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The Path to The T. J. Hooper: The Theory and History of Custom in the Law of Tort

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THE PATH TO *THE T.J. HOOPER*:
THE THEORY AND HISTORY OF CUSTOM
IN THE LAW OF TORTS

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THE PATH TO *THE T. J. HOOPER*:
THE THEORY AND HISTORY OF CUSTOM
IN THE LAW OF TORT

*Richard A. Epstein**

I. INTRODUCTION

Determining the proper standard of liability for personal injuries and property damages is one of the central missions of the law of tort. The law addresses that issue at two separate levels. First, within the domain of accidental injuries caused by the defendant, there is the perennial question of whether the applicable standard of liability should be cast in terms of negligence or strict liability. Is a defendant responsible only where he has failed to act with reasonable care under the circumstances, or is he responsible for harms even where there has been no failure to observe the appropriate standard of care? The second question is in a sense subordinate to the first but nonetheless closely entwined with it: Where a negligence standard is applicable, how should negligence be determined?

Two distinct approaches are possible on this last question. On the one hand, it is often said that the test of negligence is whether the defendant took all cost-justified precautions against the occurrence of the harm. The economic calculations involved require a jury to make at least some impressionistic assessments of the likelihood that the defendant's conduct will result in harm, the expected severity of that harm, and the cost of avoiding the occurrence. The alternative method relies on custom—not so much the custom of the individual or the firm, but that of the trade or industry of which the

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defendant is a part. Here the relevant question is this: Where the defendant has complied with an industry custom, is that an absolute defense against a charge of negligence, and therefore a finding of liability, or is it only evidence, perhaps very substantial evidence, to rebut the plaintiffs charge of negligence?

At a high enough level of abstraction there is no functional distinction between these two standards. If courts and juries could effortlessly apply the cost-benefit formulas, then the only conduct that would be held tortious is that which should not have been undertaken in the first place.¹ By the same token if customs always incorporated all the relevant information about the costs and benefits of certain practices, then they too would treat as negligent only conduct that should not have been undertaken in the first place. On the issue of negligence, both these standards should in an ideal world converge to a single correct answer. Nonetheless within the modern framework, these two standards are in strong tension, precisely because in a world filled with imperfections the dominant question is which approach generates the fewest errors at the lowest cost. The standard answer today seems to be to use some variation of the cost-benefit standard, leaving custom with a subordinate role in the overall analysis.²

It is surely more than coincidence that the most forceful exposition of both sides of this relationship is found in the work of a single judge, Learned Hand. His famous decision in *United States v. Carroll Towing*³ championed a standard that relied on the simple cost-

¹ See, for example, John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. Legal Stud. 323 (1973), for the initial formal demonstration of the proposition.

² "By the great weight of modern American authority a custom either to take or omit a precaution is generally admissible as bearing on what is proper conduct in the circumstances, but is not conclusive." *Fowler V. Harper*, Fleming James, Jr., & Oscar S. Gray, *The Law of Torts*, 579 (2d ed. 1986).

³ 159 F.2d 169 (2d Cir. 1947). "[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this not into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e. whether $B < PL$." The statement was developed in connection with the facts in the particular case, but is easily general-

benefit calculus. Some years earlier, in an admiralty case, *The T.J. Hooper*,⁴ he addressed the relationship between custom and negligence. Its facts were as follows. The tugboat *T.J. Hooper*, along with several other tugs, was making its way up the Atlantic coast when it was caught in a storm that resulted in the loss of its barge and cargo. If its captain had carried an adequate receiving set, then (or so the question was resolved)⁵ he would have received warning of the storm from the naval station at Arlington, Virginia, soon enough to put in safely behind the Atlantic breakwater thus avoiding the loss of barge and cargo.⁶ But having been caught in the storm, the tug owner was sued by both the owners of the barge and the cargo for their loss.

The critical question was whether the tug should have carried a receiving set on board in order to meet the requirements of good care. Learned Hand in a most questionable proposition--first held that there was no custom that tugs should carry receiving sets while in transit, and then stated the objections to a standard of negligence based on custom in language more eloquent and forceful than anyone else, either before or since, has put it:

ized to all situations, and has spawned an enormous literature. See, for example, Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972); Steven Shavell, *Economic Analysis of Accident Law* (1987). Shavell, heavily concerned with cost-benefit analyses, does not cite *The T.J. Hooper* or discuss the relationship between custom and negligence. His formal orientation leaves little place for such institutional issues as the role of custom.

⁴ 60 F.2d 737 (2d Cir. 1932).

⁵ There are two implicit causal complications in the case. First, the warnings from the radio would have made no difference if the captain could have acquired the same information through other means. Second, the warnings would be irrelevant if they had arrived too late to make a difference. The implicit causal finding is that they would have made a difference, a point contested by the tug in its brief. See Brief on Behalf of Northern Barge Corporation, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (No. 430).

⁶ The actual case was complicated by two points of little theoretical relevance. First, the owner of the cargo sued the owner of the barge claiming the unseaworthiness of its vessel. Second, there was some argument as to the causal role of the radio in avoiding loss. Both of these questions consumed enormous space in the briefs. Thus, for the Northern Barge Corporation, the brief devoted two pages to demonstrating that "[t]ugs' failure to have efficient radio receiving apparatus made them unseaworthy" (*id.* at 4-6) and fourteen pages to the proposition that "[t]he Barges were seaworthy" (*id.* at 6-20).

There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its uses. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.⁷

The proposition as stated by Learned Hand did not break any new legal ground, but carried over into the law of admiralty the judicial caution about the use of custom in negligence cases that dominated the common law then as now. Hand's opinion fell securely within the legal mainstream of his own time and was greeted with relatively little commentary. *The T.J. Hooper* is not included, for example, in the 1939 edition of Leon Green's tort case book.⁸ It is a bit player in the first edition of Prosser's handbook on torts.⁹ Nor was the case explicitly mentioned by Clarence Morris in his classic 1942 article, "Custom and Negligence," which sets out the received wisdom on the subject and which has wielded enormous influence on the field.¹⁰ But the opinion has been cited and quoted far more frequently, and with uniform approval in, say, the past generation. Until recently, the major articles on custom in tort cases have all explored its continued tenacity, itself endorsed by Morris,¹¹ in the area of medical malpractice.¹² As far as I am aware, the most sustained recent treatment of the case, with due recognition of its

⁷ 60 F. 2d, *supra* note 4, at 740.

⁸ Leon Green, *The Judicial Process in Tort Cases* (2d ed. 1939).

⁹ William L. Prosser, *Handbook of the Law of Torts* (1941).

¹⁰ Clarence Morris, Custom and Negligence, 42 Colum. L. Rev. 1147 (1942).

¹¹ *Id.* at 1164-65.

¹² See, for example, Joseph H. King, In Search of a Standard of Care for the Medical Profession: The 'Accepted Practice' Formula, 28 Vand. L. Rev. 1213 (1975); Allan H. McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549 (1959).

failings, is provided by Landes and Posner.¹³ Although in the interim the issue has arisen in thousands of tort cases, it has not been subject to any systematic reexamination.

In this article, I shall examine the role of custom in the law of negligence, with special reference to *The T.J. Hooper*. The subject is one of enormous importance. I hope to show that, given the imperfections of the legal system, the conventional wisdom that places cost-benefit analysis first and custom second is incorrect in at least two ways. First, in cases that arise out of a consensual arrangement, negligence is often the appropriate standard for liability, and, where it is so, custom should be regarded as conclusive evidence of due care in the-absence of any contractual stipulation to the contrary. It is quite possible that in some consensual settings no custom will emerge, at which point the negligence inquiry will be inescapably ad hoc. But where consistent custom emerges, regardless of its origins, it should be followed. Second, in stranger cases—that is, those where the harm does not fall on a contracting party or someone with whom the defendant has a special relationship—negligence should normally not be the appropriate standard of care,¹⁴ so that reliance on custom is as irrelevant as the negligence issue to which custom alone is properly directed. But where negligence is adopted in these stranger cases,¹⁵ then custom is normally not the appropriate standard because it registers the preferences of the parties to the custom, not those who are victimized by it. It should be taken into account, but given no dispositive weight.

Since much, if not most, of the litigation over custom comes in consensual situations, the choice between custom and cost-benefit

¹³ William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 131–39 (1987).

¹⁴ See, for example, Restatement of the Law, Torts 2d, §§519–520 (ultrahazardous activities). Section 519 makes it appear as though strict liability is a powerful rule because it imposes liability on a defendant “although he has exercised the utmost care to prevent the harm.” But much of its rigor is compromised in §820, which sets out tests to determine which activities are ultrahazardous, and embeds a negligence test into this part of the analysis. A return to strict liability is far more evident in §520A, which imposes strict liability for harms caused by flying aircraft or things that drop or fall from them.

¹⁵ See, for example, *id.* at §166 (trespass to land); §826 (nuisance cases). There is of course contrary authority, but the weight of the precedents is not the issue addressed in this article.

formulas lies at the heart of understanding the distribution of power between the market and the courts in setting the standards of conduct for defendants in all lines of business and endeavors. Although championed by Landes and Posner, Shavell and other conservative economists, the cost-benefit formula is, when generally applied, far more **interventionist** than the standard of care based on custom. These cost-benefit tests are used to challenge the rationality of markets, while formulas based on custom accept and rely on some level of implicit rationality in market behavior.

