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# THE COMMUNITIES THAT MAKE STANDARDS OF CARE POSSIBLE

ANITA BERNSTEIN\*

## INTRODUCTION

"There are two core principles in the law of negligence," writes Joseph H. King, Jr., a leading scholar of contemporary tort law, by way of summary introduction.<sup>1</sup> "The first is that negligence law is a fault-based theory of liability (rather than strict liability), and therefore requires proof that the defendant's conduct was substandard. The second is that a person's conduct should be evaluated according to objective criteria, rather than by a subjective assessment."<sup>2</sup> Taking Professor King's "two core principles" as axiomatic, we may wonder how a liability system applies them.

The axioms make a difference. In a claim for negligence, one litigant has charged another with fault, a moralistic accusation; King goes on to say that the litigant also claims that the other has failed to follow "objective criteria" for behavior. When the claimant (usually the plaintiff, but sometimes a defendant who asserts contributory negligence as an affirmative defense)<sup>3</sup> prevails, then the accused (usually the defendant) has been condemned as blameworthy. When the plaintiff does not prevail, then a loss lies unremedied where it fell. Affirmative defenses similarly yield either blame or disappointment at the failure to achieve a remedy for an injury and both blame *and* disappointment in those cases where the defenses succeed. It is easy for us Torts teachers, grown perhaps a bit callous after reading many

\* Sam Nunn Professor of Law, Emory University. My thanks to the faculties at Iowa, Seton Hall, and Pepperdine law schools for the comments they offered when I presented early versions of this Article. Thanks also to Robert Cochran, Richard Cupp, Patrick Kelley, Jean Love, Lea VanderVelde, and Richard Wright for constructive criticisms.

1. Joseph H. King, Jr., *Reconciling the Exercise of Judgment and the Objective Standard of Care in Medical Malpractice*, 52 OKLA. L. REV. 49, 49 (1999).

2. *Id.*

3. Although contributory negligence has been superseded in almost every U.S. jurisdiction by a rule of apportionment, most often called "comparative negligence," the differences between the old and the new rules are unimportant for present purposes, and "contributory negligence" is the simplest term available.

accounts, not to notice the pain that afflicts losers in our bipolar negligence-claim game, and to overlook institutional costs that make even prevailing parties feel that they have suffered a defeat. (Those of us who like to describe American negligence law as a "lottery"<sup>4</sup> may have a better-than-typical understanding of the low ratio of winners to losers that the system creates.) Even though the application of King's axioms spreads sorrow through the citizenry, these principles continue to operate.

Successful players in a political system, of which the American common-law negligence system is one, do not maintain their thriving position by absorbing full responsibility for having doled out suffering to their clientele. When these successful players are involved in causing suffering, they need cover, deniability, and the appearance—or perhaps the reality—of not having been the sole source of anyone's misery. In this Article, I argue that negligence law relies on what one might call "communities" (for the moment I will postpone my definitional task) to give its authority some necessary lateral support, a political and philosophical buttress. Communities soften the hard surface of the standard of care and allow negligence law to distance itself from the painful effects of its judgments.

To broach this argument, I start by accepting the prevailing academic belief that tort law mediates between freedom and security.<sup>5</sup> Negligence litigation juxtaposes two parties as antagonists: the initiator, who protests an infringement of his security (or, in the context of affirmative defenses, an infringement of his rights with respect to the plaintiff's claim about security), and the accused, who contends that she had an entitlement to have behaved as she did. Because negligence law honors both security and freedom, neither initiators nor accuseds<sup>6</sup> can be confident that their assertions about

4. See JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* (1979); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

5. See Jules L. Coleman, *Legal Theory and Practice*, 83 GEO. L.J. 2579 (1995); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1754–55 (1998) (identifying the balance between freedom and security as central to the formation of the objective standard of care); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 819 (2001) (characterizing the concern with freedom-versus-security as a "social contract approach" to negligence law); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 313–27 (1996) (relating freedom-versus-security to the political philosophy of John Rawls).

6. Elsewhere I have grappled with the problem of what to label the two players. Unable to identify *les mots justes*, I have settled on not settling on any one locution so as to avoid occluding the discussion with a false and misleading precision. See Anita Bernstein, *Reciprocity*,

their security or freedom will prevail; negligence law dispenses some of each desideratum. This mediation between freedom and security means that every actor must accept a measure of external constraint, not precisely specified *ex ante*, on her movements. Although her freedom conduces to social prosperity (as the utilitarian-efficiency theorists would contend), and may be her birthright as a creature of reason (in the Kantian tradition), she may not do entirely what she likes.

Whereas negligence law regards freedom and security as zero-sum antagonists—at least when they are demanded by their spokespersons, defendants and plaintiffs<sup>7</sup>—there exist other American institutions that do not think of freedom as contrary to security, or security as contrary to freedom. Some of these entities fall within the term “communities” as I use it here. For purposes of negligence law, and indeed all of law, I argue, the defining condition of a community is *group-based constraint* with respect to behaviors that imperil the physical safety of others. Negligence law concerns itself with accidental injury; group-based constraint makes an actor less likely to inflict such injury on other people.

For an example of group-based constraint, consider the Amish as they are portrayed in American religious liberties cases like *Wisconsin v. Yoder*.<sup>8</sup> The Amish choose to withdraw from what looks like the freer world of secular license and submit to a host of special rules. For another illustration, consider Islamic dress codes for women, which are perceived by Westerners as contrary to freedom; some girls and women have flaunted their adherence to these strictures.<sup>9</sup> To members of these religious communities, liberty and

*Utility, and the Law of Aggression*, 54 VAND. L. REV. 1 (2001) (experimenting with “initiator,” “aggressor,” “putative aggressor,” “victim,” “complainant,” “plaintiff,” and other inadequate terms).

7. The Kantian tradition regards freedom and security not as zero-sum antagonists but as complements, or two faces of the same coin. Because rights bespeak duties and vice versa, human freedom cannot exist without due regard for the security of others. Here, then, I am distinguishing a stance in American litigation from a philosophical antecedent. I thank Richard Wright for pressing me on the point.

8. 406 U.S. 205 (1972) (upholding the right of Amish parents to keep their children out of public high schools); see also *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (rejecting a religion-based complaint about a mandatory public school curriculum).

9. An article in a popular magazine provides photographs of garments that government authorities around the world have banned and other garments that they have ordered women to wear; Islamic dress appears in both the mandated and prohibited sections. *Where a Miniskirt Can Get You Arrested*, MARIE-CLAIRE, Aug. 2001, at 56; see also *Ali v. Alamo Rent-a-Car*, No. 00-1041, 2001 U.S. App. LEXIS 3389 (4th Cir. Mar. 6, 2001) (rejecting a religious-liberty claim to wear Muslim headgear at work); cf. Nathan Diamant, *Protect Religion Now*, FORWARD, Oct. 19, 2001, at 9 (associating head scarves, skull caps, and certain hairstyles with “religious

restraints on liberty are not antagonists.<sup>10</sup> Submitting themselves to authority, some persons experience the freedom of conscientious dissent from secular notions of freedom.

Now if, as I have suggested, negligence law finds it convenient to exploit constraints that fit within its security-related goals yet derive from extrinsic sources, so that the legal regime does not have to take political responsibility for chafing the citizenry with authoritarian decrees, then negligence law reaps gains—almost free-rider benefits—from the fact that subgroups or communities exist.<sup>11</sup> Whereas civil and criminal liability instill sullenness along with their famed general deterrence, an actor who accepts group-based constraint will feel little resentment when compelled to toe the line as a member of the group. (Any resentment that he does feel about this constraint will not be directed toward negligence law.) This actor has what John Austin called “the habit of obedience,”<sup>12</sup> a submissiveness necessary in any system that relies on positive law—necessary not only because positive law lacks the resources to decree all that it wants done and to enforce those decrees, but also to diffuse political hostility.

We begin to see why negligence law might take note of whether an actor is a member of a subgroup. Subgroups function as a kind of unrecognized accessory to negligence law, dispensing freedom and security in a way that diverts hostility from the legal system. This hostility is built into American civil litigation. Although negligence law hands out good news now and then—such as an unexpected entry of summary judgment for a defendant<sup>13</sup> or a generous award of

freedom”).

10. Nomi Maya Stolzenberg discusses this paradox in *“He Drew a Circle that Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

11. I am putting aside those communities whose values are antagonistic to the values that negligence law esteems. This conflict is not manifest in negligence law—communities that favor waste, carelessness, or imprudence are insignificant in American case law—but it turns up in the law of dignitary torts. See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 714 (1986) (“The common law takes its function of maintaining community identity so seriously that it will refuse to protect individual dignity if it determines that a particular community is not worthy of legal support.”).

12. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 168 (Wilfrid E. Rumble ed., Cambridge University Press 1995) (1832).

13. Many years ago as an unskilled and very junior associate in a big-firm litigation department, I was stunned to hear the news that the first memorandum of law I had ever filed had just resulted in an entry of summary judgment in behalf of the firm’s client. My supervisor wryly pointed out that a defendant need not hire Clarence Darrow reincarnate in order to win summary judgment under Illinois law (I was more familiar at the time with the plaintiff-favoring, send-it-to-the-jury tradition of New York), but for a week or so I felt like a magician:

punitive damages for a plaintiff—more often it will send some kind of unwelcome message. In addition to facing the pressure of trying to mediate effectively between freedom and security, negligence law risks provoking serious resentment when it makes people feel like losers. Subgroups serve as a useful adjunct to negligence law because their constraints can feel to members like freedom, or at least less oppressive than the distant, impersonal commands of negligence doctrine.

As we move to Professor King's second point, about objective standards of care,<sup>14</sup> we can take this connection between negligence and communities to a wider plane than the narrow category of religious minorities, never a large presence in accident law. Professor King has traded away precision in order to shorten his axiom: the standard of care in negligence, though generally identified as "objective," also allows for "subjective" recognition of certain characteristics.<sup>15</sup> Commentators agree that although negligence law requires most actors to follow an abstract, unmodified ideal of care (an ideal that goes by many names, of which perhaps "the reasonable person" is most familiar), it treats children, the physically disabled, and persons acting in the throes of certain emergencies differently—usually more leniently—than this ideal would demand.<sup>16</sup> The objective standard is further revised in the context of profes-

using just paper and Shepard's, I had vaporized a complaint, made a plaintiff disappear from the docket! This decision by an Illinois court is still my sole personal experience to date with an unexpected torts decision. It is what I think of when tort reform writers denounce "the lawsuit lottery." See *supra* note 4.

