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The Economics of the Restatement and of the Common Law

Keith N. Hylton[†]

INTRODUCTION

Perhaps the most optimistic view of the American Law Institute's Restatement project was provided at its inception by Benjamin Cardozo:

When, finally, it goes out under the name and with the sanction of the Institute, after all this testing and retesting, it will be something less than a code and something more than a treatise. It will be invested with unique authority, not to command, but to persuade. It will embody a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation. I have great faith in the power of such a restatement to unify our law.¹

I will take a somewhat less optimistic view here. The incentives of actors in the common law process have been examined many times.² Much less has been said about the incentives of actors in the Restatement process.

Incentives are always something to worry about, at least from the perspective of the non-optimist. Holmes referred to the law as reflecting a concern for the decisions of the "bad man."³ The Holmesian bad man was not necessarily bad in the sense of being evil. He was bad in the sense that he acted solely for his own advantage after calculating the private costs and benefits of his actions.⁴ Many lawyers have to consult with bad men of this type all of the time. As much as we would like to

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¹ BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 9 (Yale Univ. Press, 1924).

² See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (3d ed. 2000).

³ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459-61 (1897).

⁴ *Id.*

emphasize ethics and moral standards in the legal academy, lawyers in the real world have to provide advice to clients who do not have justice or social welfare at the top of their agendas.

The common law process itself could be distorted by the actions of Holmesian bad men. Judges might decide cases out of self-interest or with a disregard for a certain type of litigant. The common law process, if it is as good as the evidence suggests,⁵ must have built deep within it some shock absorbers to minimize the impact of bad men on its development. In other words, the common law process presumably has checks and balances that prevent the self-interest of a particular embedded actor (judge or lawyer) from having a substantial effect. This is a question, in any event, that I will consider here.

The question that immediately follows is whether the Restatement project is also immune—to the same extent as is the common law—from the self-interested incentives of actors involved in its creation. I will argue that it is far more vulnerable to distortion from self-interest than the common law process. Because of this, it is an open question whether the Restatements will, as Cardozo believed, unify and improve the common law.

I. THE COMMON LAW PROCESS AND SOCIAL WELFARE

Some impressive legal authorities have defended the common law. Blackstone, for example, singlehandedly set out a unified account and defense of the common law, as well as its history and policies.⁶ Blackstone's account, which shaped legal education for roughly a century after its publication, describes the common law as virtually synonymous with reason and holds that any unambiguously unreasonable rule should be regarded as not part of the common law—even if a court says that it is.⁷ Blackstone never quite explained what it means for the law to be reasonable, but one can infer from his arguments that the common law is reasonable because it is based on norms adopted by convention. Such norms should be reasonable because they reflect implicit agreements or conventions that maximize the joint welfare of all interested

⁵ See Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001).

⁶ See generally WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago Press 1979).

⁷ *Id.* at 69-70.

parties. These norms would trade off competing interests in an objective manner; they would reflect the choices of an impartial spectator.⁸ Courts could discover these norms in the course of deciding legal disputes.

Blackstone's hazy, almost mystical reverence for reason in the common law generated a vicious counterattack by Bentham, who argued that reason could only be understood from the perspective of self-interest.⁹ What is reasonable to me, Bentham argued, is what I think is good.¹⁰ The same goes for you. There is no perspective-neutral argument for believing that something I find reasonable would also be reasonable in your eyes. The common law materializes, then, when one of us is able to assert control over the framing of a legal rule. The one who prevails declares the law that suits him to be reasonable, putting an end to disputes over the law.

The notion of reasonableness in the common law would have its next great defender in Holmes.¹¹ Reasonableness in the law resulted, according to Holmes, from trading off competing interests in a manner that maximized social welfare. Courts sacrifice a dollar of gain to Sam if that gain would result in a two-dollar loss to Joe. The rules that emerged from this utilitarian balancing did not necessarily reflect underlying societal norms that courts had discovered. The rules were imposed by courts, as Bentham believed. In the common law process, disputes in which the appropriate or prevailing norm was unclear were litigated and re-litigated in court until a utility-maximizing set of rules was established.

The most recent defense of the common law is the efficiency thesis associated with Posner.¹² Common law rules tend to be economically efficient, in the sense that they minimize social costs. Like Holmes, Posner argues that the courts choose these rules without necessarily relying on or discovering underlying social norms. Efficiency differs from the utility maximization process envisioned by Holmes in the sense

⁸ See BRUNO LEONI, *FREEDOM AND THE LAW* 13-15 (3rd ed. 1991).

⁹ See JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* (Cambridge Univ. Press 1988); see also GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (Clarendon Press 1986).

¹⁰ Jeremy Bentham, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 159 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 2008) ("A regulation lies before me. I look at it and pronounce that it is 'unreasonable': what is it that I mean by this? Just this much and no more; that my reason, i.e. I myself, applying to it that faculty in me which is called reason, do not approve of it.")

¹¹ See OLIVER WENDELL HOLMES, *THE COMMON LAW* (Little, Brown & Co. 1881).

¹² See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2011).

that efficiency takes markets, explicit and implicit, into account.¹³ An efficient solution is consistent with one that the market, in its ideal form free of transactional barriers and externalities, would generate. To find the efficient solution, a judge need only consult the market or try to imagine what the market would have provided. In contrast, utility maximization, as stressed by Holmes, does not necessarily attempt to replicate an ideal market.¹⁴ Utility maximization might result in an inefficient outcome that is preferred by a faction with intense preferences and control over the law creation process. However, outside of this rather special case, the welfare maximization and economic efficiency theses are equivalent in terms of their implications for the common law.

The welfare maximization arguments of Holmes and Posner do not explain how the common law moves toward welfare-maximizing rules. If the law were controlled entirely by one judge, and that judge were committed to inefficient outcomes, presumably the law would not be efficient or welfare maximizing. This suggests that there must be features of the common law process that permit reasonable, efficient, or welfare-maximizing rules to evolve and to persist.