This article is organized as follows: In Section II, I examine the weight custom should receive in setting liability as a matter of first principle. In Section III, I examine a related question, namely, under what circumstances should we expect to see a custom emerge at all? Section IV then looks historically at the role of custom in the law of tort before the decision in *The T.J. Hooper* and concludes that, while courts sometimes stated that unreasonable customs should not be respected, cases in which unreasonable customs are actually identified seem most difficult to find. In Section V, I take a closer look at the decision in *The T.J. Hooper* itself, and how it continues the basic argument. The customs governing that case were misstated and misunderstood by Learned Hand. Properly stated and understood, these customs were sufficient to impose liability on the defendant wholly without regard to Hand's soaring rhetoric. The decision in the case was correct, even though the reasoning was wrong. In closing, I offer a brief assessment of *The T.J. Hooper's* influence in the subsequent law of torts, not so much in the admiralty context where it arose, but for the common law in general.

II. WHY RESPECT CUSTOM?

Customs are ubiquitous. The sheet metal worker who wants to make a proper weld, the salesman who wants to conclude a deal, the ship captain who wants to negotiate a dangerous channel, the athlete who wants to do well for a big race, the accountant who wants to balance the books, the proofreader who wants to check the accuracy of text, all rely constantly on relatively simple rules of thumb and standard practices to guide them in their daily work. In other settings custom may be more sophisticated. Just as customs could arise about a standard medical procedure, so too a "meta" custom

could (and doubtless does) regulate the way in which one form of medical practice yields to a newer and more enlightened alternative. Viewed apart from the world of litigation, most situations are not distinctive or novel but fall into certain repetitive patterns. Common practices, sanctioned by general usage, that cover these similar situations are what I (in accordance with long usage) mean by customs. Customs are one critical way people organize their daily and professional lives to free their creative energy for the distinctive tasks that may lie before them. It is scarcely possible to imagine how any of us could organize the daily task of living and coping without extensive--and perhaps unconscious--reliance on myriad customs.

I treat customs as relatively discrete and bounded in most cases, although there is obviously some period of flux as certain practices rise in popularity and then decline. Notwithstanding the occasional borderline problem-problems that have not proved severe for the vast case law that deals with custom--the black-and-white quality of customs is probably an accurate reflection of most areas of business and social life. The key point is the level of routine repetition that custom presupposes. Individual actors need a high level of certainty in their ordinary affairs, and that certainty cannot come from probabilistic judgments or delicate evaluations about borderline cases. It is easier to delineate sharp categories (for example, between the wholesale and the retail trade) and to force persons to assume either one clear role or the other than it is to allow a thousand shades of gray to block the emergence of uniform rules. Within any particular trade, as an empirical generalization, the demarcations that are sharp and clear to insiders may seem obscure to an **outsider**.¹⁶

¹⁶ Two examples follow. In the law book business, there is a very sharp line between books sold to the law schools and books sold to the bar, and companies that work both markets divide their labor such that they cannot sell books (for example, monographs) that do not fall into either category. In the furniture business, there is a sharp distinction between persons who sell to the trade and persons who sell at retail, and admission to certain shows and buying privileges depends heavily on which side of the line one is. The older common law often follows these categorical lines, as with the tripartite distinction of trespassers, licensees, and invitees, defended on categorical grounds even by judges who understood the occurrence of marginal cases. See, for example, *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358 (per Viscount Dunedin).

If custom is indispensable to ordinary life, it has nonetheless been greeted with an uneasy ambivalence in the narrower and more focused setting at common law.¹⁷ Clearly there are some limitations on the use of custom that should be respected. As regards consensual arrangements between two or more parties, the applicable standards of liability are, and should be, those that are set by voluntary contract, even if that agreement should run contrary to established industry custom. Contract itself is a technique that allows private parties to individuate their own arrangements. Let it be the case that 10,000 people have decided to require that goods be delivered under a contract before the money need be paid, but it counts for naught in the single transaction whose parties, for reasons sufficient unto themselves, decide that the payment should be made before the goods themselves are delivered. Contract is a private form of sovereignty for the parties, and their joint decision of the proper allocation of rights and responsibilities carries the day even if other knowledgeable parties facing a similar problem choose to structure their rights and liabilities differently.¹⁸

Yet even if freedom of contract is rejected as a principle of social organization, the role of custom is at best obscure. The contractual provisions rejected on grounds of adhesion or inequality of bargaining power or on grounds of unconscionability are often both customary on the one hand and explicitly adopted by agreement on the other. The ubiquity of a given term within this framework may be taken with equal enthusiasm to indicate the widespread utility of certain contractual practices, or, from a more skeptical theoretical orientation, may be taken as evidence of the pervasive and illicit

¹⁷ Although this discussion is largely confined to the use of custom in the context of accidental injury or property damage case, the question can arise in many other contexts. See, for example, *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (1805), where a majority of the court rejected the customary hot pursuit rule between rival fox hunters in favor of a rule that required actual capture or something very close to it in order to establish ownership of an unowned fox. For an analysis of the case, see Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221 (1979).

¹⁸ See, for example, *Les Affréteurs Réunis Société Anonyme v. Leopold Walford, Ltd.* [1919] A.C. 801, 809 (rejecting proposition that custom may be given effect "when entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well-known a custom, have nevertheless thought proper to enter").

power of landlords, employers, manufacturers, or sellers of all sizes and descriptions. Within this new regulatory world there is, if anything, even less place for custom to legitimate common practice or to allay the deep-seated suspicions about the entire process of contractual formation.

What, then, about the place of custom in the law of tort? Here it is possible to adopt any one of a number of positions, all of which (as will become clear later) have some support in the case law. Some nineteenth century decisions regard custom and ordinary practice as the “unbending test” of negligence; others regard customary practice as wholly irrelevant to the question of negligence, at least for those practices that a court is willing to condemn as obviously **dangerous**;¹⁹ and there is a vast and dominant middle ground that treats compliance with custom as useful and relevant evidence of negligence but not as dispositive—the position perhaps most eloquently articulated in *The T.J. Hooper* itself.²⁰ Custom, then, is a factor that must be taken into account in property, contract, and tort, but its role is fuzzy and uncertain. The question is how the analysis may be sharpened.

Starting with the consensual situation, I draw on an assumption that I shall not defend here: that contracts should normally be enforced in the absence of fraud, duress, or **incompetence**.²¹ Within that framework, custom has a role, even if it is subordinate, as noted

¹⁹ The early Pennsylvania cases were the most notable exponents of this position. See, for example, *Titus v. Bradford, Bordell & Kinuza Railroad Co.*, 136 Pa. 618, 20 A. 517 (1890); *Kehler v. Schwenk*, 144 Pa. 348, 22 A. 910 (1901); *Cunningham v. Fort Pitt Bridge Works*, 197 Pa. 625, 47 A. 846 (1901). These cases were heartily disapproved in *Morris*, *supra* note 10, at n.2, n.29; see also cases at n.36.

²⁰ *Id.* at n.1 offers a long list of cases that takes what was by his time clearly the dominant view. Interestingly enough, *The T.J. Hooper* is not cited on that list, nor anywhere in his hugely influential article on the subject of custom and negligence that champions this view. See also, the quotation from Harper, James, & Gray, *supra* note 2.

²¹ For an earlier defense, see Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. Law & Econ. 293 (1975). There are further complications with freedom of contract that arise when there is the question of coordination and the risk of holdout among multiple actors, but those are not pursued here.

above,²² to expressions of individual choice in contractual agreements. The role for custom is critical because while persons have the **right** to draw up complete contingent-state contracts if they see fit, they are under no **duty** to do so: for reasons of cost and convenience, they may see fit to draft these contracts in ways that do not cover all possibilities. In many cases their decision rests upon the conscious judgment that the contingency involved is so sufficiently remote that it is cheaper to work through unanticipated difficulties after they arise than it is to plan imperfectly for them in advance. Knowing when to quit is often the first virtue of a conscientious draftsman. But while much academic discussion is directed to the case of the remote and improbable contingency, by definition these will occur only a tiny fraction of the time; while disputes of this sort may lurk large in the decided cases,²³ they do not lurk nearly as large in the overall scheme of contracting and business behavior.

The far more important role for custom rests in those common cases where the parties are able at low cost to specify particular terms and then must decide whether to do so. In these situations the custom or standard practice of the trade performs two useful and related functions. First, it gives guidance as to the terms that should be specifically included in agreements. While some situations are unique and known to be such, businessmen have little desire to revel in the rights of individuation allowed them under the law or to risk litigation. They will, if given the choice, cast a novel business deal in a traditional legal framework. To say that a clause in a certain contract is “standard” is not normally to convict businessmen of the charge of lack of imagination or originality. Instead that outcome is greeted with sighs of relief that uncertainty does not suffuse one aspect of a complicated transaction, freeing limited resources to deal with those aspects of the deal that need special attention. Standardization is a blessed state of safety to those who can achieve it, for the party that may not know the ins and outs of a particular transaction can now rest in relative comfort on the knowledge that others with greater experience and knowledge have adopted a pattern of doing

²² See note 16, *supra*.

²³ For one reasoned discussion of the remote contingency, see Clayton P. Gillette, Commercial Relationships and the Selection of Default Rules for Remote Risks, 19 J. Legal Stud. 535 (1990).

business on which he can sensibly free ride. Custom is a socially desirable form of free riding that offers a cheap and reliable source of information about a form of agreement that is worthy of use because of the impersonality and universality of its origins. It may be possible to rig a given transaction; it is much more difficult to rig an industry-wide custom.