14. See King, *supra* note 1, at 49.

15. I use quotation marks here because the adjectives "objective" and "subjective" are inexact, even misleading. By convention, however, persons who read and write about negligence law understand the distinction that these terms pose, as well as their limitations; henceforth I will omit the quotation marks because they are distracting, while retaining this doubt about the meaning of these words.

16. This schema excludes one type of subgroup treated less leniently than "the reasonable person": the common carrier, which is said to be held to "the highest degree of care," or the care that "a very cautious and prudent person would use," or some other intensifier. CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 55 (2d ed. 1980) (citation omitted). It is unclear how, if at all, these superlatives affect judgments about the care that an actor has taken. See *id.* (noting that some jurisdictions define the carrier's duty as "ordinary care under the circumstances," and characterizing the circumstances as ones which "call for great care"); DAN B. DOBBS, THE LAW OF TORTS 261 (2000) (treating the topic of common carrier duties in a historical chapter); JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 66 (2d ed. 2000) (contending that "the notion of highest degrees of care [for common carriers], though not uncommon, makes little sense"). Regardless of whether a common carrier has unique duties of care, this category is not controversial or significant in litigation today and can therefore be omitted from a symposium about negligence in contemporary courts.

sional malpractice, the subject of King's article,<sup>17</sup> where actors are held to the standard of a member of that profession; this standard seems more demanding than that of "the reasonable person," who presumably lacks occupational training. As I elaborate below, the choices between objective and subjective approaches to the standard of care reveal no particular logic. Nor has scholarly commentary shed much light on the problem. Writers defend and attack the rules regarding certain categories—a host of articles, for instance, discuss the subject of negligence liability for mentally disabled actors<sup>18</sup>—but have not adumbrated any principle behind the practice of recognizing some group memberships as relevant, and deeming others irrelevant, to an actor's obligations of reasonable care.

Enter the concept of community as group-based constraint. Communities in this sense get special notice in negligence law. This locution is alien at first:<sup>19</sup> one might find it odd to posit, for instance, a "community" of children. Why do members of this community allow outsiders to disenfranchise them and send them to bed early? Why would the community tattle to teachers, cling to parents, and have so much trouble building its own norms? A "community" of blind persons that excludes everyone who is not blind, no matter how sincerely a non-blind person might identify with concerns relating to visual impairment, is contrary to ordinary usage. This locution also prunes away various rhetorical and sentimental meanings that grew in the American vernacular during the 1980s, when "communitarianism" arose. Indeed. Negligence law is indifferent to most of what goes on in the name of community. For this purpose, it concerns itself only with constraint.<sup>20</sup>

17. See King, *supra* note 1.

18. See Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67 (1995); John V. Jacobi, *Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA*, 33 U.C. DAVIS L. REV. 95 (1999); Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1 (1995); Edward P. Richards, *Public Policy Implications of Liability Regimes for Injuries Caused by Persons with Alzheimer's Disease*, 35 GA. L. REV. 621 (2001).

19. Some readers have found this use of the word "communities" jarring and misplaced. I defend it below. See generally *infra* Part III (parsing the term).

20. I intend no disregard of the torts literature about the civil jury as "Meliorator and Repository of Community Values." DOBBS, *supra* note 16, at 35; see also Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 380-82 (1990) (arguing that the jury is at the center of negligence determinations); Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2383-90 (1990) (noting function of the jury as a counterweight against formulaic abstraction). As a source of community values, the jury functions extradoctrinally; here I am considering "communities" at the heart of doctrinal rules.

Consistent with its preference for objective standards of behavior, the type of constraint that interests negligence law is constraint derived from a characteristic that more than one person can hold at the same time. One could imagine a profound constraint that severely hampers freedom, but is beyond the ken of negligence law because only the constrained person can understand the compulsion. Group-based constraint, then, refers to characteristics that are common to more than one individual. The existence of a “group,” however, does not necessarily mean that membership in the shared entity disciplines the actor: used in this sense, “constraint” is not adjudicatory, like the practices of tribal leadership that mete out something resembling American secular rituals of process. Group-based constraint can be any kind of characteristic shared with others that limits the freedom of an actor to exercise his freedom to inflict accidental harm—usually by incapacitating him in a verifiable way,<sup>21</sup> but sometimes (as in the case of medical malpractice, particularly during the middle decades of the twentieth century) through social, peer-enforced judgments.

The focus of this inquiry into group membership is always the risk of accidental harm. If membership in a particular group does not hamper actors in behaviors that risk injuring other people—consider for example my own memberships in “women” and “Jews,” affiliations that do not stop me much from hurting others by accident—then the standard of care will tend to ignore the actor’s membership in the group. Conversely, if group-based membership does constrain an actor from injuring other people accidentally, then negligence law will note the existence of the group and “outsource” the liability question toward that group and away from an abstract universal ideal about Persons, unmodified.

“Freedom” and “constraint” are inexact concepts, and negligence law, (in)famous for fluidity, can accommodate various degrees of constraint. Being a child constrains a person, for instance, but not all children are equally young or immature; some choose to pursue what negligence law calls adult activities or dangerous activities; some injure themselves, and some injure other people. I explore some of these nuanced treatments of constraint below. The general idea here is that the less constraint a group membership imposes on an actor,

21. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 58–60 (1997) (contending that verifiability is central to the standard of care). I return briefly to verifiability below. See *infra* note 65.



the more negligence law will be inclined to treat the actor as if he were not a member of a group, and therefore deem him not entitled to the negligence law benefits of membership. By limiting freedom while making limits look external to law, and fostering security by the same means, "communities" do some of the work of negligence doctrine.<sup>22</sup>

### I. THREE STANDARD-OF-CARE PUZZLES

As an explanation of the standard of care in contemporary American case law, the communities thesis sheds particular light on three dark corners.

#### A. *What Is the Objective Standard, and What Justifies It?*

The official story sites origination of the objective standard for judging behavior in the mid-nineteenth century, when industrialization gave rise to a modern law of accidents. New machinery tended to hurt numerous human bodies, especially those of laborers and travelers who came into contact with that high-tech innovation, the network of railroads. A proliferation of injury pressed tort law to devise rules about new risks. In this development the repeat-player defendant,<sup>23</sup> a business enterprise that regularly generates physical injuries through the course of its operations, came into view. Unlike the pre-industrial enterprises that preceded them, newer industries, starting with railroads, came to be thought of as defendants in perpetuity: the repeat-player defendant can expect to be litigating personal injury claims as long as it stays solvent and in business.

The rise of the repeat-player defendant preceded, and may have helped to generate, a literature about this new creature. Writers

22. Negligence doctrine may or may not need to reward these communities for their services. At one end of the continuum, apolitical communities like children can demand no quid for their quo. At the other end, physicians have been handed the power to write their own unique rules about what acts and omissions constitute negligence; negligence law turns over explicitly to this community almost all contentions that a member breached a professional standard of care. See *Toth v. Cmty. Hosp. at Glen Cove*, 239 N.E.2d 368, 372 (N.Y. 1968) (noting that "[t]he law generally permits the medical profession to establish its own standard of care"); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 189 (5th ed. 1984) (noting that the medical profession has "the privilege, which is usually emphatically denied to other groups, of setting their own legal standards of conduct, merely by adopting their own practices") (footnote omitted).

23. This term is an anachronism. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97 (1974) (pioneering this concept).

pondered its capacity to guard against risk, the scope of its accountability for harm, and the need to strike a balance between allowing it to carry on its activities and keeping it from causing too much unremedied injury. These jurists, notably Frederick Pollock in England and, in the United States, Oliver Wendell Holmes and Lemuel Shaw, both of the Supreme Judicial Court of Massachusetts, inaugurated modern tort law, with its signature attention to the defendant's responsibility *vel non*.<sup>24</sup> What some contemporary scholars have identified as a nineteenth-century move from strict liability to fault or negligence<sup>25</sup> may be understood more precisely—or at least less controversially—as a move toward greater focus on the defendant as an actor.<sup>26</sup>

Whether impelled by the sheer volume of accidental injury (that is, a volume of aggregate harm that was too costly for industry to absorb and pass along to customers) or, as Holmes and others argued, by the demands of reason, some kind of fault rule appeared necessary in the nineteenth century. The courts would impose liability on those defendants whose conduct they would condemn as at fault, while exonerating those whose acts or omissions did not meet the criteria of the fault rule. Once the commitment to fault emerged, another question arose: What does it mean to be at fault? In later decades scholars would explore the question at subtler new levels: fault as waste or aggregate disutility, fault as a breach of Kantian or Aristotelian ethics, fault as transgression of local norms, and the like. But this early in the official story, lawyers sought to give content to the fault standard at a general level, to cover the wide new world of accidents.

In 1837, the Court of Common Pleas in England decided *Vaughan v. Menlove*,<sup>27</sup> bestowing on the common law a fundamental point of fault doctrine that remains in place today. The *Vaughan* court faced a choice. A fault standard might condemn an actor for

24. See FREDERICK POLLOCK, *THE LAW OF TORTS* (1887); O.W. HOLMES, JR., *THE COMMON LAW* (1881); *Brown v. Kendall*, 60 Mass. 292 (1850) (Shaw, J.). By definition, of course, tort law has always concerned itself with the defendant's responsibility. The nineteenth-century shift was to put this concern at center stage, thereby displacing such earlier preoccupations as the strictures of the trespass writ.

25. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 85–99 (1977); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951).

26. See generally P.S. Atiyah, *The Legacy of Holmes Through English Eyes*, 63 B.U. L. REV. 341, 362 (1983) (suggesting that the nineteenth-century view, though of great value to the development of tort law, neglected plaintiffs' rights and interests and did not adequately distinguish between types of damage).

27. 132 Eng. Rep. 490 (C.P. 1837).

not having done all he could have done, for not fulfilling his own potential, or for not acting in good faith to the best of his ability. Alternatively, fault might be perceived as deviation from a universal ideal, a failure to hew to the standards to which all persons ought to be held.<sup>28</sup> Assuming that human beings vary innately (or in a way they cannot control) from one another in their capacity to live up to an ideal—that, in other words, every person proceeds through life with a unique blend of temperament, capacity for judgment, intelligence or wisdom, taste for risk, ability to take into account the well-being of others, and the like—the two approaches will point sometimes in opposing directions. The most familiar instance of divergence arises when a defendant uses the subjective standard to plead for leniency. The subjective standard exonerates the actor whose abilities are less than those of the universal norm if the actor measured up to his own lesser potential while causing an injury; the objective standard insists that the actor must be held liable where he fails to meet an impersonal ideal standard.<sup>29</sup> In *Vaughan*, the defendant Menlove argued that he could not comply with an objective standard because he had “the misfortune of not possessing the highest order of intelligence.”<sup>30</sup>

Chief Justice Tindal rejected the defense argument, characterizing it as a demand that “liability for negligence should be co-extensive with the judgment of each individual.”<sup>31</sup> A bad idea, Tindal continued, because individual judgment is “as variable as the length of the foot of each individual.”<sup>32</sup> The man of ordinary prudence standard, by contrast, provides juries with clear and unitary guidance.<sup>33</sup>

28. As later stated in RESTATEMENT (SECOND) OF TORTS § 283 (1965):

[T]he law has made use . . . of a hypothetical “reasonable man.” Sometimes this person is called a reasonable man of ordinary prudence, or an ordinarily prudent man, or a man of average prudence, or a man of reasonable sense exercising ordinary care. It is evident that all such phrases are intended to mean very much the same thing. The actor is required to do what this ideal individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. He is not to be identified with any real person; and in particular he is not to be identified with the members of the jury, individually or collectively.