Paul Rubin offered what is perhaps the most persuasive theory for evolution toward welfare-maximizing common law rules.¹⁵ Rubin argued that inefficient rules would be litigated more often than efficient rules, and, because of this greater rate of litigation, inefficient rules would be overturned more often than efficient rules.¹⁶ Inefficient rules would be litigated more because, relative to efficient rules, such rules reduce the joint welfare of long-term stakeholders involved in any dispute. Given this, the stakeholders would have incentives to overturn the rule through litigation. Alternatively, the stakeholders could overturn an inefficient rule through private agreement.¹⁷

¹³ Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 90 (2005).

¹⁴ *Id.*

¹⁵ Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53 (1977) ("If rules are inefficient, there will be an incentive for the party held liable to force litigation; if rules are efficient, there will be no such incentive.").

¹⁶ For example, suppose the likelihood of a rule being overturned is ten percent. If inefficient rules are litigated more often than efficient rules, then inefficient rules will be overturned more frequently. For a careful examination of this argument, see Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980).

¹⁷ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (Harvard Univ. Press, 1991); Keith N. Hylton & Sungjoon Cho, *The Economics of Injunctive and Reverse Settlements*, 12 AM. LAW & ECON. REV. 181 (2010).

For example, suppose property law gave the right to cut down the old oak tree on John Doe's property to Richard Roe, Doe's neighbor. In most cases such as this, John Doe would put a higher value on keeping the tree than Richard Roe would put on cutting down the tree. Suppose, for example, John Doe values the tree at \$4,000 and Richard Roe values the absence of the tree at \$1,000. If the inefficient rule granting the property right to Richard Roe were overturned, John Doe would gain \$4,000 and Richard Roe would lose \$1,000; their joint gain would be \$3,000. If John Doe could sue to overturn the inefficient rule for a relatively small expense, he would do so. Richard Roe would not be willing to invest more than \$1,000 in a lawsuit defending his right to cut down the tree. John Doe would be willing to spend up to \$4,000 to gain the right of control over the tree. Given these differences in willingness-to-pay, litigation is likely to lead eventually to a decision in which the property rule giving the neighbor the right of control over the tree is overturned.

In addition to simply challenging inefficient legal rules, litigation also provides information to courts. Each litigant has strong incentives to reveal every fact that could bolster his side of the case. The end result is that a court receives far more information, from parties with direct and opposing stakes, than any other regulatory or legislative institution in existence. As Hayek stressed in relation to markets,¹⁸ the litigation process induces actors to reveal information that they would otherwise keep private.¹⁹

The evolutionary arguments discussed so far leave out the role of the law itself. The common law, Blackstone noted, equates legal validity with reasonableness.²⁰ This means that legal decisions in the common law process have to be justified on the basis of reasonableness. Reasonableness typically has been explained in terms of the trade-off in competing utilities, objectively evaluated, or in terms of the expectations of the parties.²¹ Judges often defend their decisions by highlighting the implications their decisions may have on the welfare of parties that are in the same positions as the litigants. Those

¹⁸ F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

¹⁹ See Keith N. Hylton, *Information, Litigation, and Common Law Evolution*, 8 AM. LAW & ECON. REV. 33 (2006) (private information on facts improves common law); Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007) (private policy preferences of judges improve common law over time).

²⁰ BLACKSTONE, *supra* note 4 at 69-70.

²¹ See, e.g., Keith N. Hylton, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 98-99 (Cambridge Univ. Press, 2003).

justifications become grounds for subsequent reexaminations of the legal rule.

Reasonableness arguments are not infinitely malleable. There is only so much spin that you can put on the reasonableness justification for a court decision. Return to the example of John Doe and Richard Roe. A court could argue that the inefficient rule should be deemed reasonable by asserting, falsely, that most neighbors would put a higher valuation on control over a tree on a given piece of property than would the property owner himself.²² But this is an empirical proposition that can be tested and proven false. The common law process allows for such empirical propositions to be tested in the litigation process; indeed, the appeals process provides a direct test of relative valuations. The decentralization of the common law process implies that empirical propositions will be tested and retested, both formally in evaluation by independent judges, and informally—though perhaps more effectively—through the hurdles of the litigation process. Justifications that are not falsified will be accepted and adopted by other courts, which, in turn, will lead to a rapid dissemination of the welfare-maximizing rule.

The testing and retesting of empirical reasonableness propositions in the common law occurs both horizontally—that is, among other courts of the same hierarchical status—and vertically—that is, among appellate courts of superior status. Extremely biased policy preferences held by a minority of judges will tend to be cancelled out at the horizontal level, and the average set of policy preferences of a band of like-courts will prevail.²³ Similarly, the appellate process presents the same opportunity for judges to reconsider empirically false assessments of reasonableness. Courts hearing a case on appeal are guided by the information revealed by the opposing parties.²⁴ The cost of appeal screens out some litigants who have benefited from an empirically false assessment of relative costs and benefits. The appeals process forces Roe to post a bond, in effect, to support his assertion that his valuation of the old oak tree exceeds Doe's. But if Roe does not really care about the tree, he is unlikely to accept the burden of appeal.

²² I do not mean to suggest that the court would deliberately assert a false statement. It is sufficient for this argument that judges have different policy preferences, and those policy preferences lead them to make different judgments on comparative utilities. See Gennaioli & Shleifer, *supra* note 19.

²³ *Id.*

²⁴ Hylton, *supra* note 19.

The rule of reason, which has generated specific utilitarian balancing tests in the common law, operates as a type of core code, or metarule, that facilitates the killing off of inefficient rules and the rapid dissemination of efficient rules. Because of the discretionary, utilitarian balancing in the common law, calibrated in every application by the private information revealed by litigants, welfare-maximizing rules emerge at a faster rate than would be observed if courts decided cases randomly and simply followed the precedent of previous courts.

The core code inserted by the common law into the judicial process is a general utilitarian balancing test that compares discrete choices—the rule favored by the defendant with the rule favored by the plaintiff. If the rule favored by the plaintiff increases the burden on the defendant, but results in a trivial benefit to the potential victims, or, even worse, increases the risks to other potential victims, then a court would find the proposed rule of the plaintiff unreasonable.