Second, a confident sense that the custom within the trade will become the norm in any future dispute allows people to dispense with the costs of drafting particular clauses in the first place. Even the inclusion of contract terms noted above is costly because the parties-or, more ominously, one of the parties-has- to make sure that the term proposed as standard for the trade is, in fact, standard in that trade. It may be possible in principle to allow incorporation of a given term into a contract and then to seek to set it aside on the ground that the other party behaved fraudulently or perhaps negligently in stating that this term was common to the trade when in fact it was not. But no person in his right mind would rely upon so weak a legal claim in planning a legal transaction. Explicit terms must be known to be those customary to the trade. Therefore, putting no term in the agreement (or one that says custom shall control in the event of dispute) in some circumstances may be both cheaper and more reliable-than putting in any express term, if both parties know that in the event of some subsequent dispute the customary term will be implied. Should a dispute arise, then each side can find out what that custom is and in most cases receive the same answer. A costly front-end inquiry over the full array of contractual terms in every case is thereby averted at the far lower cost of ascertaining how the relevant contractual provision works in the much less likely event that something goes wrong. It is, of course, possible for parties to adopt intermediate approaches, specifying some terms and leaving others to custom, in which case the two should be integrated as carefully as possible.²⁴ But the success of all contracting strategies is enhanced if customary terms do exist-itself no legal or moral necessity-and if parties can be confident that courts will reliably apply that custom to their future disputes.

²⁴ See *for example*, *Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co. Ltd.*, [1916] 1 A.C. 314.

III. WHY CUSTOM EMERGES

With all this said, it remains to ask why customs evolve and why anyone would choose to rely on them in the first place: just because something has always been done does not necessarily mean that it has always been done correctly. What must be shown is that there is a strong set of incentives that leads custom to succeed. In this discussion, I confine my attention to customs arising out of consensual arrangements and ignore those that impose costs on strangers. In dealing with these consensual arrangements, it is necessary to take into account two separate variables. First, we must have some information about whether the parties to the transaction have identical or different roles. Second, we must know something about the frequency and severity of the loss that will be allocated in the event of breach or mishap.

Roughly speaking, the following two generalizations hold. First, where the parties have identical or parallel roles in a transaction, a custom is more likely to emerge than in those cases where the parties assume asymmetrical roles. Second, customs will tend to emerge in cases where the contingency arises with relatively high frequency and where relatively little turns on each application of the rule. The key conditions then are reciprocity and high frequency. Where only one of these conditions is present, the likelihood of a viable custom forming will diminish proportionately. Where neither is present a custom is not likely to emerge. The most difficult question to answer is whether the customs that emerge under these different circumstances should be treated with equal dignity by the law, to which the answer is (although this point could be disputed) probably yes. The differences in context will tend to go to the likelihood that the custom will emerge more than to the strength or clarity of the custom. If a custom does form when circumstances are adverse to its development, then chances are that the issue is sufficiently important that it should be respected in any event, given the difficulty of framing alternative standards of care. The problem should not, however, be all consuming because the vast bulk of customs will emerge in repetitive settings where their clarity and power is likely to be strong. Virtually none of the case law on custom is directed to weak customs. The key question, then, is what are the determinants for a customary practice to develop within a consensual situation?

Beginning with the first factor, identical roles for the parties increase the likelihood that a durable and sound custom will emerge. Customs do not arise from conscious introduction, but from widespread imitation and adaptation of past practice. The lack of determinate origin is one feature that sharply distinguishes customs from statutory norms. Start with a large community of individuals who engage randomly in bilateral transactions with each other. Those parties occupy identical roles in these transactions, so it is hard for either of them to engage in opportunistic behavior that provides overall private gain at the expense of the trading partner. Thus, so long as *some* general rule has to be adopted, each party must calculate the relative magnitudes of the short-term gain from the immediate transaction, relative to the long term-losses from adopting an inferior rule in future **transactions**.²⁵ Since the roles of the two parties are identical-say both are merchants in the same market-a general rule that offers one side benefits today is almost certain to work against the winning party in some future transaction. For one party, short-term and long-term gains will coincide; for the other they may not. For the large mass of neutral but interested third parties working in the field-including fellow traders, arbitrators, or industry experts-all that matters is the long-term institutional gain, and not the distribution of gains and losses in the immediate transaction. There is therefore a constant incentive shared by all parties to get the rule right. But there is only a short-term interest of one party to get it wrong and even that will not dominate his conduct if his private long-term losses outweigh these short-term gains. The more stable the general environment, and the longer the time horizons, the more likely it is that all parties will seek the optimum rule. The greater number of repeat plays (a consequence implied by the stable environment) will allow convergence to take place by trial and error, hint and modification, the tools in the kit bag of custom.

Where the parties assume asymmetrical roles, the tendency to seek the correct customary solution is somewhat weaker. To be sure, it is always possible in principle to allocate the losses from a given contingency in one direction, thereafter making adjustments in a

²⁵ Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 *J. Pol. Econ.* 615 (1981).

cash term in order to offset the difference. But with parties in asymmetrical roles, someone has to compute the frequency and severity of the loss in order to determine the appropriate level of the financial adjustment, which may well vary from party to party and case to case. That variation undercuts the mechanism of automatic in-kind offset otherwise available when parties do have identical roles. These valuation problems are a constant source of potential error and doubtless, create some incentive for any given party to seek to resolve the dispute at hand in his own favor, leaving the financial adjustments to a later day. The tendency of individual parties is not buffered by the larger groups of which they are a part because the trading community is likely to be divided along the same fault line (wholesaler and retailer) as the parties to the individual transaction. The bargaining and information problems that emerge when roles are asymmetrical are likely to retard the introduction of a custom and to weaken its strength. It will take a greater number of repeat plays and a larger relevant community for a custom to take hold-if it takes hold at all. But by the same token, the problem of asymmetry does not doom to failure the emergence of viable custom, for there are strong efficiency gains to all concerned if the correct custom can emerge. All that can be said, therefore, is that in equilibrium fewer customs should appear. It need not follow that the customs that do emerge are less likely to work than those that emerge in the settings where the parties occupy identical roles.

Looking to the second point, the role of the frequency and severity of breach, there are four polar cases that have to be considered. Essentially there is a two-by-two matrix with frequency and severity taking both high and low values. In the simplest model, we can assume that the severity in any individual case is roughly of the same order, either high or low, so that one does not have to ask how the custom would look when some instances yield high losses and the others low ones. In general, the greater the skew in the distribution, the more difficult it will be for custom to emerge.

A. Case 1: High Frequency, Low Severity

The easiest case for custom to emerge is probably that where the frequency of the problem is high and the amount at stake is low. The high frequency level means that the parties are likely to have a lot of experience or instances on which to test and retest the judg-

ment of custom. Since the stakes involved in each individual case are small, the tendency to deviate from the successful equilibrium on either side will be low, relative to the future gains from keeping the relationship alive. The custom falls into a class of self-enforcing contracts. If there is \$1,000 at stake in a given case, and generating the right rule yields overall gains of \$10,000 per party, both sides will opt for the superior rule. The party in the right gets \$11,000 (\$1,000 + \$10,000) and the party in the wrong still gets \$9,000 (- \$1,000 + \$10,000). Both are better off with the same rule. As before, where the parties are in symmetrical roles, equilibrium should occur more rapidly, but the asymmetrical roles should not preclude the emergence of a stable and sensible equilibrium, although it will make the occurrence somewhat less probable.

B. Case 2: High Frequency, High Severity

In one sense, this situation should not differ in principle from the previous one. So long as there are lots of plays, the ratio between the immediate gains to any party and the long-term value of having the right rule should remain relatively invariant, and, therefore, we should expect to see the proper rule- emerge-more quickly if the parties occupy symmetrical roles in the relationship. It is as though a zero were added to each of the numbers of the example above. Nonetheless, some complications could emerge. First, the increased size of the dispute means that the issue has greater importance for the parties governed by the custom, who in turn should be expected to press more quickly to reach the correct outcome. Their speed will be hastened because the utility of the custom is measured not only by the accidents or disputes that it controls, but by the frequency of the accidents or disputes that it averts. So long as the risk of accident is a constant theme, as it surely was for both mines and rails (the major source of nineteenth century institutional tort cases), the true frequency level is measured by preoccupation and not by accident.

Nonetheless, there are still obstacles to the emergence of custom. The immediate players may be so preoccupied by the size of the stakes in their own transaction (which in the limit could be a rule or ruin situation) that they will not possess the long time horizon that allows relational gains to soften the desire for immediate success. There may be a tendency, for example, to resort to lawyers instead of private and informal accommodation, and nothing kills the emer-

gence of custom like the active intervention of an external legal system replete with its own extensive norms and powerful vested interests. The insistent demand to defend and rationalize behaviors and preferences places an enormous premium on verbal acuity and relatively little on experience and judgment. The skilled lawyer can make a better public statement on any issue than the practitioner of the art whose knowledge is practical but not formal. The frontal attacks on custom are likely to be met by defenses that are better in substance than they are in appearance. The legal system may therefore disrupt customary practices. The relative strength of these factors is hard to assess in the abstract, and they may be sufficient to prevent a custom from developing. Yet, from the point of a legal system, it does not follow that the customs that do emerge in this setting should be treated any less favorably than those that arise in other ones. It is merely strong evidence that this custom provides sufficient gains to make it hardy enough to survive the legal intervention that might subvert it. The class of cases here is not unimportant, for injuries that arise during the course of employment fall into this category. The asymmetrical roles of the parties and the large if frequent size of the stakes could prevent the custom from emerging or could lead a court (as will become evident) to view with deep suspicion any custom that does emerge.