29. A similar difference in outcome arises when the actor’s abilities are greater, rather than less, than those of the universal ideal; here, of course, the subjective standard would tend to favor liability while the objective standard would exonerate the actor. Except in the context of professional malpractice, however, this variation is relatively insignificant. Because the actor knows more about his own deviation than does the accuser, accounts of deviation that reach the courts will emphasize inferiority rather than superiority.

30. 132 Eng. Rep. at 492.

31. *Id.* at 493.

32. *Id.*

33. *Id.*

Tindal's approach to the subjective-versus-objective difficulty appears to emphasize administrative convenience: one standard is easier to apply than many. Holmes too may have had administrative convenience in mind when he defended the *Vaughan* result (without actually citing the case), although his expression cast the objective standard as something to which the actor's "neighbors" are entitled:

If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.<sup>34</sup>

Although Holmes and Tindal spoke of the putative wrongdoer as a human being, the objective standard proved expedient as a way to judge the new repeat-player industrial defendant as well as frail humanity; and acclaim for this analytic device, like the repeat-player defendant category itself, grew over the next century. Almost with one voice, commentators following Holmes have deemed the objective standard to be not only administratively convenient but substantively right.<sup>35</sup> The economists agree with the philosophers;<sup>36</sup> critical and feminist theorists do not protest; case law is consistent, at least on its surface. That the basic standard of care in negligence ought to be objective rather than subjective is one of the least controversial points in the Anglo-American common law of accidents. Because of the absence of controversy, perhaps, commentators following Tindal and Holmes have devoted little energy to the

34. HOLMES, *supra* note 24, at 108.

35. See generally King, *supra* note 1, at 49 n.1 (noting that the objective standard conduces to "the overriding compensatory (loss-spreading, distributional) goals of tort law" and that it "better promotes safety and loss reduction by its aspirational normative focus"). It should be noted that this happy harmony is limited to negligence; for contributory negligence, significant case law and commentary support a subjective standard. See *infra* Part I.C.

36. Compare WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 126-28 (1978) (explaining that high information costs justify the objective standard and that exceptions to the objective standard are implemented only where "the cost of determining the individual's due care level is low"), and Warren F. Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 GEO. L.J. 241 (1989) (concluding that courts' application of the objective standard and use of subjective exceptions is justified by an economic theory underlying the use of a single standard), with Jules L. Coleman, *Legal Theory and Practice*, 83 GEO. L.J. 2579, 2603-04 (1995) (favoring the objective standard because it comports with a generalized conception of liberty and security for all persons), and Richard W. Wright, *The Standards of Care in Negligence Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 257-59 (David G. Owen ed., 1995) (identifying the objective standard as congruent with Kantian moral theory).

task of explaining the status quo in the law, and to date the literature still lacks a robust defense of this choice.<sup>37</sup>

*B. What Explains and Unites the Subjective Exceptions to the Objective Standard?*

The smooth sea of the objective standard is dotted with islands of subjective exceptions that supplement and support, rather than contradict, the ideal of objectivity. An early defense of one subjective deviation, made in behalf of blind persons and, by extension, persons with physical disabilities, appears in *The Common Law*:

When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for any injury to himself, and, it may be presumed, would not make him liable for injuring another.<sup>38</sup>

In *Restatement (Third) of Torts: Liability for Physical Harms (Basic Principles)*, this deviation from the objective standard is extended to “physical disability” generally: “If an actor has a physical disability, the actor’s conduct is negligent if it does not conform to

37. The problem dates back to the earliest classic on the subject in the law review literature, which reports, after surveying case law, that a general theory of the conflict between objective and subjective approaches is unavailable. See Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 5 (1927) (“It would not seem possible, therefore, to say more than that as to some elements, an objective test is used, meaning by this that some external standard is set up with which, as to such elements, the actor’s conduct is compared.”). Critiquing the utilitarian-efficiency endorsement of an objective standard, Richard Wright finds a subjective standard at least as congenial for economic analysts. Efficiency would require an actor “to invest in care only to the point where the marginal cost of such care does not exceed the marginal benefits in reduced risk. Due to differing capacities and thus costs of care, this point will vary for each individual.” Wright, *supra* note 36, at 258. Wright goes on to elaborate that economist analysts assume, but do not show, that the objective standard is “a second-best efficient solution” to the problem of “very high administrative costs” associated with a subjective approach. *Id.* Having established that utilitarian-efficiency acclaim for the objective standard is unsound, Professor Wright goes on to defend the objective standard with reference to Kant: “[T]he question is one of objective Right rather than subjective virtue. The external exercise of freedom depends on sufficient security against interferences by others with one’s person and property.” *Id.* This perspective, yet another scholarly conjunction of freedom and security, perceives invasions from the plaintiff’s or victim’s perspective. From that vantage point, however, strict liability would serve at least as well as negligence; Wright has not so much defended the objective standard as rejected excuses or defenses based on inability to fulfill its demands. He has, however, noted a significant distinction between negligence and contributory negligence.

38. HOLMES, *supra* note 24, at 109.

that of a reasonably careful person with the same disability.”<sup>39</sup> Consistent with its predecessor Restatement, the *Third Restatement* also grants children a deviation from the objective ideal: “When the actor is a child, the actor’s conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience.”<sup>40</sup> Scholars date this exception as having appeared in the beginning of the twentieth century.<sup>41</sup> The deviation appears to move in the direction of leniency: more lenient still is the *Third Restatement’s* assertion that “[a] child who is less than five years of age is incapable of negligence.”<sup>42</sup>

Tort law also judges members of a profession with reference to their subgroup, rather than the objective ideal, if the complaint has accused them of negligence in carrying out their occupational duties. This doctrinal stance reaches its apex with respect to physicians: negligence law only rarely tolerates a judgment of liability against a physician if the plaintiff cannot produce expert testimony from a physician to show the defendant’s failure to comply with professional custom or a substantially accepted practice.<sup>43</sup> In this view, the category of a profession, like a disabling condition, differentiates the actor from other people, rendering him extraordinary rather than ordinary.<sup>44</sup>

The paradigm of objective-ideal-tempered-by-subjective-deviation occasionally attempts to describe the nature of the departures, but cannot. On the one hand, courts and commentators continually assert that various subjective departures impose a “lower,”<sup>45</sup> “lesser,”<sup>46</sup> or “less onerous”<sup>47</sup> standard. In this view a court will make an allowance for infirmity,<sup>48</sup> reject the unfairness of

39. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 11(a) (Tentative Draft No. 1, 2001) [hereinafter BASIC PRINCIPLES].

40. *Id.* § 10(a). The *Second Restatement* version of the rule appears in RESTATEMENT (SECOND) OF TORTS § 283A (1965).

41. See Caroline Forell, *Reassessing the Negligence Standard of Care for Minors*, 15 N.M. L. REV. 485, 488–89 (1985).

42. BASIC PRINCIPLES, *supra* note 39, § 10(b).

43. See Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 27–34 (2000).

44. See *id.* (discussing this stance, and suggesting that unmodified principles of negligence should govern medical malpractice).

45. *Holmes v. City of Oakland*, 67 Cal. Rptr. 197, 202 (Ct. App. 1968).

46. DOBBS, *supra* note 16, at 277.

47. Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 779.

48. Cf. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES

holding actors to rigors they are “incapable” of meeting,<sup>49</sup> and tolerate or condone behavior that “falls short” of reasonable care.<sup>50</sup> These descriptions view the disabilities of childhood or physical limitations as worthy of indulgent treatment: the actor, unlike most persons, is allowed to behave dangerously and get away with it.

On the other hand, as judges and scholars have observed, this notion of subjective deviations as “protective”<sup>51</sup> or “tending to advantage the actor”<sup>52</sup> is sometimes misleading. For example, the Nebraska Supreme Court once had occasion to note that the decedent, a visually handicapped person, had fulfilled her obligation to wear special glasses and add mirrors to her vehicle,<sup>53</sup> an extra burden that the non-handicapped do not bear. In a comment to *Third Restatement* blackletter, Gary Schwartz added that “a blind person may be found negligent for walking over [unfamiliar] terrain without a cane or some other form of assistance”; a person who is not blind is free to walk over unfamiliar terrain in such a way.<sup>54</sup>

A parallel problem emerges in professional malpractice, where some authorities say that the actor who is a professional—here again we focus on physicians—is held to a higher standard of care than the reasonable person. “The standard of care required for medical care givers is higher than the standard of care required of ordinary laypersons,” asserted the Texas Court of Appeals in a recent decision.<sup>55</sup> In *Johnson v. Westfield Memorial Hospital, Inc.*,<sup>56</sup> a New York appellate court also spoke of “higher” standards, placing an ophthalmologist on an upper rung and a nonspecialist physician on

AND MATERIALS 165 (10th ed. 2000) (“Most courts do not make any allowance for the mental illness of the defendant—the defendant is judged by the standard of the reasonable person.”); see also *id.* at 162 (noting that “a similar allowance has been made for the physical and mental deficiencies of old age”).

49. *Bauman v. Crawford*, 704 P.2d 1181, 1184 (Wash. 1985) (stating that “it would be unfair to predicate legal fault upon a standard most children are incapable of meeting”).

50. Korrell, *supra* note 18, at 1.

51. *DOBBS*, *supra* note 16, at 282–83 (noting that the “physical disability rule is not always protective of disabled persons”).

52. BASIC PRINCIPLES, *supra* note 39, § 11 cmt. b (“Physical disability can both advantage and disadvantage actors . . . as the possible negligence of their past conduct is considered.”).

53. See *Traphagan v. Mid-America Traffic Marking*, 555 N.W.2d 778, 787 (Neb. 1996).

54. BASIC PRINCIPLES, *supra* note 39, § 11 cmt. b. For a contemporary case in accord, see *Poyner v. Loftus*, 694 A.2d 69, 72–73 (D.C. 1997).