To give just one example, consider *Cooley v. Public Service Co.*²⁵ The plaintiff complained about a traumatic neurosis that resulted from a loud explosive noise in her telephone. The noise occurred when one of the defendant power company's cables snapped during a heavy storm, landed on a telephone cable running several feet beneath it, and burned through the telephone cable. The plaintiff argued that the power company was guilty of negligence because it failed to maintain devices—where its wires crossed over telephone lines—that would have prevented the accident that injured her. She proposed a wire-mesh basket that would catch the power cable before it landed on the telephone line. The court found, however, that while the plaintiff's proposed design reduced the risk of an accident of the sort that occurred, it increased the risk of electrocution to a person on the street. The court held that an accurate assessment of reasonable care would require a comparison of the burden of the plaintiff's alternative design to the net change in aggregate harm resulting from the design.

Note that in *Cooley*, the court applied the utilitarian balancing test in a manner that compared the specific precaution proposed by the plaintiff to its expected net social benefits. The standard “Hand Formula” analysis of comparing the burden of precaution to the foreseeable loss was modified to take into account the foreseeable net social loss. As this case illustrates, and as judges and litigants understand, the

²⁵ *Cooley v. Pub. Serv. Co.*, 10 A.2d 673 (N.H. 1940).

reasonableness criterion gives courts the flexibility to modify previously adopted algorithms to take into account all of the relevant social costs and benefits.

The core code of the common law allows courts to discover welfare-maximizing rules without first having the information required to do so. The common law reasonableness requirement provides a general balancing test of which litigants are aware. The litigants have every incentive to reveal information to the court that tips the balancing test in their favor. Judges do not need to be experts in a specific area of litigation for the general test to favor efficient rules. All judges need to do is recognize the nature of the test and allow its application to be determined by the factual content provided by the litigating parties.

The decentralization of the common law process implies that a particular faction that wants to see its own welfare-reducing version of the law adopted in a majority of jurisdictions, or within a single jurisdiction containing several independent judges, will have to work very hard. The faction may be able to persuade a minority of judges, but its work may not have an impact on other judges. Moreover, the decisions of the minority of judges who were persuaded by the faction are continually vulnerable to challenge by opposing litigants. In order to carry out an effective lobbying campaign under the common law, a faction committed to a particular inefficient legal rule would have to litigate continually in virtually every court. Once a judge discovers that the faction's preferred rule is inefficient, and explains why it is so in an opinion, other courts are likely to be influenced by the reasoning of the better-informed judge.

II. THE RESTATEMENT PROCESS

The process I have just described for the common law differs from the process by which a Restatement is created. Here is a simple model of the Restatement process. A Restatement Reporter reads the court opinions in an area of law, say tort law. The Reporter then tries to codify the rules that courts have applied, and offers interpretive guidance. By "codify," I mean that the Reporter attempts to summarize the common law in the form of codes or rules. The Reporter then has his codifications approved by the ALI, which means that lawyers, judges, and law professors get to look over the Reporter's codification to make sure that it is consistent with their readings of the law. A persuasive codification might convince a court to change a rule that it had previously adopted.

There are many ways in which this process differs from the common law process. First, we begin with a single Reporter (or maybe more than one Reporter) who eventually writes a final rule. In comparison, the common law process does not rely on a single judge, and no judge produces a final rule. Every rule of the common law is constantly subject to testing by parties who have a deep investment in the dispute. Indeed, the common law consists of rules and relies on an underlying background norm, the rule of reason, to reexamine those rules. The rule of reason is sometimes crystallized in the form of particular rules—such as, for example, that contributory negligence does not bar recovery from an intentional wrongdoer²⁶—but those rules are required to be consistent with the general rule of reason.²⁷ Because of this ever-present requirement, the consideration of new facts might require a change in a rule, or a change in the way that a rule is stated, so that the rule remains consistent with the background norm.

A Restatement Reporter who is committed to an inefficient rule, or to inefficient rules in general, has considerable freedom to interpret common law rules with a slant toward inefficiency. That slant is unlikely to be corrected by the rule-development process for two reasons. First, there are relatively few litigants directly involved with a stake in the rule. Second, there are no other Reporters, vertically above or horizontally in competition, who are likely to reject the proposed rules and publish alternative rules. Of course, there are many prominent law professionals who review Restatement drafts, and many who provide detailed comments. But as a general matter, this type of review is unlikely to involve the same combination of intensity and fear as one observes in the litigation process. A judge who tells a Reporter that his reading of the law is wrong probably has little direct leverage to force the Reporter to change.

Of course, the ALI has to approve the Reporter's work, which constrains the Reporter's freedom. But the ALI as a body is similar to a population of voters in an election process. The typical voter does not have a strong incentive to spend resources in determining the validity of any particular claim put to a vote.²⁸ Indeed, if the voter believes that his vote is not pivotal, he either has weak incentives to replicate the

²⁶ See, e.g., *Ruter v. Foy*, 46 Iowa 132 (1877); *Steinmetz v. Kelly*, 72 Ind. 442 (1880).

²⁷ Holmes, *supra* note 11 at 110-15; see also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592-3 (1988).

²⁸ On the incentives of voters, see DENNIS C. MUELLER, PUBLIC CHOICE II 348-50 (1989) and ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 141 (1957).

Reporter's research or can easily be persuaded by any side of the issue. The problem of rational apathy, apparent in most voting processes, is likely to be present to some degree in the ALI approval process.

It is not clear that this process would be improved by having multiple Reporters rather than a single Reporter. A single Reporter may worry more about permitting his individual preferences to control his interpretation of rules than would one of many Reporters. A single Reporter may think that his reputation would suffer greatly if the whole project were deemed defective because of distortions caused by his biases. One of many Reporters, on the other hand, may feel that his contribution is relatively small, and he therefore gains the benefits of imposing his biases while externalizing the costs to the Restatement in general. In other words, one of many Reporters may be like the franchisee who gets the benefits from cutting costs or from enhancing some related business interest, while spreading the losses in the form of reduced goodwill across the entire franchise network.²⁹

These arguments suggest that the checks—constraining distortions due to self-interest or excessive zeal—observed in the common law process are not at work in the Restatement process, or at least not at work with the same force. As a result, a Reporter who is committed to a particular view of rules—a non-utilitarian view for example—could impress his perspective upon some of the rules that he codifies without running into a serious obstacle in the Restatement process.

