial, disadvantages. Admitting practice evidence could help to combat the anti-innovation bias of the custom rule, but without appropriate constraints could also prejudice idiosyncratic actors. This inconclusive assessment certainly is not a strong prescription for making practice evidence admissible, though it does suggest that doing so ordinarily would not be dangerous and could be helpful.

The inconclusiveness of my assessment, however, is revealing in another way. Assessing whether the probative value of practice evidence is substantially outweighed by such factors as prejudice, confusion, and undue delay depends on how much we value what practice evidence proves. The more we value the potential for practice evidence to educate and forestall unwarranted inferences by the jury, and to neutralize the impact of the custom rule on innovation, the more we are likely to conclude that the probative value of such evidence outweighs concern about its downside risks. And how much we value these potential functions of practice evidence depends on our particular conception of negligence.

III. NEGLIGENCE

My last subject is what the emphasis reflected by the custom rule and the converse of the rule, precluding practice evidence, reveal about the meaning of negligence. By admitting evidence regarding custom, and excluding evidence regarding the incidence of practices that are not sufficiently widespread to constitute custom, the custom rule specifies the role that these forms of normative experience are permitted to play in the negligence determination. The custom rule thus simultaneously reflects a particular conception of negligence and implements that conception.

The conception of negligence that the custom rule reflects sees reasonable care and negligence as being potentially constituted by actual normative experience. Both the traditional explanations for the custom rule and my suggestion that the rule performs an educational function

fit comfortably within this conception. The rules for assessing the negligence of children,⁶⁶ the disabled,⁶⁷ and those possessing exceptional knowledge or skill⁶⁸ also fall into this conception, for they derive from experience-based generalizations about what should be expected of these categories of actors. And the rule that violation of a safety statute is negligence *per se* largely fits within this conception, because it is derived from normative experience: reasonable people ordinarily do not violate the law.

Underlying this conception of negligence is the notion that there are regularities and patterns of experience that can usefully be called upon to pour content into the standard of reasonable prudence. Indeed, the very idea of a custom presupposes that there are regularly recurring situations whose risks can be repeatedly addressed by the same precaution. The idea of a precautionary practice presupposes the same thing.

An alternative conception of negligence is implicitly reflected in the rule in another strand of negligence law and much of the law of evidence.⁶⁹ Under this conception, negligence and negligence cases are unique and individuated. Each case stands on its own footing. Reasonable care is not what some others actually do, but what the abstract reasonable person in exactly the defendant's circumstances should have done. In the world of the individuated negligence case, reasonable care is defined by reference to what would constitute reasonable prudence under the specific circumstances, or based on an objective risk-benefit test applied to the specific circumstances.⁷⁰ In either event, there is no evidence of how often others do or do not behave the way the defendant behaved, or how others make the risk-benefit tradeoff, unless there is a single, customary way of doing so. In this world, recurring situations and patterns of experience are regarded as sufficiently different in fine detail that *per se* rules are exceptional, and directed verdicts or judgments as a matter of law are rarely granted.⁷¹ Direct evidence of what happened in the particular instance under scrutiny is privileged over statistical evidence about what generally happens in such instances, and inferences drawn from a party's own past practices have less

⁶⁶RESTATEMENT THIRD, *supra* note 2, §10.

⁶⁷*Id.*, §11.

⁶⁸*Id.*, §12.

⁶⁹I am indebted to Frederick Schauer for acquainting me with this feature of the rules of evidence and, by implication, of the law of negligence.

⁷⁰*Id.*, §3, Comment e.

⁷¹Morris, *supra* note 3, at 1156, made this point long ago: "Modern courts are curiously prone to dodge the responsibility of deciding the negligence issue – it goes to the jury even when the defendant's conduct is not in dispute, and even though a verdict of negligence would be outrageous." Somewhat more recently, the Supreme Judicial Court of Massachusetts made the same point more succinctly, noting that "judicial intrusion into jury decision-making in negligence cases is exceedingly rare." *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E. 2d 65, __ (Mass. 1985).

probative value than actual observations of what that party did on a single occasion.⁷²

Under this alternative conception, both negligence law and the rules of evidence tend to wall off the particular facts of each case from the normative regularities and patterns of normative experience. Otherwise potentially probative evidence drawn from and generalizing about normative experience is sometimes excluded from consideration, precisely in order maintain the atomistic and individuated focus of each case. The converse of the custom rule, making evidence of non-customary practices inadmissible, fits comfortably within this conception, since the rule precludes consideration of how others, perhaps even a plurality of others in the defendant's position, conduct themselves.