55. *Rehabilitative Care Sys. of Am. v. Davis*, 43 S.W.3d 649, 657 (Tex. App. 2001). To support this higher standard, the court noted that “physicians and other medical care givers possess greater skill and knowledge than laypersons.” *Id.*

56. 710 N.Y.S.2d 862 (App. Div. 2000).

the rung directly below.<sup>57</sup> The defendant, a physician's assistant, was held to an undifferentiated ordinary standard.<sup>58</sup>

In a phenomenon that parallels the view that physically disabled actors are held to a standard that is merely different, not lower, several commentators deny that the standard of care required of professionals is higher or more strenuous than that expected of a reasonable person. These scholars become less articulate, however, when they try to say what that standard *is*. Superior skills are deemed "a mere circumstance," for instance, in the *Third Restatement's* rather opaque phrase: "[E]ven though the actor's extra skills can properly be considered, these skills do not establish for the actor a standard of care that is higher than reasonable care; rather, they provide a mere circumstance for the jury to consider in determining whether the actor has complied with the general standard of reasonable care."<sup>59</sup> Another commentator calls the physician standard of care "narrower," and then a few sentences later "higher," than the ordinary undifferentiated standard, using the two adjectives as apparent synonyms.<sup>60</sup> Professor Dobbs points out that in particular instances the physician standard can be more lenient or indulgent than the ordinary reasonable person standard: for example, medical custom could approve of several alternative courses of treatment, whereas the reasonable person might well choose only the most prudent of these alternatives.<sup>61</sup>

*Not higher, not lower, just different* is the message from scholars. And yet this correction of what seems an error may itself need

57. See *id.* at 863.

58. *Id.* The idea of professionals as standing above ordinary persons in case law spreads beyond negligence. *Feldman v. Tennessee Board of Medical Examiners*, No. M1999-00474-COA-R7-CV, 2000 Tenn. App. LEXIS 257 (Tenn. Ct. App. Apr. 26, 2000), a disciplinary decision, characterized the physician-appellant as having argued in effect that his misdeeds were not egregious enough to warrant being put on probation; disagreeing, the Tennessee Court of Appeals noted that the Board of Medical Examiners had deemed Dr. Feldman's behavior "unprofessional" but not "dishonorable or unethical, thus sustaining a valuable distinction that the appellant would rather we ignore. Such a distinction is consistent with the idea that an individual who has been entrusted with a license to a [sic] practice medicine is charged with a higher standard of conduct than is a layperson." *Id.* at \*11.

59. BASIC PRINCIPLES, *supra* note 39, § 12 cmt. a. There is no separate provision in the *Basic Principles* on professional negligence, but section 12 states that "[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person," and the Reporters' Note indicates that the section "can easily be applied to cases involving the liability of professionals." *Id.*, Reporters' Note at 168.

60. Jodi M. Finder, *The Future of Practice Guidelines: Should They Constitute Conclusive Evidence of the Standard of Care?*, 10 HEALTH MATRIX 67, 78 (2000).

61. DOBBS, *supra* note 16, at 633-34.



correction. Different in what way? Why aren't the "hasty and awkward"<sup>62</sup> different too? Given the unitary ambitions of the reasonable person standard—and the defeat of the maladroit Menlove in 1837,<sup>63</sup> an outcome that almost everyone in torts has cheered—what justifies the creation of patchy subjective exceptions now and then? The higher versus lower, upward-departure versus downward-departure schema at least lines up with the experience of everyday hierarchy that most of us share, divided into three familiar tiers: a wide middle, where the reasonable person may be found, separates those few who deviate in either direction, low and high.<sup>64</sup> Imprecise statements about the standard of care accept this division; specialists say that it is wrong; and negligence law still lacks a theory to unify its subjective exceptions to the objective standard of care.<sup>65</sup>

### C. *Is Negligence Different from Contributory Negligence?*

The paradigm of unitary-ideal-tempered-by-subjective-deviation does not account for the courts' tendency to treat negligence differently from contributory negligence. In the standard account, as we have seen, a small number of conditions that are believed to affect an actor's capacity become the basis for exceptional treatment. When these conditions are absent, the actor in principle must hew to the universal ideal to avoid being found contributorily negligent.<sup>66</sup> Although nothing in the paradigm accounts for treating negligence

62. See *supra* text accompanying note 34.

63. See *supra* text accompanying notes 27–33.

64. When I typed "low w/3 middle w/3 high" into Lexis's MEGA library and MEGA file on September 8, 2001, I found this three-tier hierarchy invoked in a variety of cases. The concept turned up in discussions of shareholder appraisals, educational tracking, federal sentencing guidelines, contract disputes, land use, and other contexts.

65. Torts scholars and teachers usually fall back on two well-worn locutions when asked to state the common characteristic of all islands of subjectivity: "verifiability" and "administrative convenience." Neither term does the job of unifying the categories that receive a subjective exception to the unitary objective standard. Verifiability in an actor's condition may be necessary in order for negligence law to take note of that condition, but it is certainly not sufficient. I have brown eyes, as you can tell by looking. My weight and blood type are also verifiable. But these verifiable conditions do not determine, or even affect, the standard of care to which I am held; if I tried to argue that brown eyes give me a relaxed obligation of reasonable care (or perhaps, taking a leaf from malpractice law, that a plaintiff needs testimony from a person with O-negative blood about the O-negative defendant's behavior in order to survive summary judgment), I would not get far. "Administrative convenience" seems to cover the same ground as "verifiability"; one is hard-pressed to find anything more than a conclusion derived from the observation of judicial behavior: if courts do something, observers call that thing convenient. Neither of the two locutions tells us what will or should happen when an actor (like Mr. Menlove) asks for the boon of a subjective standard.

66. See DOBBS, *supra* note 16, at 284.

differently from contributory negligence, the *Second Restatement* was willing to condone a relaxed standard for contributory negligence in a couple of contexts,<sup>67</sup> and case law has long been replete with such divergence.<sup>68</sup>

Mental disability is the condition that provokes the most disarray in this area. Both judges and scholars have written that in evaluating the behavior of a mentally disabled actor they favor an objective standard when the actor has hurt others, and a subjective standard when the actor has hurt himself.<sup>69</sup> Decisional law so holding comes from not only the era of full-bar contributory negligence but also the current climate of apportionment, suggesting that this tendency cannot be written off as mere pity for helpless (and bygone) wretches who would otherwise recover nothing even though their contribution to their own injury was slight.<sup>70</sup> One contemporary case, evaluating the behavior of an eight-year-old plaintiff who had a mild learning disability, stated that under New York law “a plaintiff with diminished mental capacity may not be held to any greater degree of care for his own safety than that which he is capable of exercising.”<sup>71</sup> Another federal court, applying state law, also took a stance contrary to the *Third Restatement*:

[I]n Missouri and in many other courts there is a double standard of conduct with respect to negligence and contributory negligence. Ordinarily the standard of conduct applicable to one person injuring another by his acts or omissions is an objective standard. But with respect to contributory negligence, in Missouri and in many other states a subjective standard is applied to children and persons suffering from a mental deficiency.<sup>72</sup>

67. RESTATEMENT (SECOND) OF TORTS §§ 463–464(1) (1965).

68. See *Galindo v. TMT Transp., Inc.*, 733 P.2d 631, 633 (Ariz. Ct. App. 1986) (“Some authorities support the adoption of a double standard of care, namely an objective, external standard for defendant’s negligence and a ‘relaxed,’ subjective standard for contributory negligence.”) (citation omitted).

69. Writing in the contributory negligence era, Fleming James explicitly advocated such an approach. See Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691 (1953); Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 786–89 (1950).

70. Cf. BASIC PRINCIPLES, *supra* note 39, § 11 cmt. e (“The shift in tort doctrine from contributory negligence as a full defense to comparative responsibility as a partial defense weakens whatever arguments there otherwise might favor a dual standard.”).

71. *Banks v. United States*, 969 F. Supp. 884, 893 (S.D.N.Y. 1997) (citations omitted); see also *Mochen v. State*, 352 N.Y.S.2d 290, 294 (App. Div. 1974) (“A plaintiff whose judgment has been blunted by mental disability should not have his conduct measured by external standards applicable to a reasonable normal adult anymore [sic] than a physically disabled plaintiff is held to the same standards of activity as a plaintiff without such a disability.”) (citations omitted).

72. *Snider v. Callahan*, 250 F. Supp. 1022, 1023 (W.D. Mo. 1966) (citations omitted).

Indeed, the state courts that favor a relaxed standard for plaintiffs seem to constitute a majority of those that have addressed the question,<sup>73</sup> despite the stance in the *Third Restatement* insisting that mentally disabled plaintiffs be treated the same as mentally disabled defendants.<sup>74</sup> Analyzing the cases, Gary Schwartz admitted that they take a variety of positions.<sup>75</sup> Although the Reporters' Note obscured this point somewhat, most of the decisions mentioned do not support the *Third Restatement* view, and several of them relax the standard of care for plaintiffs.<sup>76</sup>

Professor Schwartz may have been right when he implied in *Basic Principles* that courts, influenced by obsolete vestiges left over from the time of contributory negligence, are making wrong decisions in favor of plaintiffs.<sup>77</sup> In this view, the *Third Restatement*, by refusing to distinguish negligence from comparative negligence, simply modernizes accident law. But it is not obvious that ignoring plaintiffs' mental deficiencies is more progressive or up-to-the-minute than taking it into account. One student commentator, in apparent disagreement with this thesis about a unitary standard as modernization, claims that the unitary approach is old and the "double standard" new: she writes that "[r]ecently . . . courts have applied a more lenient standard" to mentally deficient plaintiffs, having traditionally refused to make any allowance for this deviation.<sup>78</sup>

The *Second Restatement's* treatment of this point is telling. Its draftsmen eschewed overt pity for plaintiffs and chose a vague, hemming-and-hawing, it-all-depends-on-the-circumstances tack to say

73. See Alison P. Raney, Note, *Stacy v. Jedco Construction, Inc.: North Carolina Adopts a Diminished Capacity Standard for Contributory Negligence*, 31 WAKE FOREST L. REV. 1215, 1226-31 (1996) (summarizing cases).

74. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 3 cmt. a (1999) (abolishing "certain ameliorative doctrines" for defining plaintiff's negligence); BASIC PRINCIPLES, *supra* note 39, § 11 cmt. e (justifying disregard of actor's mental and emotional disability and applying rule equally to issues of negligence and contributory negligence).