C. Case 3: Low Frequency, Low Severity

In this situation it is quite likely that no custom will emerge at all. The relative importance of the issue is, as a first approximation, measured by the product of the two numbers, which will be small given that both the components are small. Here the tendency will be, perhaps, to expand the size of the community to which one looks for guidance or for the issues to simply be resolved in a quick off-handed way since neither side has a large stake, present or future, in the issue.

D. Case 4: Low Frequency, High Severity

Again the situation is one in which the custom is not likely to emerge given that any party to the suit will see that the losses from the immediate transaction are larger than the potential gains from maintaining a relationship. The result should hold whether or not the roles are symmetrical, although the threshold frequency needed

for the custom to emerge should, as before, be lower when the parties have symmetrical roles than when they do not.

On balance, therefore, the key variables on the emergence of custom seem to be the symmetry of results and the frequency of the dispute with the question of severity of loss playing a secondary role.

Important indications flow from the interaction of these distinctions. We should predict that custom will be strongest and most durable in ordinary transactions between merchants where the sums at stake in any individual case are small relative to the goodwill at stake for long-term players in the **business**.²⁶ It should be easier to fashion rules that govern the position between traders, that is, those who buy on some occasions and sell on others but always in the same market, than it is to fashion customary rules for persons who buy in one market only to resell in another—distributors or retailers, for example—or persons who are always one side of the transaction—lenders or borrowers, physicians or patients. Similarly, detailed customs are likely to be robust when there are thousands of repeat transactions—purchases and sales or a given exchange, for example—and when they take more time to emerge. They will perhaps be weaker where there are isolated large losses, as with employer liability, medical malpractice, and product liability cases arising out of a consensual arrangement. Ordinary personal injury cases are perhaps the greatest test for custom because they involve infrequent large losses and asymmetrical roles.

IV. THE RELATIONSHIP BETWEEN CUSTOM AND DUE CARE BEFORE *THE T.J. HOOPER*

The development of the common law of custom before *The T.J. Hooper* took place in large measure in ignorance of the analytical factors that indicate whether a custom will prove to be either stable or desirable. Instead, judges relied largely on a patchwork of common sense and precedent to inch toward what they regarded as the correct solution. Most judges knew at some level that custom could not be decisive in all cases, an intuition that (given the risks of externalities) is surely correct. By the same token, judges often did not

²⁶ The power of custom between merchants is reflected in the weight it receives under the Uniform Commercial Code; see, for example, U.C.C. §1-205.

perceive the circumstances that rendered the adherence to custom a suspect legal norm. The cases themselves tend to divide into three basic **classes**.²⁷ There are some cases in which evidence of custom is regarded as inadmissible on the question of due care. At the other extreme are cases that treat custom as the “unbending” test of negligence. Then there is a third class of cases, the most famous of which are relied on in *The T.J. Hooper*, that take the dominant middle position that custom is evidence of due care but not conclusive on that issue.

The very diversity of opinion should give pause to those who think that “the” law of negligence during the nineteenth century tended to converge on efficient results. Given the persistent and enormous variation in legal approaches to custom, there is every reason to be confident that at least one of the approaches was inefficient even if we cannot identify which one it is. Thus the courts of Pennsylvania tended to be conspicuous champions of the “unbending” rule that was rejected in other large industrial states and in the Supreme Court. It is doubtful that there is any local explanation that makes this rule fit for analyzing negligence cases there but not elsewhere. Instead, genuine differences in ideology and perception best account for the differences in substantive approaches.

There is also good reason to believe that the best approach on the subject was the one that was least favored in its own time—that which treated custom as the unbending test of negligence, at least for the workplace injuries it governed before the advent of the workers’ compensation laws. In this section, I examine these earlier precedents cited in *The T.J. Hooper* in some detail because the black-letter propositions for which they are customarily cited take on a very different **aspect** when placed in their factual and procedural context. I cannot say that I have read all the nineteenth century cases, but I have read a fair number and can rely on accounts given by others as well. Certainly there is nothing in the account of Clarence Morris or the standard textbook writers of the time that contradicts the basic impression. The cases cited in *The T.J. Hooper* seem to be representative of the larger whole, and several of them have proved influ-

²⁷ The tripartite division is recognized and adopted in Harper, James, & Gray, *supra* note 2, at 581, which notes that the divisions were greater in the earlier cases than they are today.

ential in their own right in transmitting the common law of negligence. Looking closely at these cases, one powerful irony clearly emerges that should be stated at the outset: notwithstanding all the suspicion that is heaped upon custom as a standard of due care, the major nineteenth century cases reveal scant evidence of inefficient customs arising out of consensual evidence.

A. Outright Rejection of Custom

*Romana C. Mayhew v. Sullivan Mining Co.*²⁸ is perhaps the nineteenth century case most hostile to the equation of custom with due care. The plaintiff, an independent contractor, fell thirty-five feet through a bucket hole cut in a mine and suffered serious injury. On orders from the defendant's superintendent, a hole had been cut without giving notice to the plaintiffs, it was not surrounded by a rail or other barrier, nor lighted or marked in any way that gave notice to the plaintiff. In order to show that it had taken "average ordinary care," the defendant sought to ask the superintendent (as a combination fact and expert witness) whether he had "ever seen a ladder-hole in a mine, below the surface, with a railing around it," and if it was "feasible" to use a ladder-hole in that **condition**.²⁹ The court held that the decision to exclude these questions was proper in terms that left little to the imagination.

If the defendants had proved that in every mining establishment that has existed since the days of Tubal-Cain, it has been the practice to cut ladder-holes in their platforms, situated as this was while in daily use for mining operations, without guarding or lighting them, and without notice to contractors or workmen, it would have no tendency to show that the act was consistent with ordinary prudence or a due regard for the safety of those who were using their premises by their invitation. The gross carelessness of the act appears conclusively upon its recital. Defendants' counsel argue that "if it should appear that they rarely had railings, then it tends to show no want of ordinary care in that respect," that "if one conforms to custom he is so far exercising average ordinary care." The argu-

²⁸ 76 Me.100 (1884).

²⁹ *Id.* at 111.

ment proceeds upon an erroneous idea of what constitutes ordinary care. “Custom” and “average” have no proper place in its ‘definition?

Strong stuff indeed. But it is necessary to disentangle the many cross currents contained in this brief passage. It appears as though the defendant’s testimony was designed to explain why railings were never put around holes. That custom itself might be easily justified on the ground that the -railings themselves were dangerous obstacles that could cause injury to others working on the floor—an alternative hazard that should be taken into account in any reckoning of the utility or wisdom of the practice. If this is so, then the exclusion from evidence denies the jury the chance to understand what the practice is, and why it might be the case. Indeed, if the custom was widespread, there is good reason not to require the explanation at all.³¹ This argument, however, is not sufficient to allow the defendant to carry its case in its entirety, for it does not dispose of the question of whether there was a duty to give notice to the plaintiff of the new bucket holes in the mine floor. The plaintiff was an independent contractor, who, unlike regular employees, might not be expected to have notice of what takes place in the mine on a daily basis. It **appears** (absent custom to the contrary) that the cost of notifying the plaintiff is low, and that there is no custom **not** to notify independent contractors entering the mine of new hazards. The plaintiff might well have won by showing that there was no custom of the trade that precluded the recovery.

The opinion, however, does not concede the dominance of custom only to show its inapplicability to the case at hand. Rhetorically, it takes a very different stance. The court states that its own general appreciation of what is or is not dangerous practice is sufficient to exclude the evidence altogether. But, if there were in fact a universal custom, then why should courts find it unsuitable? The tendency of consensual arrangements to optimize the joint welfare of the parties is neither mentioned nor appreciated; nor does the court in **Mayhew** have any sense that, so long as safety is a paramount issue in a mine, customs usually tend to work to minimize the extent of the potential losses from all sources associated

³⁰ *Id.* at 112.

³¹ See paragraph after note 66, *infra*, in the text.

with its operation. The omnipresent risk of accident and its frequent occurrence make this a high frequency/high loss situation.

A number of other nineteenth century cases have followed a similar rule, but their context is wholly different, for typically the custom is set up by its practitioners as a defense against strangers to the trade. Once the plaintiff is not part of the group that sets the custom, the evident risk is that the custom will evolve to meet the standards of the members of the group and not the outsiders who are harmed by it. Taken to its extreme, the uniform practice of slavery does not offer a customary justification relative to the slaves whose interests are suppressed by the custom in whose formation they played no part. Many of the other cases that exclude the use of the custom are indeed stranger cases of this sort. Thus in *Basset v. Shares*,³² the defendant teamsters left their horses unattended under a building then being constructed. The horses bolted when frightened by some falling materials, and they ran into the plaintiffs horse that was standing hitched on a public highway. Here the teamsters custom was treated as irrelevant within the negligence system. “Until it was proved or admitted that the others in so doing had acted with ordinary care, no valid inference could be drawn from their conduct that the defendant in imitating it had acted with ordinary care, and so the evidence excluded was **irrelevant**.”³³

The same result in *Bassett* is reached by following a rule of strict liability in stranger cases such that the issue of negligence, and thus that of custom, is irrelevant to the outcome; hence the connection between the two questions central to tort liability: the choice between strict liability and negligence and the role of custom and cost-benefit analysis in negligence cases.³⁴ The ubiquity of the negligence standard in so many nineteenth century settings, however, made this course impossible to follow. Courts that had the strong instinct that something was awry within the system perceived the analytic error as the connection from custom to negligence, when the error lay in the connection between negligence and liability. The great attraction of negligence, relative to strict liability, is that it *looks* like a principle applicable to all cases, no matter what the setting. Strict

³² 63 Conn. 39, 27 A.421 (1893).