In addition, compared to the common law process, the ALI process suffers from a greater vulnerability to lobbying. A member of an interest group with a particular view of the law can contact the ALI Reporter and attempt to persuade him. Of course, most ALI Reporters would see through an attempt by openly pro-defendant or pro-plaintiff groups to have the law interpreted in a manner that favors them. But the lobbying effort becomes more difficult to identify when the motive of the group is unclear, or when the interest is in the nature of a commitment to a particular view of the law. By contrast, motivation is never in doubt in the common law process, which makes lobbying more difficult.

These differences between the common law and the ALI processes may explain some of the instances in which the ALI

²⁹ Paul H. Rubin, *The Theory of the Firm and the Structure of Franchise Contracts*, 21 J. LAW & ECON. 223, 227-28 (1978).

process has produced rules that seem to be inconsistent with the common law codification goal of the Restatements. I will discuss a few of those instances in the next part, confining my attention to previous Restatements.

The *First Restatement of Torts* and the *Second Restatement of Torts* have both benefited from being under the control of the most capable Reporters one could imagine: Francis Bohlen oversaw the *First Restatement* and William Prosser oversaw the *Second Restatement*. Prosser appears to have been the most careful of all in his efforts to prevent personal bias and opinion from influencing the Restatement. George Priest's critique of his work on products liability, however, suggests that Prosser was not entirely immune from the bias disease.³⁰ In the remainder of this article, I will examine the work of Bohlen and Prosser, and offer a few remarks on the *Third Restatement*.

A. *Bohlen on Consent and Mutual Combat*

An early example of Reporter bias having an effect on the Restatement appears in the *First Restatement of Torts* in its rules on mutual combat. Francis Bohlen, the Restatement Reporter, had to choose between two rules. One, adopted in the majority of states, held that consent to engage in mutual combat is not a defense to battery.³¹ The other, the minority rule, held that consent to engage in mutual combat is a defense to battery so long as the evidence indicates that the prevailing party did not use excessive force or act with an intention to severely injure the other party.³² Bohlen, having already published a paper in which he criticized the majority rule,³³ adopted the minority rule as the *Restatement* provision on mutual combat.³⁴ He included the proviso that consent would not be recognized as a defense in states that had expressed a

³⁰ See George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDIES 461, 514 (1985) ("Prosser's appendix supported his claim of an explosion in the law toward strict liability by the citation of forty cases. A rereading of these cases today suggests either that what Prosser meant by strict liability is vastly different from the regime that has evolved or that Prosser's discovery of a trend in the case law was largely his own creation.")

³¹ See, e.g., *Adams v. Waggoner*, 33 Ind. 531 (1870); *Mullin*, 79 P. 168 (Kan. 1905); *Barholt v. Wright*, 12 N.E. 185 (Ohio 1887); *McNeil v.*; *Royer v. Belcher*, 131 S.E. 556 (W. Va. 1926).

³² *Hart v. Geysel*, 294 P. 570, 572 (Wash. 1930).

³³ Francis Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 834-35 (1924).

³⁴ RESTATEMENT (FIRST) OF TORTS § 61 (1934).

policy of protecting individuals who were unable to fully understand the nature of the risk they took on.³⁵

Setting aside Bohlen's decision to adopt the minority rule as the *Restatement* provision on mutual combat, his reading of the law on consent in the mutual combat context is questionable. *Hart v. Geysel* indicates that the rule recognizing consent as a defense was accompanied with a qualification that limited the rule's applicability in cases where the defendant used excessive force or intended to severely injure his adversary.³⁶ Bohlen ignored this important qualification and treated mutual combat as indistinguishable from any other setting in which consent might be an issue.

As a general matter, treating mutual combat as indistinguishable from any other setting in which consent is an issue introduces confusion into the law. The common law has long assessed physical contact using special rules when questions of consent are presented. One's consent to the nature of the act and the identity of the actor generally operates as a valid assent to physical contact.³⁷ Someone who consents to a touch in exchange for a counterfeit \$100 dollar bill, fully aware of the nature of the touch and the person doing the touching, does not have a claim for battery against the party who inflicts the touch; he only has a claim for fraud or for contract breach. At first glance, this seems hard to reconcile with the law of battery. To establish a *prima facie* claim for battery, one must only show a touch was motivated by an intention to inflict a potentially harmful bodily contact. Touches that occur after fraudulently induced consent would appear to be based on a desire to inflict harmful bodily contact, but the law does not treat them as such. In contrast to the law, Bohlen's treatment of the consent question in the mutual combat setting imposes a contractual framework over the question of consent to a touch, suggesting generally that any fraudulent misrepresentation as to the basis for a touch might justify bringing a battery claim. A student of the law, exposed early to Bohlen's work, would be set on a path that would require correction later.

The more serious and practical problem introduced by Bohlen's *Restatement* provision is its failure to incorporate the excessive force qualification of the minority rule. If one looks closely at the qualification adopted in the minority rule

³⁵ *Id.* § 69.

³⁶ *See Hart*, 294 P. at 572.

³⁷ *R. v. Clarence*, 22 Q.B.D. 23 (U.K. 1888).

jurisdictions, it has the effect of severely limiting the role of consent as a defense or excuse. In essence, the qualification holds that consent is a defense in the mutual combat setting, except when the injuring party has gone too far. This qualification makes consent an extremely thin defense.

There is a good reason for this limiting qualification. If one considers the typical setting in which the party injured in mutual combat sues the injuring party, it is likely that the injuring party has used excessive force under the circumstances. One excessive force scenario is where the injuring party has pushed his advantage too far, to the point of *overkill*. In a case of overkill, the injuring party continues to punch the injured party long after he is unable to put up a fight. Another excessive force scenario involves an *asymmetry of force*, as in the case where one combatant uses a knife on another who uses only his fists. The injured party, feeling that the treatment he received from the injuring party went well beyond the implicit terms of the agreement, would see nothing incongruous in suing for battery after having agreed to the fight. A spectator, having observed the whole scenario, probably would not find the injured party's decision to sue unreasonable, too.

On the other hand, consider the mutual fistfight where the injuring combatant gets in a good punch, and then steps back to let the injured combatant fall. This is not a case of overkill or asymmetric force. The reasonable participant in mutual combat would realize that he had received the treatment that he had contracted for.