75. BASIC PRINCIPLES, *supra* note 39, § 11, cmt. e.

76. *Id.*, Reporters' Note at 160. This paragraph about mentally disabled plaintiffs cites nine cases. Some of these decisions both support and refute the *Third Restatement* view: for instance, courts have ruled against the plaintiff but declared in dicta that a relaxed standard will sometimes be proper. See *Fox v. City & County of San Francisco*, 120 Cal. Rptr. 779 (Cal. 1975); *Hobart v. Shin*, 705 N.E.2d 907 (Ill. 1998); *Jankee v. Clark County*, 612 N.W.2d 297, 318 (Wis. 2000). Other cited cases explicitly endorse a relaxed standard for plaintiffs. See *Stacy v. Jedco Constr., Inc.*, 457 S.E.2d 875, 879 (N.C. Ct. App. 1995); *Feldman v. Howard*, 214 N.E.2d 235, 237 (Ohio Ct. App. 1966).

77. BASIC PRINCIPLES, *supra* note 39, § 11, Reporters' Note at 160.

78. Raney, *supra* note 73, at 1215.

why the rule for plaintiffs might perhaps be different from the rule for defendants:

[T]he application of the standard to particular facts may lead to different conclusions as to whether the same conduct constitutes negligence or contributory negligence. . . . There may be circumstances in which a jury may reasonably conclude that a reasonable man would take more, or less, precaution for the protection of others than for his own safety. Thus the risk of harm to others may be more apparent, or apparently more serious, than the risk of harm to the actor himself. . . . He may have undertaken a responsibility toward another which requires him to exercise an amount of care for the protection of the other which he would not be required to exercise for his own safety. The relation of the parties, the particular circumstances, and all other relevant factors are to be taken into account. In the great majority of cases it is probably true that the same conduct will constitute both negligence and contributory negligence, but it does not necessarily follow in all cases.<sup>79</sup>

Interesting. Mentally disabled plaintiffs have always been the hard case in contributory negligence—the recurring instance of a gap between defendants’ and plaintiffs’ standards—but the *Second Restatement* does not purport to speak about these people, preferring instead a generic reference to relationships. Moreover, the *Second Restatement* refuses to characterize its departure as either upward or downward (its drafters speak neutrally of “more, or less, precaution”), even though case law and scholarly writings typically deem the plaintiff’s standard lower or “relaxed.” Although it cannot find precise words to express its stance and has to fall back on “circumstances,” “the relation of the parties,” “prior undertakings,” and “all other relevant factors” in its treatment of plaintiff negligence, the *Second Restatement* manifests its recognition of something like the group-based constraint that communities impose.

## II. COMMUNITY = CONSTRAINT

One dictionary gives nine definitions of the word “community.”<sup>80</sup> Sociologists, not to be outdone, have long found dozens and dozens of meanings in the word.<sup>81</sup> The aspect of this term relevant to the standard of care relates to limits on freedom. Just as negligence law posits that the person of ordinary prudence acts or refrains from

79. RESTATEMENT (SECOND) OF TORTS § 464 cmt. f (1965).

80. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 414 (1996).

81. See George A. Hillery, Jr., *Definitions of Community: Areas of Agreement*, 20 RURAL SOCIOLOGY 111 (1955) (classifying and analyzing ninety-four meanings of the word “community”).

action because of an internalized sense that not all behaviors may be pursued or avoided simply as she pleases, negligence law also sees the person attached to a "community" similarly constrained with respect to risky actions. Regardless of whether constraint derives from an actor's voluntary membership in a group or from an unchosen characteristic such as a physical disability, a person hampered by group-based constraint has fewer choices and prerogatives with respect to risky behaviors than a person who is not so attached.<sup>82</sup>

This rather pinched interpretation of "community" does not disparage other meanings of the word, which emphasize the deep importance of networks and relationships to human life; it articulates only the law's concerns, which are of course only a small fraction of all social concerns.<sup>83</sup> An understanding of the importance of constraint in defining community pervades the law. Consider geography, for instance, listed first among numerous definitions of community in one dictionary: "[a] group of people living in the same locality and under the same government."<sup>84</sup> For purposes of the law, geographic constraints can sometimes matter: contexts like land use and "community policing"<sup>85</sup> refer to the people affected geographically by law-related change, but will sometimes not matter, as in a parent wondering who from her neighborhood will go to the same state university campus as her teenager. For law, constraint is the linchpin.<sup>86</sup> Only when geography signifies constraint—dishes in *your*

82. Here I take no position on the philosophical or socio-psychological accuracy of this stance. The liberal notion that a person exists prior to, or apart from, group affiliation has received ample criticism, and I will not defend it here other than to say that it pervades American jurisprudence beyond negligence law—as any litigator who has tried to argue for, say, "group rights," or a deterministic evasion of criminal responsibility, can attest. Cf. Seavey, *supra* note 37, at 1–2 & n.2 (noting that much that underlies negligence law, especially the notion of "a mind and will which directs a bodily mechanism," "is out of line with modern scientific thought"; key distinctions "are very likely scientifically incorrect").

83. See generally Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 688 (1992) (arguing that "community" and "communitarianism" have multiple meanings within legal theory).

84. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 374 (4th ed. 2000) [hereinafter AMERICAN HERITAGE DICTIONARY].

85. See Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1286–87 (2000) (noting some problems with a geography-based definition of community policing).

86. An example of geographic constraint: should authorities announce a plan to expand Hartsfield Airport, I, who live in a house that I own in Atlanta, could join a geographic "community" to protest in court. But if I tried to become a party to a similar lawsuit protesting an expansion of the Orange County airport in California, I would fail, even if I identified myself sincerely as a member of a national community of concerned citizens, because I would not have to live with the externalities of an Orange County airport expansion.

cupboard rattle, *your* air becomes polluted, a sex offender who could hurt *you* moves nearby—does the law take an interest in geography-based community.

Thus far, the working definition of community has lined up with at least part of a conventional understanding of the word. In addition to geography, the themes of “similarity” and “common interests” are found in both my dictionary and my use of the word in this Article. I become more revisionist, however, in rejecting shared interactions or fellowship as integral to the word.<sup>87</sup> For instance, the community of deaf persons, as I am using the word here, aggregates every deaf person with all other deaf people—some of whom might not even know, let alone relate to, even one other person who is deaf.<sup>88</sup> In the case of children, negligence law identifies a community of persons who have no formal input into the standard of care to which they will be held. These meanings certainly seem illiberal, much more so than forcing a professional to comply with group norms that she can influence, and that identify her as a person who communicates and interacts with peers in a chosen endeavor. But it is the social need for constraint, or “security” as contemporary torts scholars have put the point, that creates this illiberality; negligence law comes by it only derivatively.

This reference to the function of negligence law suggests several pragmatic criteria for determining whether membership in a particular group will affect an actor’s standard of care. First, the group must impose fetters that limit a member-actor from engaging in risky behavior: women and Jews, as I mentioned, are among the many groups that get no subjective standard. Second, the negligence system must be able to administer the subjective exception. This criterion, commonly labeled as “verifiability” or “administrative

87. See AMERICAN HERITAGE DICTIONARY, *supra* note 84, at 374 (providing etymology from the Latin *communitas*, or fellowship, which suggests interaction). Here I note the suggestion of Richard Wright that a better term than “communities” in this Article would have been “unordinary people,” meaning persons who are exempted from the objective standard because of their unusual characteristics. “Community,” argues Professor Wright, necessarily presupposes interaction among the membership, an element missing from my working definition. I take the point, but still prefer an existing word to a neologism, and also want to help undo a recurring mischief in legal scholarship: “community” and “communitarianism” in law are tied to constraint, and constraint-free definitions of the word “community” do not belong within the law.

88. It may be necessary to repeat that I am not making a comment on any person’s essence, but rather on the stance of negligence law with respect to that person’s actions when these actions are challenged as substandard. Cf. *supra* note 82 (conceding that various premises of negligence doctrine may be unsound).

convenience,”<sup>89</sup> includes recognition within the system of common law adjudication: a newly formed or recently identified group might truly constrain an actor-member, but until the negligence system has grown accustomed to the category through experience in litigation, it cannot acknowledge the group with a subjective standard. A third point relates to the risk of abuse, a theme present in “verifiability”: no actor should be allowed to assert group membership as a free pass, a retreat from the rigors of an objective standard, if she was not really constrained by the deviating condition at the time of the injury. Accordingly, negligence law requires the actor who gains the benefit of a subjective standard to have been a member of the group before the accident occurred.<sup>90</sup>

“Community” in this sense thus helps to answer the three standard-of-care questions summarized in Part I, especially the first and second, but also the third. In response to the first “puzzle,” we may now characterize the objective standard as the means by which “ordinary” people, posited to be free of group memberships that constrain them, are inhibited from imposing excess risk to the security of others. The objective standard is necessary because these people would be otherwise too free to inflict injury.<sup>91</sup> As a corollary, and with respect to the second question, subjective exceptions relate to various group-based constraints. The distinction between negligence and contributory negligence noted in the third question also rests on constraint. I take up that last point below, at the end of Part III.

### III. THE COMMUNITIES OF NEGLIGENCE LAW

Here we assess the communities that negligence law honors, or fails to honor, with a subjective standard.

89. *See supra* note 65.

90. Robert Cochran and Christina Bohannon have separately suggested to me another possible criterion: they perceive the standard of care in terms of something like empathy or sympathetic imagination. When an outsider like a juror or judge can think of the actor's characteristics as something affecting himself or herself, the characteristics get taken into account. While acknowledging the influence of this idea on my thinking, I find the empathy paradigm too vague and indeterminate to be a criterion.

91. Disagreeing slightly with this characterization, Jean Love has contended to me that the objective standard can be understood simply as a device to compensate injured persons, with the subjective variations providing intermittent relief to defendants in settings where the law wishes to treat them leniently. Although I prefer my own thesis, in part because it fits better with the fact that subjective standards offer more than mere lenity to actors, *see supra* text accompanying notes 45–46, I believe Professor Love's account elegantly explains many of the controversies that roil standards of care.