³³ *Id.* at 43.

³⁴ See text at beginning of Section I, *supra*.

liability for its part generally seems (and is) manifestly inappropriate in many consensual situations (licenses, invitees, and medical malpractice,³⁵ for example) Hence a strict liability rule cannot pretend to the universality of negligence.

Analytically, the seeming universality of negligence rules comes at a high conceptual price. So long as negligence is required to do double duty in both stranger and consensual settings, then a court is likely to vacillate in setting rules for determining the standard of care: the schizophrenic attitude toward custom is an unintended consequence of the theoretical overgeneralization of the reach of the negligence principle. What is striking about the cases, however, is that they never advert to the distinction between consensual and stranger-cases, even though its use should be instinctive if the common law were as efficient as its chief defenders have so often claimed.³⁶ The pattern in *Bassett* is repeated in the other cases in which custom has (rightly) received short shrift. Short of liability, the railroads have little incentive to take into account the injuries suffered by small children who play about their turntables. So long as some duty of care is owed to the trespassing child,³⁷ then setting

³⁵ For an earlier discussion of this point, see Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 *Am. B. Found. Res. J.* 87 (1976).

³⁶ Landes & Posner, *supra* note 13, recognize the analytical weaknesses in the logic of *The T.J. Hooper*, but try to wish it away by noting that some of the cases that cite it do not do so for the relationship between custom and negligence, but this is whistling in the dark. Many of those cases cite *The T.J. Hooper* for just this proposition, and those that do not often cite the other leading cases, almost too numerous to count, that stand for the same proposition. It is difficult to see how the common law of torts could be regarded as "efficient" when it obscures the consensual/stranger distinction so essential to the economic analysis of the subject. The point is positive and normative.

³⁷ *Railroad Company v. Stout*, 84 U.S. (17 Wall.) 657 (1873) is perhaps the most influential of these cases. At one time I was quite skeptical of the rule allowing trespassing children to recover against the neighboring landowners, see Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 *J. Legal Stud.* 165, 201–12 (1974), but, on that question at least, I have somewhat mellowed and think that the potential gains from having all landowners take modest precautions provides general compensation for the loss of the exclusive rights in land, at least if the duties are not set so high as to discourage parental involvement and supervision. The relatively strict standards on liability to child trespassers found in the *Restatement* may be messy in principle (see *Restatement*, *supra* note 14, at §339, on attractive nuisance), but

that standard of care cannot be decided solely by reference to custom. Within this framework, a legal rule requiring independent evidence of due care is appropriate whenever railroad turntables are left unlocked where children frequently play.³⁸

B. Custom as the Unbending Test of Due Care

The second possibility of the relationship between custom and negligence is that compliance with custom is conclusive evidence of due care in a particular case. This standard has its greatest attraction in consensual situations, owing to the absence of externalities. Historically, just as the Maine Court in *Mayhew* refused to take custom into account at all, the Pennsylvania Supreme Court, most notably in *Titus v. Bradford, Bordell & Kinuza Railroad Co.*,³⁹ took exactly the opposite point of view. The decedent in that case rode as a brakeman on “trucks” that were used to transfer certain cars from broad to narrow gauge rails. The dangers of the occupation were obvious to all concerned, and the decedent had worked in the yard for some months before he took the position in which he met his death. On the fatal occasion, the standard procedures for fastening the trucks to the narrow beds had been observed, but the decedent was killed while trying to jump off a truck that had separated from its bed. The plaintiffs negligence action attacked the entire practice of transferring trucks from broad to narrow beds. In language as resolute as that found in *Mayhew*, but with opposite import, the court rebuffed that attack with two answers: custom and assumption of risk

All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, “reasonably safe” means safe according to the usages, habits, and ordinary risks of the business. Absolute

it seems to be a compromise that has caused no real dislocation in practice—a point that cannot be made about the modern rules of medical malpractice and product liability.

³⁸ See, for example, *The Ilwaco Railway & Navigation Co. v. Hedrick*, 1 Wash. 446, 25 P.335 (1890).

safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. . . . Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community. . . .⁴⁰

This conclusion was reinforced by stressing the intimate connection between custom and assumption of risk. The decedent's knowledge of the business meant that his "was a perfectly plain case of acceptance of an employment, with full knowledge of the risks."⁴¹

The rule in *Titus*, echoed in subsequent Pennsylvania cases, has sometimes been taken as representative of the dominant view of its time, most notably by Landes and Posner,⁴² but their reading is incorrect. That rule was not well received in the literature that proceeded *The T.J. Hooper*. Thus one thoughtful 1916 article put the objection to *Titus* as follows.

The harmful results that would in all probability follow the adoption of the common usage, and the safe results that would be assured by the substitution of a different method might, in a particular case, be so apparent that a prudent man would reject the former, and adopt the latter course. But in doing this he would depart from the rule laid down by the "unbending test" and of his own accord adopt the wiser and safer rule. Yet the rule of the "unbending test" constrains him to adopt the unsafe method in order to bring himself within the rule and escape the charge of negligence.⁴³

³⁹ 136 Pa., *supra* note 19, followed in the cases noted *id.*

⁴⁰ 136 Pa. at 626; 20 A.517 at 518.

⁴¹ 136 Pa. at 627; 20 A.517 at 518.

⁴² See Landes & Posner, *supra* note 13, at 137 and n.31, where they incorrectly treat *Titus* as representing the dominant nineteenth century view, which it did not. They do not discuss *Maynard*, *McDaniel*, or *Mayhew*.

⁴³ Henry R. Miller, Jr. The So-Called Unbending Test of Negligence, 3 Va. L. Rev. 537, 543 (1915).

The passage contemplates a world in which the *Titus* rule dysfunctionally locks the parties into an inferior safety equilibrium: every firm is safe if it adheres to custom, and each risks liability if it deviates from it, even for the better. Why would any firm adopt safer practices if it led to greater liabilities? The Pennsylvania rule therefore was said to place a ceiling as well as a minimum on effort. But the criticism is misplaced for two reasons. First, historically, there is no evidence that custom showed the rigidity on innovation that is attributed to it in the quoted passage. Firms, with a commendable desire to compete for labor, were willing to offer above average safety-conditions, with a lower level of anticipated risk, in order to attract workers. One can contract out of custom explicitly. Second, the rule itself makes it clear that deviations toward greater care are acceptable, by noting that some employers sometimes do supply higher level of safety, and face no legal obstacle in so doing. There is no implicit prisoner's dilemma game in treating custom as the unbending test of due care.

The harder question, whether the firm should be bound to the higher standards that it selected, was itself an issue during the last part of the nineteenth century, and there was at least some sentiment that private rules of conduct established by employers for their own workers are inadmissible in evidence in a negligence case because the "fallaciousness and unfairness" of that rule stems from its effect, as Judge Mitchell of the Minnesota court insisted, "that, the more cautious and careful a man is in the adoption of rules in the management of his business in order to protect others, the worse he is off, and the higher the degree of care he is bound to **exercise**."⁴⁴ But on this point Mitchell, one of the greatest nineteenth century judges, seems to misfire. If the defendant is able to persuade workers to take jobs or patrons to frequent premises on the footing that greater precautions will be taken, then he should be held to that individuated standard: the reduced cost of labor or the increased price from customers should be sufficient to fund the additional liability if the precautions are worth taking. So long therefore as these rules are used to induce customers to come in the defendant's direction, then

⁴⁴ *Fonda v St Paul City Railway Co.*, 61 Minn. 435, 438, 74 N.W. 166, 170 (1895).

the private action based on the higher standard allows the defendant to make its own promises credible.

Titus, however, deals with the situation where no such representation, express or implied, was made. Indeed there is a sense in which the case should not be regarded as one that is governed by custom at all, given the explicit individuated assumption of risk found in the alternative holding of the case. That assumption of risk defense should, if supported by the evidence, dominate even if the evidence of custom across the industry was to the contrary. It should govern even if the circumstances of this railroad were sufficiently unique (because no other transferred cars from broad' to narrow beds) to preclude any industry-wide custom. The assumption of risk defense precludes the need for any appeal to custom. The conflict between a general custom and particular contract should be resolved in favor of the contract.

In this case, however, no conflict appears, and custom and assumption of risk have a cumulative effect in favor of the defendant. Given that these two functioned in unison, the court 'in **Titus** reached the correct outcome even if it had a profusion of favorable rationales. There is a sharp distinction between a lawsuit that challenges the conduct in a particular case because it deviates from the custom on which it rests and one that challenges the custom to which the defendant conforms. The effort to take on this second line of inquiry was, and is, vastly larger than the first, and courts resisted the temptation not only in common law actions for negligence but also in the early English cases under the Employer's Liability Act of 1880, when this precise question recurred,⁴⁵ when the question of assumption of risk was also paramount.⁴⁶ Indeed, it is just the unwillingness to observe this distinction that marks the shift

⁴⁵ This invitation was rejected, with much division of opinion, in the English cases that construed the Employer's Liability Act of 1880. One issue litigated under the act was whether the concept of defect stretched far enough to allow an attack on designs that were dangers on the one hand, but in common use on the other. See, for example, *Walsh v. Whiteley*, 21 O.B.D. 371 (1888). On the general effect of the statute, see, Richard A. Epstein, *The Historical Origins and Economic Structure of the Workers' Compensation Laws*, 18 Ga. L. Rev. 775 (1982).