A representative sample of mutual combat cases, presented below in Table 1, shows that the cases in which defendants are held liable, whether analyzed under the majority or the minority rule, contain evidence of excessive force. The least clear example of excessive force among these sample cases is *McNeil v. Mullin*;³⁸ the court provides little detail on the exchange of blows. But the court's references to the defendant's commission of a mayhem suggest that the defendant used excessive force. Mayhem, a common law crime and trespass, is the intentional cutting off or destroying of an appendage of the victim's body, such as a hand or finger, so that the victim is left unable or less able to defend himself in battle.³⁹ Although the details of the encounter described in *McNeil* mainly cover the exchange of insults leading up to the fight rather than the fight

³⁸ *McNeil v. Mullin*, 79 P. 168 (Kan. 1905).

³⁹ BLACKSTONE, *supra* note 4 at 121.

itself, it is hard to see how an ordinary fistfight could result in the commission of a mayhem in the absence of the use of excessive or inappropriate force. The precise type of mayhem inflicted on the plaintiff is not described in the opinion, but the least injurious that one could imagine—say, the biting off of a finger—would easily qualify as excessive force under the circumstances.

The sample cases also suggest that a finding of excessive force is necessary for liability in the minority rule cases. The key difference between the majority and minority rule cases appears to be that if the evidence of excessive force is unclear, then there generally will be no liability under the minority rule. The majority rule, in contrast, does not require evidence of excessive force in order to hold a combatant liable, but moderates (or mitigates) damages according to the reciprocal nature of the exchange.⁴⁰ In terms of the incentives to file suit, or to engage in combat, the minority and majority rules may be roughly equivalent.

⁴⁰ See *Littlelike v. Wood*, 255 P. 172, 174 (Utah 1927) (“The claim made is that who committed the first act of violence was material in mitigation of damages. The fact that the parties mutually engaged in a combat, though with anger, may be relied upon and considered in mitigation of damages; but in such case who struck the first blow, or committed the first act of violence, is in and of itself of no controlling nor important factor of the question, for in such a mutual combat both parties are aggressors and voluntary combatants. The court well could have charged the jury that in case of mutual combat such fact properly could and should be considered in mitigation of damages, except where an injury of a serious character was maliciously inflicted by excessive and unreasonable force, or in a vicious or brutal manner. We think no error was committed in the particular as claimed.”); *Adams v. Waggoner*, 33 Ind. 531, 533 (1870); *Barholt v. Wright*, 12 N.E. 185, 188 (Ohio St. 1887); *Royer v. Belcher*, 131 S.E. 556, 556-557 (W. Va. 1926).

TABLE 1: SUMMARY OF MUTUAL COMBAT CASES

Case	Rule	Excessive Force?	Fact Summary	Liability
<i>Adams v. Waggoner</i> , 33 Ind. 531 (1870)	Majority	Some evidence of overkill, but court does not go into detail.	The two men engaged in a mutual fight, but the defendant brought out a knife and severely wounded the plaintiff.	Yes
<i>Barhold v. Wright</i> , 12 N.E. 185 (Ohio 1887)	Majority	Yes, the court called the excess a “mayhem.”	The parties consented to fight one another, but the defendant bit off the plaintiff’s finger.	Yes
<i>Smith v. Simon</i> , 37 N.W. 548 (Mich. 1888)	Minority	No excessive cruelty or unnecessary beating or harshness.	Defendant broke plaintiff’s arm and dislocated his shoulder. They agreed mutually to fight “in fun.” The parties were wrestling.	No
<i>White v. Whittall</i> , 71 N.W. 1118 (Mich. 1897)	Minority	Short opinion, court views the offensive contact as mutual.	Parties began a fight in the middle of the highway, using offensive language in front of their children. Both were equally “eager for the fray.”	No
<i>Mc.Neil v. Mullin</i> , 79 P. 168 (Kan. 1905)	Majority	Yes, the Petition Against the defendant is for injuries sustained from a mayhem.	A series of insulting comments back in forth resulted in both men getting off their buggies, taking off their hat and coat, and having a fistfight.	Yes
<i>Milam v. Milam</i> , 90 P. 595 (Wash. 1907)	Probably Minority	Yes, the biting of the knuckle was “cruel and unjustifiable.”	Parties got into a dispute after one accused the other of telling lies in court, resulting in a struggle and a fistfight. Plaintiff’s knuckle was bitten off and finger was broken.	Yes
<i>Lykins v. Hamrick</i> , 137 S.W. 852 (Ky. 1911)	Minority	No, both used knives, and when they separated, both were injured but neither too severely.	Parties were neighbors and friends for a long time. They fought with knives in the front yard after one made offensive remarks towards the other.	No

Case	Rule	Excessive Force?	Fact Summary	Liability
<i>Colby v. McClendon</i> , 206 P. 207 (Okla. 1922)	Majority	Although there was no overkill, it was with deadly weapons so majority rule applies.	Gunfight ensued after a dispute over a land conveyance, resulting in the death of the decedent and another party.	Yes
<i>Royer v. Belcher</i> , 131 S.E. 556 (W. Va. 1926)	Majority	Some evidence of overkill, in light of the plaintiff's inability to respond with equal force.	Defendant's wife informed him of an insulting remark made by the plaintiff. D went to P's house where a fight broke out. D repeatedly punched P resulting in P losing his glasses and physical injuries requiring a doctor.	Yes
<i>Littlelike v. Wood</i> , 255 P. 172 (Utah 1927)	Majority	Yes, defendant kicked plaintiff in the ribs after he was almost unconscious.	After a dispute over hay bales, the parties engaged in a fight. Plaintiff was kicked in the ribs causing a punctured lung. He also lost some teeth, and his face was cut and bruised.	Yes

If the excessive force scenarios just described explain the vast majority of cases in which individuals injured in mutual combat sue their opponents, then, as a practical matter, the excessive force qualification attached to the minority rule swallows the consent portion of the rule. There would be few cases in which a willing prizefight participant brought suit and won substantial damages against an opponent who had obtained a victory by fair means and who did not use excessive force. The circumstances most likely to give rise to a battery lawsuit would be those where the consent defense is precluded by the excessive force qualification.