### A. *The Community of Children*

Adults often deny that to be a child is to live under deeply chafing constraint. For children, constraint comes from both physical weakness—small stature, impatience, inexperience, inchoate powers of coordination, and the like—and domineering caretakers.<sup>92</sup> Whereas children experience their lives as permeated with an often bewildering authoritarianism, adults imagine them as free from, say, mortgage payments (individually chosen and advantageous contracts), the daily grind of employment (less freely selected, but still a venue of personal choice), emotional obligations (a source of deep satisfaction), or legal accountability for one's actions (a condition that has always been linked to privileges). "Bertrand Russell said that every child has dreams of power—just as adults have sexual-wish dreams," mused Astrid Lindgren,<sup>93</sup> the most widely translated writer in Swedish history.<sup>94</sup> "And when I read that, I thought, that's why Pippi's so popular."<sup>95</sup>

As readers may remember, the fictitious child Pippi lives alone in a big house that she doesn't bother to keep clean.<sup>96</sup> She disdains school as the quintessence of irrational and tedious adult authority. Because she possesses an undepletable stash of gold coins, left for her by a long-gone pirate father, she can tell anybody to go to hell. This character is the exact opposite of "children" in negligence, who are so lacking in freedom that they do not need the sanctions of tort law to keep them in line.

Standard accounts of a separate standard for children, neglecting this crucial attention to their lack of freedom à la Pippi Longstocking, do not say convincingly why negligence law pays attention to the actor's status as a child. Consider the rationale of the *Third Restatement*:

92. The latter condition may be more significant than the former. See generally Jessica Kulynych, *No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children*, 27 SOC. THEORY & PRAC. 231 (2001) (characterizing children as oppressed, segregated, and disenfranchised).

93. Martha Sherrill, *Astrid Lindgren and Her 'Pippi' Power; The Children's Author as Animal Advocate*, WASH. POST, Mar. 20, 1989, at B1.

94. Paul Binding, *Books for Children: Astrid at 90*, THE INDEPENDENT, Dec. 7, 1997, at 30 (noting that *Pippi Longstocking* has been translated into 50 languages, with more than five million copies of the English edition having been sold).

95. Sherrill, *supra* note 93.

96. ASTRID LINDGREN, *PIPPI LONGSTOCKING* (Florence Lamborn trans., Puffin 1997) (1950); ASTRID LINDGREN, *PIPPI GOES ON BOARD* (Florence Lamborn trans., Puffin 1997) (1957); ASTRID LINDGREN, *PIPPI IN THE SOUTH SEAS* (Gerry Bothmer trans., Puffin 1997) (1959).



Children are less able than adults to maintain an attitude of attentiveness towards the risks their conduct may occasion, and the risks to which they may be exposed. Similarly, children are less able than adults to understand risks, to appreciate alternative courses of conduct with respect to risks, and to make appropriate choices from among those alternatives.<sup>97</sup>

Well and good, but these same conditions pertain equally to some mentally disabled persons, a category that the *Restatement* refuses to recognize with subjective deviation. A second rationale is the developmental one: “children have to *learn* to be careful, and ought not be exposed to tort liability for conduct that is reasonable in light of their stage of development during the learning process.”<sup>98</sup> Again well and good—few would quarrel with the statement that children are developing—but why then does negligence law treat children like adults when they engage in “adult activities” or “dangerous activities,” behaviors that also take place in a context of growing up?

The concept of community-as-constraint helps to complete the rationale supporting a subjective standard for actors who are children. In this perspective, the infirmities of childhood are not fundamentally deficiencies in wisdom or experience from which many people who are not children suffer—without winning recognition from tort law—but rather illustrations of unfreedom.<sup>99</sup> Unfreedom best explains the lenient treatment that children receive from negligence doctrine. If children are merely heedless, feckless, and inattentive by nature, as the *Third Restatement* implies—little accident-bombs likely to go off at any time—then tort doctrine should respond not with leniency but by imposing stringent duties of supervision on adult caretakers, or perhaps strict liability on the children themselves, in a status-based analogy to “abnormally dangerous activities.”<sup>100</sup>

97. BASIC PRINCIPLES, *supra* note 39, § 10 cmt. b.

98. JOSEPH W. GLANNON, *THE LAW OF TORTS* 67 (1995).

99. Thus it seems to me that Caroline Forell is on to something, but ultimately gets it wrong, when she coins the phrase “carefree activities” as the antithesis of adult activities. Forell, *supra* note 41, at 485. The ambiguous “carefree” has several potential meanings, of which Forell’s definitional phrase—“activities where, even if the minor uses poor judgment, harm to others is very unlikely,” *id.*—is not the most obvious. With “carefree,” Forell is getting at a concept like “unfree,” an adjective that corresponds better with the case law. For instance, courts consistently deem children younger than four incapable of negligence and contributory negligence. See BASIC PRINCIPLES, *supra* note 39, § 10, Reporters’ Note, at 139–42. From this incapacity, it follows that the activities that very young children undertake are unfree, rather than carefree.

100. See BASIC PRINCIPLES, *supra* note 39, § 20 (describing the category of abnormally dangerous activities and imposing strict liability for resultant injuries).

A similar confusion about unfreedom is manifest in the inability of judges and commentators to come up with a label for such activities as driving an automobile or operating a snowmobile. The leading case on this point declined to propound an analytic category, and simply asserted that operating an automobile, airplane, or powerboat would subject an actor to the adult-level objective standard, even if he were a child;<sup>101</sup> Professor Dobbs rightly objects to the absence of a label.<sup>102</sup> The most accepted analytic summaries of the exception are “adult activity” and “inherently dangerous”; both labels have been rightly criticized as misleading.<sup>103</sup>

The “communities” concept, by contrast, recognizes that some children may take a bold step toward freedom, away from the authoritarian constraints that limit their movements. In this sense the terms “adult activity” and “inherently dangerous” each tell a part of the story. Like a volunteer soldier, a mortgagor, or a citizen whose driver’s license signifies both a privilege to operate an automobile and vulnerability to jury duty, this actor has assumed the combination of selected risks, pleasures, and accountability that characterizes autonomous adult life. Having renounced the shackles of childhood in pursuit of a risky activity, she must accept in their place the rigors of adult-level reasonable care.<sup>104</sup>

101. See *Dellwo v. Pearson*, 107 N.W.2d 859 (Minn. 1961).

102. See DOBBS, *supra* note 16, at 300 (“The mere list of activities in *Dellwo v. Pearson*, though perhaps a circumspect beginning, hardly describes for lawyers the other kinds of activities that are indistinguishable in principle. If the list is the thing and not a principle behind it, it will be impossible to know what other activities should be added to the list.”).

103. See, e.g., *id.* at 299–300. Professor Dobbs relates criticism that the “adult activities” definition “both . . . goes too far and . . . does not go far enough to impose responsibility,” and notes that automobile driving, the quintessential activity covered by this exception, is “hardly one that is normally engaged in only by adults.” *Id.* at 300. With respect to the “inherently dangerous” definition, Dobbs suggests that “inherent danger is like beauty, to be found in the eye of the beholder.” *Id.*

104. This stance permits me to stray from the prevailing scholarly view that the operation of firearms should subject the actor to an adult-level objective standard of care. See BASIC PRINCIPLES, *supra* note 39, §10 cmt. f; Forell, *supra* note 47, at 490. Notwithstanding this commentary from writers who happen to live in large cities, or the northern United States, most courts that have passed on this question favor a child standard of care for children who operate firearms. See BASIC PRINCIPLES, *supra* note 39, Reporters’ Note at 144–45 (citing cases). The communities thesis lines up with the holdings of most courts, recognizing that in some locales a youngster who picks up a shotgun is not thereby making a claim to adult freedom. This activity, like after-school soccer in other regions, can fit into a child’s routine. Elsewhere, the use of firearms will signify a clear repudiation of childhood constraints.

### *B. The Community of Persons with Physical Disabilities*

This relatively tranquil corner of negligence law needs only brief discussion here. In the vernacular, “disabled” and “handicapped” posit that a minority of human beings are constrained by the visible, verifiable, “objective” condition of their bodies. Although a growing disabilities studies movement has challenged the belief that it is immutable physical deficiencies—rather than mutable social practices—that constrain,<sup>105</sup> current negligence law still operates under this conception. Seen through the community-as-constraint lens, certain physical aspects distinguish the actor from the undifferentiated reasonable person.

A leading treatise divides the rule about physical disabilities into a “protective” side and a “demanding” side;<sup>106</sup> both concepts rely on the notion of constraint. The “protective” rationale emerges in William Prosser’s proclamation that the disabled person is entitled to “live in the world,” and should accordingly not be deemed negligent, for instance, merely because he went out into the world unable to see.<sup>107</sup> The communities-as-constraint thesis perceives the physically handicapped person as entitled to a protective deviation from the objective standard because her disability serves to limit her freedom to engage in risky behaviors. The “demanding” side of the rule, as was noted above, will occasionally require a disabled person to invest more in precautions, or to do something more, than would be required of a non-disabled person.<sup>108</sup> Here again, the communities-as-constraint thesis recognizes that a subjective standard does not signify a free pass, but rather a different set of shackles. Instead of being held to the rigorous reasonable person standard, the actor is held to a comparably rigorous set of demands related to disability.

### *C. The Community of Persons with Mental Disabilities*

Decisional law about mentally disabled defendants’ negligence (as contrasted with plaintiffs’ negligence) is relatively sparse; these cases, throughout the last hundred years or so, have almost always

105. See generally LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 24–26 (1995) (describing disability as a social construct rooted in nineteenth-century notions about “the norm”). A related literature makes a similar claim about children. See Kulynych, *supra* note 92, at 243–45.

106. DOBBS, *supra* note 16, at 282–83.

107. KEETON ET AL., *supra* note 22, at 176.

108. See *supra* notes 38–39, 51–54 and accompanying text.

refused to recognize this disability as a basis for deviating from the objective standard.<sup>109</sup> Scholars have maintained steady opposition to this approach.<sup>110</sup> Notable among these dissidents was Oliver Wendell Holmes, patriarch of the objective standard, who believed that any “insanity of a pronounced type [that] manifestly incapacitat[ed] the sufferer from complying with the rule” should excuse what would otherwise have been negligent conduct.<sup>111</sup>

The three *Restatements* document a long struggle on this point. Leading authorities of the *First Restatement* generation favored a subjective rather than an objective standard for the mentally disabled.<sup>112</sup> According to one writer, the absence of a position on the tort liability of mentally disabled actors in the *First Restatement* marks a now-bygone hope among its reporters that silence on the point would change the direction of decisional law.<sup>113</sup> When the *Second Restatement* abandoned this neutrality and prescribed an objective standard for mentally disabled actors,<sup>114</sup> it also clung a little to the old hope, noting that “in the case of negligence, the mental condition may rob the individual of all capacity to understand and appreciate the risk involved in his conduct or to take the proper precautions against that risk, so there is no negligence to be found.”<sup>115</sup> The *Third Restatement* abandons this struggle and does not equivocate: “Unless the actor is a child, the actor’s mental or emotional disability is not considered in determining whether conduct is negligent.”<sup>116</sup>

If there exists a community of mentally disabled actors, then, this community has a status in negligence law that is shakier than that of physically disabled actors or children. This denial has proved hard to defend, especially in post-1991 writings that must take into account

109. For citations to contemporary case law, ranging from 1961 to 2000, see BASIC PRINCIPLES, *supra* note 39, § 11, Reporters’ Note at 159. Earlier cases, ranging from 1887 through 1992, are cited in Korrell, *supra* note 18, at 4 n.10.