⁴⁶ See, for example, *Thomas v. Quartermaine*, 18 Q.B.D. 685 (1887); *Joseph Smith v. Baker & Sons*, [1891] A.C. 325.

from the traditional design defect cases based upon a narrow conception of product defect and the newer actions under the risk/utility banner that allow one to challenge the practice as well as the **case**,⁴⁷ a decision that also took place in an environment in which the assumption of risk defense was greeted with suspicion and hostility.

The substantive differences between the two approaches—custom and cost-benefit—are enormous. When custom is used, the courts can, in effect, function in a **reactive** fashion, relying on the practices formulated by those who have powerful incentives to get things right because of the daily peril in which they labor. Although the roles of the parties are asymmetrical in any employer liability case, the constant risk to safety should work to drive parties to the best approach to the inherent dangers of the work. The effort to second guess what a business has done requires a court to look with deep suspicion on the one source of information with a built-in tendency to reliability and to substitute its, or a jury's, judgment of what is prudent and what is not for the judgment of those in the field, even though it has inferior knowledge and a weaker incentive to get things right. Cases like **Titus** do not reveal a situation in which the parties are indifferent to the question of safety. They reveal cases in which some precautions are taken and others are not, which is consistent with a world in which additional precautions may have both hidden dangers of their own and may cost more to introduce than they are worth.

There is no conflict in ultimate objective between a cost-benefit analysis that treats custom as evidence and one that treats it as conclusive on the question of due care. The entire debate is over the question of the rate of convergence: Does one get to the due care standard more quickly and more cheaply with one approach than with the other? The argument for **Titus** has a strong Hayekian cast, concerned as it is with the importance of decentralized sources of

⁴⁷ For the modern point of view, see, for example, *Barker v. Lull Engineering Corp.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), with its heavy reliance on the balancing tests found in John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973), a hugely influential article that brought the risk/utility analysis to center stage in the products area.

information,⁴⁸ in that custom is both the more reliable and cheaper way to set standards of care where information is costly and juries themselves are prey to biases. The constant preference toward the position most persuasively championed in *T.J. Hooper* rests upon a view of the world that both stresses and exaggerates the weakness of custom, without recognizing the costliness and uncertainty of case-by-case deliberations that fly in the teeth of uniform practice. There is a tendency to say that custom should yield as the ability to collect and analyze information in a systematic fashion increases. But the same arguments have been made for centralized planning elsewhere and have failed. The improved technology gives rise to opportunities to confuse as well as to inform and offers no systematic promise of any overall improvement in decisionmaking. The defense of custom is not that it is certain, but that it is superior to any ex post reconstruction of the reasonable level of care that a judge or jury is likely to undertake.

C. Custom as Evidence of Due Care

By far the largest group of nineteenth century cases adhere to the line that was articulated with such eloquence by Learned Hand: that custom is only evidence of the role of due care. In the course of his opinion, Judge Hand cites four cases for the proposition that custom is not conclusive evidence of due care: *Maynard v. Buck*, *Wabash Railway Co. v. McDaniels*, *Texas & Pacific Railway Co. v. Behymer*, and *Shandrew v. Chicago etc. Railway Co.*⁴⁹ Each case contains general language that supports Hand's proposition, but the language in question takes on radically different significance when placed in the the factual and procedural context of each case, for none of these cases reveals any evidence on any inefficient custom that has been counteracted by the use of general negligence standards.

1. *A question of agency costs.* *Maynard v. Buck* arose out of a contract for hire under which the defendant drover was responsible for driving the plaintiffs two steers along the public highway toward

⁴⁸ For an excellent summary of Hayek's position, see John Gray, *Hayek on Liberty* 27–55 (2d ed.1986).

⁴⁹ 100 Mass 40 (1868); 107 U.S. 454 (1882); 189 U.S. 468 (1903); 142 F. 320 (8th Cir. 1905).

their destination as part of a larger herd of some 123 animals entrusted to his care by various owners. He was assisted by two men and a boy. There were two possible versions of how the cattle had been lost. One was that the defendant had failed to exercise ordinary care to see that the two steers were included in the original drive.⁵⁰ The second was that, after the drive had begun, several of the cattle, including plaintiffs two steers, were frightened by a passing train, and bolted from the herd, whereupon the drover decided to drive the rest of his herd to its destination before returning to search for the strays some two days later. Whatever the precise events, the plaintiffs two steers were not recovered, and suit was brought to recover for their loss.

The instruction given to the jury, and found correct on appeal provided that “the defendant ‘was bound to use the same care in regard to’ the cattle, which he undertook to drive for hire, ‘that men of ordinary prudence would exercise over their own property under the same circumstances.’ ”⁵¹ The defendant had asked for an instruction that “if he did do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in this action.”⁵² The following passage from Judge Wells’ judgment is the most frequently quoted.

What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed. It is not to control the judgment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs, or not such as a due regard to the obligations of those employed in the affairs of others would require them to adopt. It is evidence of what is proper and reasonable to be done, from which, together with all the other facts and circumstances of the case, the jury are to determine

⁵⁰ 100 Mass, *supra* note 49, at 46.

⁵¹ *Id.* at 47.

⁵² *Id.*

whether the conduct in question in the case before them was proper and **justifiable**.⁵³

At one level, the decision in **Maynard** looks as though it is an invitation for the court to decide to set standards for the business that are different from those which the business sets for itself. As such, it is consistent with the interventionist approach taken in **The T.J. Hooper**. But in reality, the context suggests a far narrower and much more functional test of due care—one that adumbrates the agency cost issue so dominant in modern law and **economics**.⁵⁴ The critical difference between the instructions offered by the plaintiff and the defendant lay in a single point: the plaintiffs proposed instruction looked at the question of optimal care from the point of view of the **single owner**, (the care “that men of ordinary prudence would exercise over their own property”) while the defendant’s proposed looked at the question of optimal care from the point of **view** of “**drovers** of common prudence” working under a contract of **hire**.⁵⁵

The nub of the difference is that the single owner will seek to minimize the sum of the costs of the lost cattle and the effort required to collect them because he bears the full cost of both. His course of action, without legal intervention, attributes to all relevant costs and attributes its appropriate (that is, full) social weight. The drover for his part labors under an implicit conflict of interest in that he bears all the costs of collecting the cattle, but receives none of the gain when they are safely gathered. In principle, the perfect contract is one that would require the drover to take the same level of care as that single owner, but in a world of imperfect monitoring and contracting it is just possible that a custom could develop among drovers that would allow them to slack off more than comparably situated owners.

Recast in modern terms, the effect of the instruction given is to advise the jury that it should ignore the agency-cost problem and ask whether the drover would have followed strategy if the lost cattle

⁵³ *Id.* at 48.

⁵⁴ For the initial exposition, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 31 *J. Fin. Econ.* 305 (1976).

⁵⁵ 100 *Mass.*, *supra* note 49, at 47; emphasis added.

had been his own-assuming of course that it found that the cattle were lost in transit and not previously. Within this context, the scope for this conflict of interest is narrow: the single owner knows that if he continues to drive the remaining herd to safety, he will incur (as a first approximation) no further losses in the cattle retained but an increased probability of the loss of those cattle that strayed. Alternatively, if he stops to search for the missing cattle, he will delay the journey and increase the likelihood that some other cattle will stray as well. Yet at the same time, he will increase the probability of recovering the two steers belonging to the plaintiff. A priori there is no reason why a strategy of search first/drive later would increase the drover's private costs above that of following the alternative strategy of drive first/search later. The implicit variation in the relevant variables makes it doubtful that any single strategy would minimize the losses from stray cattle and search time for the single owner, let alone the drover. But even here the drover's request for instructions sought to control for the problem by noting that the custom covered only "driving on routes from Brighton forty or fifty miles therefrom, when one or a small number of cattle stray from the drove and cannot be immediately found. . . ."⁵⁶

There is a further irony here, for the custom at issue, far from arising from a conflict of interest, may have worked to counter a second conflict of interest that was not identified in the argument at all: the plaintiffs, not owning the rest of the herd, had no incentive to see that those animals were safely delivered before the search was undertaken, whereas the defendant, being responsible for the whole herd, did. The custom therefore might have sought to control a latent but important conflict between multiple principals of a single agent.

What the jury thought is shrouded in mystery. The plaintiffs verdict could have rested on the theoretically uninteresting point that the cattle were wrongfully excluded from the herd at the outset or on the more interesting ground that an implicit conflict of interest between owners and drovers really did matter. A verdict on that last ground seems supportable given the early dismissal of the two employees who were not paid to assist in the search for plaintiffs steers, but that verdict is not an attack on custom itself. The

⁵⁶ 100 Mass., *supra* note 49, at 44.

custom only provided that the search be made after the animals were safely delivered. There was no custom that allowed a defendant to slack off in his efforts after delivery. If the defendant would have continued to employ the two men to search for his own steers, then he should have continued to employ them to search for the plaintiffs.

No matter how all these refinements are resolved, however, the deviation between custom and due care identified in *Maynard* goes to the agency-cost question and to that alone. It does not permit, as subsequent cases do, any jury to adopt a standard that seems to be wise after the event, but that would not be adopted by either a drover or an owner in the course of a drive. The gap between custom and due care reflects an intuitive sophistication of the principal-agent problem, not a widespread or intuitive distrust of private contracts or ordinary markets in the round. In *The T.J. Hooper*, Learned Hand includes *Maynard* on the list of cases that support his broad proposition that a whole calling may have lagged in the adoption of needed precautions.⁵⁷ But the case is better understood when its broad language is read in its functional context.