Indeed, the law on mutual combat appears to follow a rather simple set of utilitarian principles: as the danger of the type of mutual combat increases, the scope of prohibition expands, and the extent to which consent serves as a defense to battery narrows. The most dangerous types of mutual combat, including combat with deadly weapons, were prohibited, and consent to engage in such contests would not serve as a defense.⁴¹ Dueling with guns or swords, for example, was illegal

⁴¹ See *Hart*, 294 P. at 573 (Holcomb, J., dissenting) ("Had it been a duel, it would have been unlawful and consent to fight a duel would not prevent recovery by either those injured, on the ground of excessive force, or the heirs or personal representatives of those injured.").

and consent to such dueling would not serve as a defense in a lawsuit brought by an injured party.⁴² Perhaps a sufficient reason for prohibiting such duels is that they put innocent third parties at risk of injury or death. The next level down from dueling is boxing. Boxing can be as deadly as dueling. On the other hand, boxing with padded gloves is likely to be less dangerous, depending on how the conduct is carried out.⁴³ Given the variation in the level of danger associated with boxing—to participants and to third parties—the degree to which consent could serve as a defense should vary according to the specific danger level of the particular contest. The minority rule, as originally stated in the law, appears to be consistent with this utilitarian intuition.

Of course, once we consider the administrative costs of distinguishing battery cases resulting from mutual combat based on the degree of danger under the circumstances, we can see immediately why the majority rule is attractive. It offers a simple, straightforward statement of the law that usually produces the same outcome as the more fine-grained minority rule. When administrative costs and risks of error are taken into account, the majority rule is probably preferable on utilitarian grounds to the minority rule, even though the minority rule does a better job of tracking the regulatory dictates of the utilitarian.

In any event, Bohlen appears to have given little consideration to these issues and instead fashioned a *Restatement* rule on mutual combat that is not reflected in either the majority or minority rules of the common law. Bohlen's new rule was approved by the ALI and is part of the *First Restatement of Torts*.⁴⁴

Bohlen's rule may seem to be welfare maximizing on the simple basis that it allows for freedom of contract: if people want to engage in mutual combat, let them do so, and let them take the injuries that come with it without allowing them to shift any losses to others. But this simple version of freedom of contract misses important features of the mutual combat problem that were reflected in the law.

⁴² *Id.*

⁴³ Even the use of boxing gloves cannot prevent long term injury from sustaining repeated concussions—and may increase the risk of such injuries. See, e.g., Antoinette Vacca, *Boxing: Why It Should Be Down for the Count*, 13 *SPORTS LAW. J.* 207, 216 (2006).

⁴⁴ RESTATEMENT (FIRST) OF TORTS § 61 (1934).

The most important features that Bohlen's rule misses are the risk of escalation and the substantial risk to third parties. The rules on mutual combat were developed over a period when men dueled openly in public streets with guns or swords. A verbal slight might require a man to save face through an invitation to a deadly contest.⁴⁵ Whatever its advantages in regulating aggressive conduct,⁴⁶ mutual combat, especially with deadly weapons, imposes risks of unanticipated escalation and serious injury to third parties. Because of this, mutual combat is not simply a matter of allocating risks and rewards within a contract between two combatants. The welfare-maximizing rule on mutual combat would impose a prohibition first, and then examine possible exceptions based on the level of danger to society.

The common law appears to have adopted this approach. The states that adopted the majority rule drew a distinction between mutual combat that threatened public order and mutual combat that did not.⁴⁷ The majority rule denying consent any force as a defense applied only to the former.⁴⁸

Bohlen's work on mutual combat serves as an example of the sort of bias that can distort the Restatement process in a way that is not observed in the common law process. The consent rule fashioned by Bohlen is disconnected to some of the fundamental rules and policies reflected in the common law on mutual combat. Bohlen's work reflects his vision of how the law should look, not what the law provided. If it were a rule generated by a particular judge, it probably would not have survived the testing (and retesting) process of the common law.

B. *Prosser*

According to Priest's famous critique of Prosser's work on the *Restatement (Second) of Torts*'s Section 402A on products liability, Prosser persuaded the ALI to adopt its strict products liability theory on the basis of a small set of cases that, at best, provided weak support for Prosser's theory.⁴⁹ If

⁴⁵ See Christopher G. Kingston & Robert E. Wright, *The Deadliest of Games: The Institution of Dueling*, 76 S. ECON. J. 1094, 1095 (2010).

⁴⁶ Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321 (1984) (offering an efficiency theory of dueling).

⁴⁷ *Teeters v. Frost*, 292 P. 356, 359-360 (Okla. 1930).

⁴⁸ *Id.*

⁴⁹ George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 514 (1985) ("Prosser's appendix supported his claim of an explosion in the law toward strict

Priest's observation is true, then Prosser's work serves as another example of the Restatement process failing to accurately reflect the development of the common law. Put another way, it may be another example in which the preferences of a Restatement Reporter have distorted the common law in a manner that probably could not have occurred if the Reporter had been just the author of a judicial opinion.⁵⁰

Priest's critique is easily discounted today, particularly given that the law has advanced well beyond Prosser's formulation of Section 402A. Courts have generated a risk-utility analysis for products liability that effectively incorporates the structure of negligence doctrine. Now that products liability shares its most important features with traditional negligence analysis, there is little reason to worry about the common law on products liability retaining significant distortions attributable to the *Restatement* Section 402A.

Still, in spite of the successful integration of negligence principles in products liability law, the common law on products liability remains in a confusing state, and commentators have struggled to find the consistent patterns in the case law. Professors Henderson and Twerski, as Restatement Reporters on products liability, have advanced our understanding greatly by providing a consistent doctrinal framework for the confusingly stated and balkanized case law.⁵¹

I suspect that the law on products liability would have developed in a clearer fashion without the distortion initially provided by Prosser's Section 402A. The courts have evolved toward a liability framework that has been available for hundreds of years. The process of evolution has required some courts to stumble over the language of the Section until eventually working their way toward a clear theory of products liability law grounded in negligence doctrine.

liability by the citation of forty cases. A rereading of these cases today suggests either that what Prosser meant by strict liability is vastly different from the regime that has evolved or that Prosser's discovery of a trend in the case law was largely his own creation.").