These two conceptions of negligence live uneasily together in the same body of law. When the jury finds that risk-benefit considerations and custom point in the same direction, however, there is no automatic conflict between them. And even when the evidence supporting these conceptions conflicts, in cases involving what might be called "ordinary accidents" the conflicting evidence can be evaluated by the jury. That is, when an accident involves an activity with which the jury is familiar, the jury can make its own informed choice between the outcomes dictated by the competing conceptions. Either the fair teaching of experience is that what usually is done is what ought to have been done in this case, or experience must be reconsidered, in light of what a risk-benefit evaluation of what usually is done has now revealed. In this situation the reasonably prudent person standard is more than a mere emblem; under this standard the jury quite literally adjudicates between the two conflicting conceptions of negligence. Indeed, this is part of what I believe is meant when the jury in negligence cases is described as the conscience of the community.

Move from ordinary accidents to those involving activities with which the jury is not familiar, however, and evidence regarding recurring patterns of experience must take on an additional role if the negligence determination is to remain meaningful. When risk-benefit considerations and what is customarily done conflict, lay jurors unfamiliar with the activity in question do not have a source of normative authority for adjudicating between the two. Weighing whatever application of the risk-benefit test seems most persuasive against the burden of experience as expressed in a custom requires comparing incommensurables. Yet, in contrast to cases in which the jurors are familiar with the activity being evaluated, they cannot call on their own understanding of and experience with the activity in order to assess the conflicting evidence, because they have none. In such cases the abstract standard of reasonable prudence gives jurors no purchase, no independent place from which they can adjudicate between competing conceptions of negligence.

This predicament can be ameliorated, however, if we understand custom not only to have normative force, but also to perform an educational function. When evidence of custom informs the jury of the nature of an activity, it provides a basis for adjudicating between the normative

⁷²See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §33 at 195 (5th ed. 1984) (evidence of an actor's past conduct or habits is no evidence of reasonable care).

force of custom and a risk-benefit evaluation of that conduct. Through evidence about custom, the jury acquires a familiarity with the activity and thereby has a basis from which it can judge the activity in a manner analogous to what the jury does when it makes the negligence determination about an ordinary activity. The education provided by custom evidence gives the jury a basis for choosing between custom and conflicting risk-benefit considerations in making the negligence determination. That is a benefit that the admission of practice evidence might also provide.

I am not suggesting here that providing the jury with a basis for adjudicating between evidence of custom and risk-benefit considerations when the two conflict means that these conceptions of negligence are actually reconciled by a jury decision. On the contrary, in this situation one conception ultimately must trump the other if the negligence determination is to be made at all. But when evidence drawn from the regularities of experience helps to educate the jury, at least the jury can make the negligence determination intelligibly.

Even if the negligence determination can be made intelligibly, however, whether that determination can be principled or coherent when experience and risk-benefit considerations conflict but both are relevant is a different question. I am not at all sure that principle or coherence can be characteristic of decisions weighing incommensurables. Such decisions certainly are not law-like in substance, even if they may be law-like in procedure. As Leon Green once put it, “we may have a process for passing judgment in negligence cases, but practically no ‘law of negligence’ beyond the process itself.”⁷³ Part of the reason we have juries in negligence cases is to deal with this kind of normative incoherence, or at least normative inconclusiveness, and to do so out of sight.

Going back at least to Holmes, however, the negligence system has struggled with the tension between the two conceptions.⁷⁴ He felt, for example, that in highly similar situations that frequently recurred, the negligence issue should be decided as a matter of law.⁷⁵ Whether or not we go as far as he proposed, the more emphasis there is on the common, characteristic features that the conduct at issue in a negligence case shares with conduct in the rest of the world, the more likely it is that different cases will be identified as alike and treated alike. But tolerating the normative inconclusiveness that comes with competing conceptions of negligence makes it more difficult to treat like cases alike. When the regularities of normative experience are simply an optional ingredient of the negligence determination, the outcomes of negligence cases are more likely to vary than when such experience is given more probative force, either by the jury, or by the court in deciding whether to dispose of the case as a matter of law. Perhaps more than anything else, that is the price we pay for having competing conceptions of negligence.

CONCLUSION

⁷³LEON GREEN, JUDGE AND JURY 185 (1930), quoted in RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 169 (9th ed. 2008)

⁷⁴See OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

⁷⁵*Id.* at 123.

I have been trying in this Article to illuminate negligence law's attitude about getting a reasonable care "ought" out of the "is" of experience. The rules permitting the admission of custom evidence, and precluding the admission of evidence of non-customary practices, simultaneously reflect and shape negligence law's ambivalent attitude toward this question. Far from being the transparent, almost self-evident rule that it is often taken to be, the advantages and disadvantages of the custom rule – and of its implied converse precluding the admission of practice evidence – are contestable. The purposes we ascribe to these rules help to mark the divide between a conception of reasonable care as a reflection of experience and a conception that acts as a check on, or trump of, experience.