2. *The Procedural Blunder.* In *Wabash Railway Co. v. McDaniels*,⁵⁸ the plaintiff a brakeman employed by the defendant on its train, was injured when two of the defendant's trains crashed on its track. The cause of the accident was the negligence of a youthful telegraph operator on one of the defendant's switches, a lad named McHenry, who fell asleep one night at his position, allowed one of the defendant's trains to pass by unnoticed, and thus misled the defendant's central dispatcher as to the location of the train before it crashed. The railroad conceded that the servant was negligent within the course of his employment and that this negligence was the cause of the plaintiffs loss. The case presented difficulties only because the plaintiff mishandled the common employment rule by failing to take exception to the defendant's requested instruction that the fellow servant doctrine precluded the plaintiff from charging the railroad with McHenry's negligence. The plaintiffs blunder is transparent, as the applicable law recognized that the common employment defense did not apply when the plaintiff and the negli-

⁵⁷ 60 f.2d, *supra* note 4 at 740

⁵⁸ 107 sup22 U.S.note 49.

gent servant were in “different departments” as was surely the case here. If the right exceptions had been noted, the deadly combination of the ordinary rules of negligence and vicarious liability would have made the case a sure thing for the plaintiff. There is no custom that allows switch telegraphers to sleep on the job.

The plaintiffs initial mistake left him with a far more difficult task of recovery, for he had to persuade the court that the defendant’s “supervisory” negligence in hiring and training the worker could support a judgment of liability. **McHenry** was a youth of about seventeen years who had learned his trade as a telegraphic night operator from a fellow employee, whom he paid ten dollars a month for instruction both before and after he assumed his telegrapher’s position. This form of instruction was customary on the railroad, and the Wabash, like other railroads, made it a practice to hire its new telegraph operators from the ranks of its own **messengers**.⁵⁹ In this case it was undisputed that **McHenry**, whatever his failing in this case, was bright and industrious and of good habits. The plaintiff received an instruction that the railroad could be found negligent if it failed ordinary care, while the defendant was unable to obtain an instruction that

the question of ordinary care is to be determined by the usages or custom which obtain in railroad management, and, therefore, that proper inquiry is not what ought to be, but what is, the general practice in the business; that what the servant is presumed to know, and to have accepted as the basis of his employment, is the practice or custom as it is when, in hiring his services, he risks the dangers incident to his employment. . . . ⁶⁰

The first Justice Harlan, writing for a unanimous court, sustained the instruction, noting that the plaintiff had little or no opportunity to influence or even observe the hiring practices in the

⁵⁹ One of the night telegraph operators on the railroads was Thomas Edison, and he too fell asleep on the job, with near catastrophic consequences. Edison also advanced through the same apprenticeship system described in *Wabash Railway*. See Margaret Cousins, *The Story of Thomas Alva Edison* 46–48 (1965). (A Landmark children’s book that I read aloud with my son Benjamin, age nine.)

⁶⁰ 107 U.S. *supra* note 49, at 458.

telegraphic department: “ordinary” practice might describe what happened, but it could not set the appropriate limits for the “proper and great” level of prudence that is **required**.⁶¹ By taking this line, the court used one error to cancel out a second. There is no question that the issue of hiring custom would not have come up at all in a suit by an injured passenger or if the plaintiffs lawyer had not muffed his chance to invoke the different department exception to the fellow servant doctrine. There is no evidence that the full complex of rules works badly in this context. So long as the rule of vicarious liability is in place, then the question of supervision and retention drops out of the case. The railroad that follows its own custom is required to internalize all the costs of mistakes by its employee and therefore will gravitate to efficient hiring and retention practices, including having young workers pay for their own training. The opinion gives no clue as to what was wrong with the custom that was followed: yet from a distance it seems to make sense to bring young workers up through the ranks, to observe their character, ability, and work habits, and to know that they care enough about their future to pay higher ranked workers for individual instruction. Harlan’s opinion does not indicate what additional precaution the jury found wanting or why its undisclosed view should be persuasive in these circumstances. There is no evidence at all of any industry lag, and the verdict for the plaintiff may represent only the jury’s attempt to hold the railroad responsible for the obvious negligence of its employee.

3. *Texas & Pacific Railway Co. v. Behymer*. The second important Supreme Court case cited in *The T.J. Hooper* is this short, elegant opinion of Justice Holmes that is best known for a single sentence. ‘What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by the standard of reasonable prudence, whether it usually is complied with or **not**.’⁶² As such, the opinion does what Hand said it did by relegating custom to an evidentiary role. But there was no evidence in the case of any real tension between custom and due care; indeed there was no evidence of any operative custom at all. The plaintiff brakeman was ordered atop some cars standing in the yard and covered with ice (to release

⁶¹ *Id.* at 460–61.

⁶² See 189 U.S., *supra* note 49, at 470.

the brakes) so that the cars might be moved. When the cars were in motion, then stopped suddenly, Behymer was thrown back on a projecting nail from the running board, and injured himself when he tried to recover his balance. It does seem clear that there is a risk to stopping too suddenly; that the risk is enhanced by any icy condition; and that the projecting nail could well have hurt or distracted Behymer enough to prevent him from recovering his balance. But there is no evidence in the case of any custom of the trade that would justify the railroad's behavior to move the cars given these three factors. The case reads as one in which no custom was involved at all or perhaps one in which a custom has been violated. But there is no hint of any affirmative custom that would exonerate the defendant from a charge of ordinary negligence. The decision does not afford an instance of the industry lagging behind what is required by due care.

4. *The Impractical Precaution.* The last of the cases cited by Learned Hand, *Shandrew v. Chicago, St. Paul, M. & O. Railway*,⁶³ arose when a railroad employee, riding atop a train, was thrown to his death when the train suddenly and violently stopped. The negligence alleged was the failure to inspect properly a brake hose that burst while in use on the train. The plaintiff alleged that the railroad was negligent in using a spliced hose to replace the original, but the evidence suggested this was common custom and that these spliced hoses were as safe as any *other*.⁶⁴ The plaintiff further alleged that the railroad omitted a proper inspection, which was said to require a test of the hose "by giving it any more than the pressure which is usually applied in the use of a hose."⁶⁵ In dealing with this objection, the court noted first that the custom of the trade was uniformly the other way and that the only inspection given before use of a hose was a visual one. It then made the further argument that the excessive pressure demanded of the plaintiff could well be sufficient to burst a hose that would have been safe in its ordinary use. There is no evidence in *Shandrew* that the purported additional precaution was better than those which were already taken. Indeed the proposed alternative was likely to have made matters worse. The

⁶³ 142 F.320, *supra* note 49.

⁶⁴ *Id.* at 325.

⁶⁵ *Id.* at 326.

right way to deal with untested customs was that adopted by the court. There is surely a residual risk of accident, but none that a generalized cost-benefit formula could override.

The great risk raised by the case lies in quite the opposite direction, and it is one that infects the entire area. The defendant was all too eager to introduce evidence that indicated why its compliance with custom was prudent under the circumstances. Its lawyer took the commendable view that it was best to nail down the favorable verdict with all evidence available. While that might speak of prudence for the attorney in the individual case, it presents a systematic challenge that tends to undermine the effective operation of the system. In other cases where it is harder to get at the costs and benefits of the dominant rule, the failure to present cost-benefit evidence will be regarded as a gap in the case so long as this evidence is admissible at all. Only the hard-edged rule that denies the introduction of cost-benefit information to bolster an established custom can avoid the negative inferences otherwise drawn from silence. Yet to adopt that rule is to rely exclusively on the institutional arguments for custom to the exclusion of the particular case. In some sense the success of some plaintiffs thus paves the way for a mixed system that takes both custom and cost-benefit analyses into account. For surely, if the defendant is entitled to introduce cost-benefit evidence to bolster custom, then the defendant can introduce cost-benefit evidence to undercut it.

V. THE *T.J. HOOPER*

With this examination complete, I turn briefly to *The T.J. Hooper* itself. As a matter of doctrine, it does seem clear that Learned Hand did not take any position that was out of the ordinary. His concern to express the disjunction between custom and reasonable care may have rested in part from his effort to distance himself from two earlier Second Circuit decisions, *Ketterer v. Armour & Co.*,⁶⁶ and one of his earlier admiralty cases, *Spang Chalfant & Co. Inc. v. Dimon S.S. Corporation*,⁶⁷ which, on a complex question of cargo stowage, took the position that courts "must depend upon

⁶⁶ 247 F.921, 931 (2d Cir.1917) (testing of pork for trichinae, a "general custom" is said to offer the "most satisfactory evidence" of due care.)

⁶⁷ 57 F.2d.965 (2d Cir. 1932).

those whose greater experience gives their estimates, even if no better than honest guesses, more weight than our **speculations**.”⁶⁸ Hand’s short term motive was probably only to bring the Second Circuit back in line with what he thought to be the general view of the subject, notwithstanding language that could be read to the contrary.

Nonetheless, the most critical point about the decision is Hand’s apparent misreading of the record. There is little doubt that the rhetorical force of his opinion rests upon his assertion that there was no custom in the industry to carry these sets on board. The point of his remarks, if true, is that it suggests the radical disjunction between the requirements of the trade on the one hand and the dictates of prudence on the other. It would make *The T.J. Hooper* the perfect case to show the wisdom of the standard common law approach. Even the most casual form of armchair empiricism, whether of the 1920s or today, would lead anyone to conclude that radios are an unmixed blessing for ocean transport. The perils of the seas are so widely known and rehearsed that they hardly need to be repeated. Even if the tug was not towing a barge laden with cargo, its captain and crew should want to have a radio on board for their own protection and that of the tug. The addition of barge and cargo only increases the gain from using radio without any offsetting increase in its cost. If the world were as Hand described it—one in which no custom had emerged on the use of radios—there is powerful, if not conclusive, evidence of a gap between common practice and due care that it was imperative for the law to bridge.