⁵⁰ I must distinguish my critique of Prosser from a recent article that suggests that Prosser fell under the influence of tobacco lawyers. See Elizabeth Laposata, Richard L. Barnes & Stanton Arnold Glantz, *Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1 (2012). That tobacco lawyers lobbied Prosser does not point unavoidably to the conclusion that he was excessively influenced by their views. I remain confident of Prosser's independence from special-interest groups and hold his work in the highest regard.

⁵¹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998) (James A. Henderson, Jr. and Aaron D. Twerski, Reporters).

Modern design defect litigation has adopted what is essentially a negligence test for designs: the risk-utility test. The test could have easily developed from the common law process without the injection of the strict liability concept in Section 402A. Indeed, the case of the electric power lines discussed earlier in *Cooley* is an early example of a court applying a risk-utility test to a negligence claim based on the design of a power delivery system.⁵² The basic theories of modern products liability law have been in the courts for hundreds of years. The current consensus on the legal standard could have developed just as quickly, and I believe even more quickly, without *Restatement* Section 402A.

C. Third Restatement

The *Restatement (Third) of Torts* has been in the hands of many capable Reporters. Unlike the *First* and *Second Restatements*, the *Third Restatement* does not appear to be developing under the control of one specific torts scholar. Having said this, some Reporters have had a bigger impact on the *Restatement (Third)* project than others because of the scope of the pieces they controlled. My late dear friend, Gary Schwartz, incorporated noticeable changes within the *Restatement's* section for Liability for Physical and Emotional Harm.⁵³

Gary Schwartz was effectively the dean of torts scholars in America before his untimely death. For many years, tort scholarship has been divided into utilitarian and corrective justice camps—a division that crystallized as the sophistication of scholarship advanced. Gary Schwartz was the rare example of a scholar whose advice was accepted willingly by scholars in both camps. He steadfastly maintained a position of detachment from either camp, and discussed their respective arguments from an independent point of view. A good law school dean is both an intellectual leader and a force for reconciliation among opposing factions on a law faculty. Gary Schwartz filled this role for torts scholars. His absence has been and remains a serious loss for torts scholarship.

Having an open mind and a willingness to listen to all perspectives, however, did not prevent Schwartz from picking and choosing among arguments. Indeed, Schwartz was aggressive in imposing his views on the *Third Restatement*. Two

⁵² See *Cooley v. Pub. Serv. Co.*, 10 A.2d 673 (N.H. 1940).

⁵³ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM (2012).

areas in which Schwartz incorporated drastic changes in the *Restatement* are the law of duty and the law of strict liability.

1. Schwartz on Duty

In his capacity as *Restatement* Reporter, Schwartz treated duty as essentially a “wild card” doctrine in tort law. Courts could resort to it when they found special policy or pragmatic reasons that a defendant should not be held liable even though a straightforward examination of the breach and causation issues would point toward liability.⁵⁴ In other words, duty doctrine was an empty vessel into which courts poured their case-specific policy views whenever those views required a deviation from the standard application of negligence law.

This was not a new argument. Prosser had described duty doctrine in the same terms in his hornbook. The difference, however, is that Prosser confined his views on the function of duty doctrine to his hornbook and did not attempt to incorporate them into the *Restatement (Second)*.⁵⁵ Indeed, Prosser’s *Restatement (Second)* is respectful of negligence’s traditional four-part analysis of duty, breach, causation, and damages. Schwartz updated the *Restatement* portion on negligence to relegate the duty component to a secondary role.

I agree broadly with both Prosser and Schwartz on the necessarily ad hoc and pragmatic function of duty doctrine in negligence law. And like them, I believe it plays a secondary role. Unlike Schwartz—and to some extent unlike Prosser, too—I have attempted to explain in utilitarian terms the precise function duty doctrine plays in tort law.⁵⁶ Duty is not an empty vessel used to hold the momentary pragmatic concerns that a particular case may generate. Rather, duty doctrine

⁵⁴ *Id.* § 7 cmt. a (“[I]n some categories of cases, reasons of principle or policy dictate that liability should not be imposed. In these cases, courts use the rubric of duty to apply general categorical rules withholding liability.”).

⁵⁵ See John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *VAND. L. REV.* 657, 674 (2001) (“It would not be surprising to learn that Prosser was attracted to the formulation of Section 281 in part because it avoided talk of duty. However, Prosser kept some distance between his academic critique of the concept of duty in law review articles, and his active deployment of that concept in a Restatement or treatise. . . . Prosser continued to rely on the traditional four-part formula through several editions of his treatise and casebook.”).

⁵⁶ Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 *FORDHAM L. REV.* 1501 (2006).

shows consistent patterns and performs identifiable functions in tort law.⁵⁷

As between Prosser and Schwartz, I favor Prosser's approach. Prosser recognized the policy bases for duty doctrine, though he never attempted to set out a general theory on the subject. He saw that there was sufficient substance to respect the role of duty doctrine in negligence law, and for that reason did not attempt to minimize its importance in the *Second Restatement*.

Schwartz, in contrast, had little patience for mystical and tradition-based arguments. He was aware of the policy conjectures that Prosser had set out, but Schwartz believed Prosser's account fell short of providing a rigorous functional theory of duty doctrine. At the time that Schwartz approached the subject, there was no functional account of duty doctrine. And although Schwartz listened to all perspectives with respect, he could be counted on to reject a non-rigorous, purely tradition-based argument. Seeing no rigorous argument for giving duty doctrine an important status in the structure of negligence law, Schwartz relegated it to a secondary position.

To give just one example of what a richer account of duty doctrine would entail, consider the law governing the duty of self-care in the course of a rescue attempt. *Eckert v. Long Island Railroad*⁵⁸ holds that a person who is injured by the defendant in the course of an attempt to rescue a third party will be found liable of contributory negligence only if his conduct is reckless.⁵⁹ In terms of duty analysis, *Eckert* relieves the rescuer of a duty of ordinary care with respect to his own safety; he breaches the duty of care only by engaging in reckless conduct.⁶⁰ What is the function of this relief? The relief serves, in effect, as a subsidy to rescuers. The law on rescue shows a reluctance to punish individuals for failing to rescue. At the same time, it provides liability relief to those who attempt to rescue. To use Saul Levmore's analogy, the law of

⁵⁷ *Id.* at 1501-02 (summarizing the functions of duty law: to subsidize desirable activities by removing the threat of liability, to support property rights, and to prevent liability risk from distorting markets).