110. Contemporary critics argue that this almost univocal line of decisions relies on an unreliable scrap of seventeenth-century dicta about “a lunatick.” See Goldstein, *supra* note 18, at 68–69 (quoting *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616)); Richards, *supra* note 18, at 627–28 (same).

111. HOLMES, *supra* note 24, at 109.

112. See Jacobi, *supra* note 18, at 106 & n.65 (relating the views of James Barr Ames, Francis H. Bohlen, and W.G.H. Cook).

113. See William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 53 (1960).

114. RESTATEMENT (SECOND) OF TORTS § 283B (1965). One commentator sees this 1948 decision of the American Law Institute as a concession of “defeat”; commentators had tried and failed to achieve a contrary rule in the courts. Korrell, *supra* note 18, at 5–6.

115. RESTATEMENT (SECOND) OF TORTS § 895J cmt. c (1965).

116. BASIC PRINCIPLES, *supra* note 39, § 11(c).

the Americans with Disabilities Act:<sup>117</sup> a federal statute, said to reign “supreme” above the common law, has deemed disabling mental conditions no less real than other kinds of disability.<sup>118</sup> The attempt at a rationale for the unitary objective standard found in the *Third Restatement* is pertinent:

It is useful to distinguish between limited or moderate mental disorders and those disorders that are the most serious, such as psychoses. The former are disregarded partly because they ordinarily are not especially important as an explanation for conduct and also because of the problems of administrability that would be encountered in attempting to identify them and assess their significance. The disregard of more serious mental disorders is also based in part on administrative considerations.<sup>119</sup>

Regarding serious mental illness, these administrative considerations are (1) the discouraging track record of the insanity defense in criminal law, (2) difficulties in establishing a causal connection between a mental disorder and conduct that appears unreasonable, and (3) the inference to be drawn from deinstitutionalization, which is that persons with severe mental illness should pay for the harms caused by their substandard conduct.<sup>120</sup>

This comment to the blackletter pays attention to the salient characteristics of mentally disabled actors, but adds a couple of unfortunate distractions: neither the insanity defense in criminal law nor deinstitutionalization as a social policy can support a position within negligence doctrine. Let us note what is helpful. The *Restatement* distinguishes between “limited or moderate” disorders and “serious” disorders. The adjectives speak, in different ways, to constraint. “Limited or moderate” conditions are those that add a wrinkle of complication—one might speak of “personality”—to an individual’s psychological life. They do not constrain.<sup>121</sup> “Serious” disorders do not constrain either, at least not in a sense relevant to

117. 42 U.S.C. §§ 12,101–12,213 (2002).

118. *Id.* § 12,101(a)(1); Jacobi, *supra* note 18, at 136 (“Where state common law conflicts with the ADA, the ADA must prevail because federal law is supreme.”) (citing the United States Constitution).

119. BASIC PRINCIPLES, *supra* note 39, § 11 cmt. e.

120. *Id.*

121. Yiddish-English speakers sometimes refer to their “own *mishugaas*.” *Mishugaas*, literally craziness or insanity, figuratively connotes a mild, benign, even humorous eccentricity. We each have a comparable share of *mishugaas*, goes the premise, although we vary as to its manifestations. This universal trait would not entitle an actor to a deviation from the objective standard of care. I do not mean to suggest that all persons suffer from (at least) “limited or moderate” mental disorders, only that the notion of a nondisabling, nonconstraining mental disorder is familiar.

negligence law. Although a mental disability can limit freedom severely—illnesses like psychosis keep people from education, employment, communication, satisfying personal relationships, and other sources of expression—it does not stop an actor from imposing risks on others.<sup>122</sup> Because of their tendency to obstruct prudence and foresight, these kinds of disability constrain an actor more from taking precautions than from roaming freely in a risky manner.

Thus, neither a “limited” nor a “moderate” nor a “serious” mental disorder shackles an actor in a way that negligence law will recognize. Without constraint, there is no community; without a community to serve as its reference point, negligence law cannot sustain a systematic deviation from the objective standard. Secondary arguments about administration (such as a policy in favor of deinstitutionalization, the need to impose incentives of care on family members, or the difficulty of proving both the existence of a condition and its causal significance) may or may not be of interest, depending at any time on how the policy winds blow.<sup>123</sup> Although new understandings about the nature of mental illness will at a future date likely modify the standard of care in negligence, the function of constraint stays relatively constant.

#### *D. Malpractice and Professional Communities*

Similar to its recognition of disabilities in terms of their constraint, negligence law regards professions and occupations in terms of the degree of force they exert on individuals who make up their membership. The concept of “custom” aids the standard of care. For most subgroups, negligence law deems occupational custom on matters pertaining to safety to be relevant, but not determinative of any outcome: “inconclusive evidence of due care,” as Professor

122. One reader queries whether I have satisfactorily distinguished children from the mentally disabled in this respect. Certainly in this description children and the mentally disabled appear similarly uninhibited. But I perceive the constraint of childhood as comprised of physical weakness, as well as lack of socialization or inhibition. See *supra* note 92 and accompanying text.

123. The comment in *Basic Principles* goes on to remark that “deinstitutionalization becomes more socially acceptable if innocent victims are at least assured of opportunity for compensation when they suffer injury.” BASIC PRINCIPLES, *supra* note 39, § 11 cmt. e. Because negligence law does not start a priori with a preference for deinstitutionalization (the way it does start, for instance, with a preference for safety), using the deinstitutionalization trend or movement in support of a rule is puzzling. One might expect similar blowing-in-the-wind variation in the way medical experts, and then lawyers, choose to deal with the neurobiological bases of mental disorders. See *id.* (conceding that “many mental disabilities have organic causes”).

Dobbs has phrased the rule.<sup>124</sup> Seen in terms of the communities thesis, this stance regards custom as a distinct but mild source of constraint. An actor who complies with occupational custom about safety implicitly acknowledges the force of community membership as a limit on her freedom; an actor who defies a safety norm expresses disregard for security, and her antagonist can call her to account by introducing this custom into evidence against her.

As was mentioned, physicians stand at the apex of custom in negligence law: whereas courts evaluating claims of malpractice or other occupational negligence against members of many other occupations think of custom as merely relevant or admissible, the law of medical malpractice equates custom or substantially accepted practice with the standard of care.<sup>125</sup> "In negligence suits against railroads, banks, drovers, or any defendant other than a medico," according to a leading treatise, "the plaintiffs usually need not prove that the defendants departed from the ways of their craft, and the defendants do not escape liability, as a matter of law, merely by showing that they acted like others following the same occupation."<sup>126</sup> This "anomaly"<sup>127</sup> bespeaks an unusual degree of constraint within the profession of medicine.

Public health scholar Marshall Kapp depicts physicians as working under conditions of profound and internalized constraint:

Tort standards require that physicians provide reasonable care under the circumstances, as judged against the level of knowledge and skill exercised by their professional peers. . . . By contrast, most physicians impose a considerably higher standard on themselves and their colleagues: namely, perfection. Physicians are professionally socialized into a "culture of infallibility," in which errors in patient care are . . . manifestations of unacceptable character flaws. . . . In light of this perfectionist mentality, being accused in a public forum, such as a court, of committing an error by an external scrutinizer cannot be interpreted by the physician in any manner other than as a deeply personal affront.<sup>128</sup>

Constraint-through-cohesion characterized this community throughout the twentieth century. For decades a potent norm of

124. DOBBS, *supra* note 16, at 393; see generally Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 5 (1999) (noting dominance of the "evidentiary" approach to custom).

125. See *supra* notes 22, 43–44 and accompanying text.

126. MORRIS & MORRIS, *supra* note 16, at 56.

127. *Id.*

128. Marshall B. Kapp, *Medical Error Versus Malpractice*, 1 DEPAUL J. HEALTH CARE L. 751, 755 (1997) (citations omitted).

cohesion kept physicians from testifying against one another in court.<sup>129</sup> The medical establishment spent decades fending off one group of potential competitors so vigorously that a federal court found the American Medical Association, along with eleven other prominent professional groups working in a tight and cohesive strategy, to have violated the Sherman Act thereby.<sup>130</sup> For decades American physicians only rarely would retire early, or switch to a different line of work, preferring to remain as long as possible in their identity-forming vocation.<sup>131</sup> Although many believe that this unity has deteriorated,<sup>132</sup> for the time being the medical profession is still uniquely cohesive and constraining; it maintains a unique hold over its members.<sup>133</sup> And so negligence law still pays this profession the unique tribute of an especially staunch exception to the unitary, objective standard of care.<sup>134</sup>

129. See *DIAMOND ET AL.*, *supra* note 16, at 107–08 (noting that in the past, plaintiffs “frequently could not find a doctor willing to testify against the defendant due to fear of ostracism by other doctors in the community”). In a 1999 speech before an audience of Danish physicians, the president-elect of the American Medical Association recounted that in 1934 the journal *Medical Economics* reported that it was impossible to recover a judgment against a physician for malpractice. See Thomas R. Reardon, First, Do No Harm: Medical Liability in the United States, Address Before the Danish Medical Association Conference (Jan. 18, 1999), in 65 VITAL SPEECHES OF THE DAY 399, 401 (1999).

130. See *Wilk v. Am. Med. Ass’n*, 895 F.2d 352 (7th Cir. 1990) (upholding antitrust claim of plaintiff chiropractors). Until 1980, AMA policy prohibited physician-members from associating with chiropractors. See *id.* at 356.

131. See Patrick Morrison, *Frustrated Docs Take New Roles*, INDIANAPOLIS BUS. J., July 16–22, 2001, at 23.

132. Judge Posner has offered an unsentimental summary of how cohesion in the medical profession has grown weak:

[T]he explosion of medical knowledge . . . has been accompanied by a rapid decline in the mystique elements formerly so conspicuous in this profession—highly discriminatory selection practices, the concealment of carelessness and incompetence (the “conspiracy of silence” and the often literal “burying of mistakes”), the physician’s assumption of omniscience in dealing with patients and refusal to level with patients with regard to prognoses, hostility to forms of health maintenance that do not require esoteric medical skills (such as diet and exercise), . . . [and] disdain for outsider methods or disciplines such as statistics and public health. . . .

Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 10 (1998).

133. See John R. Siberski, *Medicine: Vocation or Job?*, AMERICA, May 25, 1996, at 22 (insisting that the contemporary profession of medicine is more properly described as a “vocation” than as a “job” and emphasizing the concept of “a higher calling”).

134. In recent years, the legal profession has come closer to achieving a similar tribute. See *Developments in the Law—Lawyers’ Responsibilities and Lawyers’ Responses*, 107 HARV. L. REV. 1547, 1564 (1994) (noting that although at one time judges hearing legal malpractice claims would routinely refuse to admit expert testimony, “courts in a majority of jurisdictions now require that a malpractice plaintiff present testimony from a qualified expert on the particular requirements of the standard of care and the defendant’s fulfillment of those obligations”). Nevertheless, legal malpractice still contains a “common knowledge” exception generally unavailable to plaintiffs in medical malpractice, see *DOBBS*, *supra* note 16, at 1390, and legal malpractice still lacks well-developed case law on the necessity of specialist expert witnesses. See *id.* at 1389.



*E. Postscript: Constraint without Preexisting Groups, or a Community in the Moment*

The communities thesis indirectly helps to solve the third standard of care puzzle: why courts often treat negligent plaintiffs more leniently than negligent defendants. The thesis is also germane to another aspect of the standard of care not previously discussed here—the judicial recognition that emergency and sudden incapacity release actors from some of the demands made by the objective standard.<sup>135</sup> Once constraint comes to the fore, observers can more easily see why these actors often gain a favorable deviation from the objective ideal.

With respect to contributory negligence, courts start from an axiom that persons do not wish to harm themselves; human beings are constrained by a law of self-preservation. As one commentator recounts, the notion of self-love, or the desire to keep oneself alive and well, pervades Western political philosophy and American jurisprudence.<sup>136</sup> This premise may explain the existence of a self-defense privilege in tort and criminal law,<sup>137</sup> and it underlies the presumption of due care that will benefit plaintiffs (generally deceased plaintiffs) when a defendant wants to imply that a plaintiff might have helped to cause his own injury through negligence.<sup>138</sup>

135. See DOBBS, *supra* note 16, at 282, 284 & n.22.

136. See Adam Schoeberlein, *Better to Be Judged by Twelve than Carried by Six: The Need for an "Against-Self-Preservation" Interest Exception to the Hearsay Rule*, 38 AM. CRIM. L. REV. 373, 385–88 (2001).

137. See *id.* at 388.

138. As the Pennsylvania Supreme Court once wrote, the presumption of due care is "based on the tenacious and objective reality that life is sweet and death is cruel, and, in the case of railroad accidents, is founded on the unassailable logic that no one wants to engage in a duel with a locomotive." *Travis v. Pa. R.R. Co.*, 105 A.2d 131, 133 (Pa. 1954). Reminiscent of Gary Schwartz's suggestion that plaintiffs no longer need a presumption in their favor because they have received the boon of comparative fault, some judges have written that the presumption of due care does not survive the abandonment of contributory negligence. See, e.g., *Rice v. Shuman*, 519 A.2d 391, 394 (Pa. 1986) (noting that although "[a] definitive resolution by this Court of the impact of comparative negligence upon the continuing viability of the presumption of due care" has proved elusive in Pennsylvania, the instant case demonstrates that the presumption should be abandoned); *Simpson v. Anderson*, 517 P.2d 416, 417 (Colo. App. 1973) (deeming the presumption superseded by comparative negligence), *rev'd on other grounds*, 526 P.2d 298 (Colo. 1974). As with post-comparative negligence double standards, see *supra* text accompanying notes 69–76, many contemporary judges seem to disagree, and have reiterated their support for the presumption in favor of plaintiffs following the advent of comparative fault. For cases from comparative negligence jurisdictions affirming the presumption of due care, see *Johnston v. Pierce Packing Co.*, 550 F.2d 474, 476 (9th Cir. 1977) (applying Idaho law); *McQuay v. Schertle*, 730 A.2d 714, 738 (Md. Ct. Spec. App. 1999); *Duke v. Am. Olean Tile Co.*, 400 N.W.2d 677, 683 (Mich. Ct. App. 1986). But see *Elias v. City of St. Paul*, 350 N.W.2d 442, 444 (Minn. Ct. App. 1984).

More than just a reiteration of the rule that defendants bear the burden of proof with respect to plaintiffs'-conduct defenses, the presumption of due care will often give plaintiffs the benefit of an instruction directing the jury "to consider and bear in mind that there is, in every man, an instinct of self-preservation which is ordinarily reflected in the exercise of due care and in the avoidance of danger."<sup>139</sup> Constrained always by self-regard, actors will enjoy a more lenient standard of care when it is themselves that they put at risk: the shackles that negligence law always demands are in place.

In recognizing both emergency and sudden incapacity as conditions that mitigate the rigors of the reasonable person standard,<sup>140</sup> the *Third Restatement* notes indirectly, yet clearly, that constraint is at the center of these exceptions. Comments to the blackletter observe that in an emergency: a response may be "instinctive rather than deliberative,"<sup>141</sup> and "the opportunities for deliberation have been limited by severe time pressures;"<sup>142</sup> in short, that the actor had no ability to behave differently. Here the actor has not joined a community, except in an attenuated and metaphoric sense of being forced into a fleeting moment of constraint. She is still held to the objective standard, but with regard for that brief hampering of her freedom.<sup>143</sup>

139. *Moore v. Esso Standard Oil Co.*, 72 A.2d 117, 120 (Pa. 1950) (emphasis omitted).

140. See BASIC PRINCIPLES, *supra* note 39, § 9 (identifying "an unexpected emergency requiring rapid response" as "a circumstance to be taken into account in determining whether the actor's resulting conduct is that of the reasonably careful person"); *id.* § 11(b) (treating conduct caused by unforeseeable "sudden incapacitation or loss of consciousness brought about by physical illness" as not negligent).

141. *Id.* § 9 cmt. a.

142. *Id.*

143. Negligence law contains numerous analogies to this doctrinal recognition of episodic or fleeting constraint. For example, the famous "danger invites rescue" proclamation in *Wagner v. International Railway Co.*, 133 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.), may be understood as holding that because the plaintiff was constrained to rescue, his rescue venture was not a superseding cause of his injury. The rescue rule has been reaffirmed in the comparative fault era, suggesting (once again) that lenient treatment of a class of plaintiffs is more than a vestige of contributory negligence. See *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 598 (Iowa 1996); *Solomon v. Shuell*, 457 N.W.2d 669, 683 (Mich. 1990); *Govich v. N. Am. Sys., Inc.*, 814 P.2d 94, 100 (N.M. 1991). Another analogy is the exception to the "firefighter's rule" when the firefighter or other professional rescuer suffers injuries while trying to give aid outside the confines of professional obligation: although tort law generally denies recovery to professional rescuers, courts treat these professional rescuers more leniently when they encounter the danger under conditions other than the rescue work that they have accepted as an occupational project. See, e.g., *Webb v. Jarvis*, 553 N.E.2d 151, 157 (Ind. Ct. App. 1990) (noting that plaintiff had been present at rescue as a relative, not as a police officer); *Gray v. Russell*, 853 S.W.2d 928, 930 (Mo. 1993) (holding that the firefighter's rule does not apply when officer encountered the danger in a nonemergency setting); *Labrie v. Pace Membership Warehouse*, 678 A.2d 867, 868-69, 871 (R.I. 1996) (noting that firefighter was present for a routine, planned inspection, "in a shirt and tie"). Seen through the constraint lens, an on-the-job rescue follows an autonomous choice to pursue this work and therefore can leave the rescuer disadvantaged in tort law, whereas injuries

## CONCLUSION

Lon Fuller in *The Morality of Law* included a chapter on function and called it "The Morality That Makes Law Possible,"<sup>144</sup> an apt and assonant phrase that I invoke in the title of this Article in order to comment on the role of subgroups, or communities, in negligence law. Morality here does not reduce to moralism: instead, Fuller insisted that the law cannot function—it would collapse, or cease to exist—without certain precepts of fair play.<sup>145</sup> In this Article I have taken inspiration from Fuller's phrase while deferring for another time, or another writer, all prescriptive or normative claims about "morality," focusing instead on negligence law as an institution that works.

"Communities," in the sense that I have used the term, are to negligence law as Fuller's background precepts (with respect to justice) are to the rule of law generally. Negligence doctrine is not "possible" without this extrinsic support. Its task of advancing both freedom and security—goods that often come each at the expense of the other—will put great pressure on negligence law, especially given the context of anxiety (if not also calamitous injury) that typically affects the litigants. Negligence doctrine needs an ally, and finds one in the social fact of group membership. Like the notion of deterrence that pervades current understandings of accident law, group membership inhibits an actor from engaging in risky behavior. Unlike tort-derived deterrence, however, this constraint is perceived as extrinsic to negligence law; so when group membership serves to constrain, the negligence liability system gains the benefit of constraint without suffering the political detriment of appearing repressive.

Different groups serve to constrain in varying ways. Certain subgroups expressly encourage their members to behave in a prudent manner; some accept responsibility for chafing their members and thereby divert resentment away from the negligence regime; a few may be understood as sources of disability in a literal sense, making

not attributable to the volunteered-for rescue work suggest that the rescuer was trapped, or otherwise constrained, in a situation; because the freedom-security balance tilts the other way, she is entitled to a favorable exception to the firefighter's rule and her injuries are compensable.

144. LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1977).

145. These precepts describe the necessary content and function of rules: rules must be general; they must be promulgated so that affected persons can know them; they must be prospective rather than retroactive; they must be clear and understandable; they should strive to be free from contradictions; they must not require the impossible; they must not be frequently changed; and official action should be congruent with the law. *See id.* at 38-39.

persons less able to engage in risky activities. For the negligence system, groups also provide an administratively convenient method of combining an objective standard of care with some limited attention to the actor's circumstances. As sources of constraint, and thus adjuvants to negligence doctrine, groups do much of the work that negligence law would otherwise have to undertake. These communities make standards of care possible: negligence law could not function without their support.



# THE KENNETH M. PIPER LECTURE

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The Kenneth M. Piper Lectureship Series is dedicated to the memory of Mr. Kenneth M. Piper, who made substantial contributions to the fields of personnel management and labor relations during more than two decades of service with Motorola, Inc. and Baush & Lomb, Inc. The lecture series is funded by the Kenneth M. Piper Endowment, established by a gift from Mrs. Kenneth M. Piper in memory of her husband. Major programs in labor law are presented each year at Chicago-Kent College of Law as part of the Piper Lecture Series.

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