The difficulty with Hand’s decision is the factual premise on which it rests. The imperative need for radio communication was apparent to outsiders to the business. Radio was the growth industry of the 1920s, and its rapid expansion was plain to all.⁶⁹ The Navy made extensive efforts to keep the spectrum under its control because

⁶⁸ *Id.* at 967.

⁶⁹ The cargo owner’s brief contains a telling passage from Frederick Lewis Allen, *Only Yesterday: An informal history of the nineteen-twenties* (1931), that recounts the commercial growth of the industry. Allen noted that by the spring of 1922 radio had become a craze. Sales of radio equipment jumped from \$60 million to \$842 million from 1922 to 1929. See Brief for New England Coal and Coke Co., at 30, n.5, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932)

of its vast use as an aid to navigation? There were several high level conferences in the 1920s to discuss the fate of the spectrum.⁷¹ These were quickly followed by the Radio Act of 1927,⁷² which introduced the current system of frequency allocation carried forward by the Federal Communications Act of 1934.⁷³ In light of this history, the district court found that “[r]adio broadcasting was no new or untried thing in March 1928. Everywhere, and in almost every field of activity, it was being utilized as an aid to communication, and for the dissemination of information.”⁷⁴ That radio sets were in widespread use on vessels of all kinds is clearly indicated by the testimony in this case. “The coastwise towing experts who testified in this case were unanimous in the opinion that an efficient radio receiving set in March 1928 constituted a part of the necessary equipment on every well-equipped tug, and that radio weather reports in the coastwise towage service constituted important information in order to take proper precautions in navigation.”⁷⁵

The testimony further indicated that at least 90 percent of the tugs in the defendant’s company and others along the coast relied upon the receiving sets.⁷⁶ It is likely that the other 10 percent followed as quickly as time and circumstance permitted. On the strength of this record it is quite amazing that Learned Hand treated this case as one in which there was no established custom. The evidence is against his point, and, wholly apart from the merits of the issue, he should have been bound by the determination of fact below. Yet he wrote--it is impossible to say why--“[i]t is not fair to say that there was a general custom among coastwise carriers so to equip their tugs. One line alone did it; as for the rest, they relied on their crews, so far as they can be said to have relied at all.”⁷⁷ This is a misleading way to characterize both the evidence and the finding.

⁷⁰ For the early history, see Jonathan Emord, *Freedom, Technology and the First Amendment*, ch. 11 (1991), and the earlier account in R.H. Coase, *The Federal Communications Commission*, 2 J. Law & Econ. 1 (1959).

⁷¹ See Emord, *supra* note 70, at 146–53.

⁷² *Id.* at 171

⁷³ *Id.*

⁷⁴ See Brief, *supra* note 69, at 35.

⁷⁵ *Id.* at 29–30.

⁷⁶ *Id.* at 35.

⁷⁷ 60 F.2d, *supra* note 4, at 739.

The most that can be said for Hand's position is that the duty was delegated by the tug owner to the crew, but, as with other forms of delegation, the tug owner is responsible if the delegation misfires and leaves the ship unseaworthy in consequence. Hand seems to have altered the record in the case in order to make his legal point that custom is not dispositive on the issue of due care and seems to have done so in circumstances calculated to attract attention. In a sense his treatment completes the cycle. There is a uniform line of cases that stand for the proposition that custom is at most evidence for due care in a negligence action. Yet there is not a *single one* of these critical cases relied upon by Learned Hand where that proposition is true. In each and every one of them, the outcome is better explained on narrower grounds, and while there is doubtless some case in which the general proposition is true, that fact alone offers no reason for deviating from the unbending rule that custom is conclusive evidence of good care in negligence cases arising out of consensual arrangements.

VI. CLOSING REMARKS

The T.J. Hooper, then, does not derive its influence from its doctrinal originality. It followed a line of cases that held much the same thing. Earlier cases established the relationship between custom and due care and treated it as an arid proposition that concerned the internal operation of the negligence law. Clarence Morris thought that the critical distinction was between two senses of reasonable or average care: the statistical sense and the value-laden sense. In his view, custom was thought to establish the former, while the ultimate issue was the latter? There is an important internal difficulty with Morris's formulation, for it is doubtful that any negligence rule should ever hold that one-half of any calling—that below the median—is negligence, and this difficulty is obviated with custom as a standard, for everyone can comply with the customary standard. But these conceptual fine points are about law and for lawyers. What Learned Hand was able to do was to project the same point in a different light. He was able to make the gap between custom and negligence seem less like a fine point in the law of torts

⁷⁸ Morris, *supra* note 10, at 1155.

and more like an attack on industry, one that gained credibility because it was authored by a great judge whose own conservative credentials could scarcely be called into doubt. In effect, *The T.J. Hooper* erected a populist manifesto for the tort law.

Within the law of admiralty and the law of automobile accidents, there is little perhaps that this change in orientation can achieve. But the remarks were carried over into the expanding areas of medical malpractice and product liability, where they served to direct social criticism toward physicians and other health care providers on the one hand and product manufacturers on the other. In the former context, *The T.J. Hooper* did not fall on fertile ground. The famous passage from this case (along with *Behymer*) was set out in *Helling v. Carey*,⁷⁹ where it has received a chilly reception and has not worked its way into the dominant fabric of the law.⁸⁰ Even Clarence Morris criticized the effort to oust the standard of customary care in negligence cases on the ground that custom was probably the only “workable test available.”⁸¹

That skepticism has not, however, carried over to product liability law. That branch was the litigation backwater it deserved to be when the concept of defect was defined so that one could only challenge one discrete unit on the grounds that it deviated from the standards set by the firm for the product. But it became big business once custom was no longer the standard by which the safety or defectiveness of products was judged. It became possible to challenge an entire industry whose custom “lagged” behind what reasonable prudence dictated, as the famous quotation from *The T.J. Hooper* is trotted out at critical junctures to justify the movement away from any market-based standard of liability. Assumption of risk is no longer an absolute defense against charges of liability unless it is unreasonable, and it thus becomes a species of contributory negligence.⁸² Liability is not restricted to latent defects, where there is a colorable claim that the condition of the product was misrepresented

⁷⁹ 83 Wash. 2d 514, 519 P.2d 981 (1974).

⁸⁰ *Helling* was overruled by Wash. Rev. Code §4.24.290. It has been disavowed elsewhere. See, for example, *Barton v. Owen*, 71 Cal. App. 3d 484, 139 Cal. Rptr. 494 (1977).

⁸¹ Morris, *supra* note 10, at 1164

⁸² See, Restatement, *supra* note 14, at §402A, comment *n*.

by the manufacturer to the consumer. Common practice is never an absolute defense but is admissible as evidence on the state of the art.⁸³

The overall pattern is clear. The successive layers of protection against government intervention are thus pierced one at a time, so that in the end it is possible to attach liability to known defects sanctioned both by common practice and individualized assumption of the risk. With all the limitations on liability put to one side, there was but one technique by which such a development could take place: the cost-benefit calculus of the Hand formula in *Carroll Towing*, championed by both Landes and Posner and by Shavell ironically becomes the “risk/utility” test of Wade that has received such prominence in the decided cases.⁸⁴ The rhetoric of Learned Hand has fit in perfectly with the antimarket rationales that dominate this area of thought, so that *The T.J. Hooper* has its greatest influence and vitality in an area that lies far removed from the admiralty controversy that gave it birth.

The effectiveness of Hand’s condemnatory rhetoric has not diminished with time. It is always open season on an established practice, as the cost-benefit approach can be used, without rudder or compass, to override the established custom. “[A] whole calling may

⁸³ Perhaps the leading discussion is in *Boatland of Houston, Inc. v. Bailey et al.*, 609 S.W.2d 743 (Tex. 1980), which reaffirmed the admissibility of custom on the state-of-the-art question, where it is not decisive. A plaintiff may show that a design alternative that has not been put into use is nonetheless feasible, a determination that requires courts and juries to make trade-offs between quality, safety, and price that are better done by markets. A minority of courts hold that a strict liability standard of tort liability does not even permit a defendant to raise a state-of-the-art defense. See, for example, *Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884 (Mo. Ct. App. 1984) (evidence of conformity with industry standards inadmissible, as is evidence that manufacturer’s design was the safest available with existing technology).

⁸⁴ Wade, *supra* note 47. It would be nice to report that Wade cited Learned Hand, but he did not. The influence of his dictum in *The T.J. Hooper* is picked up in Marshall S. Shapo, 1 *The Law of Products Liability*, ch. 10-6 (1989), which is immediately followed by a long discussion of state-of-the-art and cost-benefit tests. Shapo’s next chapter is then devoted to finding the rules which allow for the public determination of reasonable design standards; it begins with a repetition of Hand’s point. *Id.* at ch. 11-2 to 11-3.

have unduly lagged in the adoption of new and available devices.”⁸⁵ There are many competitors for this questionable honor, but Hand’s famous statement is perhaps the most influential, and mischievous, sentence in the history of the law of torts.

⁸⁵ 60 F.2d, *supra* note 4, at 740.

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