⁵⁸ *Eckert v. Long Island R.R. Co.*, 43 N.Y. 502, 506 (1871).

⁵⁹ *Id.* ("The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless.").

⁶⁰ *Id.*

rescue is a policy leaning toward carrots and away from sticks.⁶¹ Such a view of the law governing rescue provides a set of policies that a Restatement Reporter could use in examining details in the case law on the subject matter.⁶² A richer understanding of duty doctrine provides not just a one-off explanation for a particular case, but a basis for reconsidering a set of doctrines associated with a recurrent scenario.

2. Schwartz on Strict Liability

The other major change Schwartz imposed in the *Third Restatement* is the provision on strict liability for hazardous activities. Schwartz replaced the *Second Restatement's* six-part test for strict liability with a simpler, two-part test.⁶³

Under Prosser's guidance, the *Second Restatement* created a six-part test for strict liability. Found in Section 520, the test evaluated whether: (1) the risk of harm is great, (2) the harm that would occur is great, (3) the harm could not be prevented by reasonable care, (4) the activity is not one of common usage, (5) the activity is inappropriate for its location, and (6) the social value of the activity is not sufficient to offset the risks.⁶⁴ The six-factor test of Section 520 appears to be consistent with the common law of strict liability.⁶⁵

The *Third Restatement* replaces the six-factor test with a two-factor test. The *Third Restatement* eliminates the last two factors and collapses the first three parts of Section 520 into one question—is the residual risk of harm great when the defendant takes care? The comments to this section of the *Restatement* soften the impact of these changes by reintroducing the “benefit to the plaintiff” as a factor to be considered in analyzing strict liability.⁶⁶

The different formulations of the strict liability test in the *Second* and *Third Restatements* are capable of being

⁶¹ Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 882-94 (1986).

⁶² On the case for integrating instrumentalist policy reasoning with the Restatement process, see Keith N. Hylton, *The Theory of Tort Doctrine and the Restatement (Third) of Torts*, 54 VAND. L. REV. 1413 (2001).

⁶³ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 20(b) (2011) (“An activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage.”).

⁶⁴ RESTATEMENT (SECOND) OF TORTS § 520 (1977).

⁶⁵ See Keith N. Hylton, *The Economics of Nuisance Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW, 323-43 (K. Ayotte & H.E. Smith eds., 2011).

⁶⁶ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS & EMOTIONAL HARM § 20(b), cmt. k.

interpreted so that they are consistent with one another and produce the same outcome in any particular case. One could argue, for example, that the commonality inquiry of the *Third Restatement* incorporates the “appropriateness” and “value” inquiries of the last two parts of Section 520 in the *Second Restatement*. But if one chooses not to read the tests so that they are equivalent, then one is left with the claim that an examination of commonality does all of the work that used to be accomplished by the last two factors of Section 520.

This is a doubtful claim. Commonality is an empirical question that is easy to address in extreme cases but otherwise difficult to answer. Was the storage of water—to be used as a source of power for a production facility—common at the time of *Rylands v. Fletcher*?⁶⁷ I suspect the answer is yes, though I am also inclined to believe that this is a matter of opinion. Certainly the storage of water for the purpose of powering mills was not a rare phenomenon in the middle 1800s.⁶⁸

How does one determine if an activity is sufficiently common to merit an exemption from strict liability? The obvious question that follows any attempt to determine whether something is common is to ask “common relative to what”? The commonality test of the *Third Restatement* sounds deceptively simple, but it raises more questions than it answers. I am not sure that the commonality test, by itself, would support the court’s conclusion in *Rylands v. Fletcher*, which is a deeply troubling turn of affairs. The Restatement project, which has admirably attempted to codify the doctrine of strict liability, has at length found its way to a rule that appears to be incompatible with the framework set out in *Rylands v. Fletcher*. If accepted literally by courts, the *Third Restatement*’s commonality test would mark a significant departure from the common law of strict liability

CONCLUSION

The foregoing examples are instances in which the individual preferences of Restatement Reporters have led them to interpret and describe the law in a way that is not consistent with the common law at the time of their reports. What explains these excesses? I think it largely comes down to the

⁶⁷ *Fletcher v. Rylands*, [1866] H.L. 1 Ex. 265 (U.K.) (Blackburn, J.).

⁶⁸ A. W. B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. LEGAL STUD. 209, 216 (1984).

checks and balances inherent in the common law process and their absence in the Restatement process.

Everyone comes to work with their preferences, including judges. Rational individuals will always act to satisfy their preferences within the constraints that are set before them. Duty can be defined generally as acting against the satisfaction of one's own preferences in order to carry out the requirements of some position or station in society. The law provides a set of constraints that restrict the freedom of individuals to act exclusively in a manner that satisfies their own preferences. The relatively few individuals who are motivated by an internal sense of duty have little need for the law's constraints. But just as the law constrains individuals in their interactions with others, the common law process constrains judges from operating according to their own preferences at all times.

An individual judge writes with a keen awareness that his arguments will be reviewed by later courts, which, by itself, constrains the tendency to substitute one's own interpretive preferences for an objective rendering of the law and its associated policies. The review process permits well-reasoned arguments to have a continuing impact on the law, while the poorly reasoned arguments are discarded. The reasonableness standard in the common law of torts provides a utilitarian metarule to guide courts in making decisions. Thus, judges are constrained by their perceptions of the likelihood of review, constrained in fact by a survivorship bias in the common law (only the best-reasoned arguments survive the process of review by other courts), and constrained by an overarching utilitarian framework for policy.

These constraints are not part of the Restatement process. An individual Reporter can find latitude, even if only interstitially, to substitute his own preferences, or those of a lobbying agent, for an objective description of the law and its policies. Once these preferences become embedded in a Restatement provision, they can have a distortive effect on the development of the common law. Instead of unifying the common law, as Cardozo thought would happen, the Restatement can create inconsistencies and distortions, in law and in policy, which courts will be left to sort through over time.