California Law Review

Volume 105 | Issue 1 Article 4

2-1-2017

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James A. Henderson, Jr., *Learned Hand's Paradox: An Essay on Custom in Negligence Law*, 105 Cal. L. Rev. 165 (2016).
Available at: http://scholarship.law.berkeley.edu/californialawreview/vol105/iss1/4

Link to publisher version (DOI)
http://dx.doi.org/10.15779/Z38585V

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Learned Hand's Paradox: An Essay on Custom in Negligence Law

James A. Henderson, Jr.*

In a well-known tort decision, Judge Learned Hand observes that while legal standards almost always coincide with customary industry standards, strictly speaking custom never controls. This Essay examines the implications of this apparent paradox, concluding that courts must have final say in order to prevent doctrinal feedback loops—situations in which legal doctrine influences customary behavior which, in turn, influences doctrine, which in turn influences custom, and so on. Were feedback loops allowed to develop unchecked by judicial review and intervention, they would lead to unfair and inefficient overinvestments or underinvestments in care. The Essay describes the approach courts should adopt in determining whether, in given instances, these feedback loops present a problem.

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DOI: http://dx.doi.org/10.15779/Z38585V
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INTRODUCTION

This Essay pursues two objectives concerning the role of custom in negligence law. The first aims to resolve a seemingly paradoxical assertion by an American torts icon, Judge Learned Hand, in one of his judicial opinions. Custom intrigued the judge. Even his most famous contribution to American tort law—his "B<PL" formulation of the negligence concept—touches on the topic.[1] But it is Hand's observation in another case that addresses the role of custom head on—his assertion in a much-cited decision affirming the rule that, while industry custom almost always coincides with legal standards, it never sets those standards[2]: "[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure . . . . Courts must in the end say what is required . . . ."[3]

The paradox in the quoted language lies in this: to ensure that customary behavior ordinarily satisfies applicable negligence norms, courts setting the negligence standard must be careful to defer to custom in almost all cases—allowing custom, in effect, to call the liability tune. But this imperative stands in apparent contradiction to Hand's second assertion that, strictly speaking, law, not custom, always has the final say. So which is it to be: do customary behavior patterns call most of the negligence-based liability tune, or must court-determined reasonableness norms always, in the end, perform that function?

When the preceding text refers to custom calling the liability tune "in almost all cases," it glosses over a difficult decision-making problem. In classic negligence litigation, a court never has "most cases" before it at one time. If it did, it would be relatively easy for the court to employ comparative analysis—as when a professor arranges a hundred or so law exams on a curve from worst to best—to identify the extreme examples that justify judicial intervention. So how does a decision maker decide whether the single case before it is truly exceptional? If the legal negligence standard were specific, straightforward fact-finding would reach the appropriate outcome, letting the worst and best chips fall as they may. But the basic negligence standard is quite vague. Perhaps the court might rely on a presumption of reasonableness, rebuttable only in extreme cases. Once again, without a meaningful opportunity to make cross-case comparisons, how would a court decide, applying a vague

1. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("[I]t may be that . . . custom [is available] and that, if so, the situation is one where custom should control."). Hand's statement is enigmatic in that it implies that custom, when proven, controls. However, Hand's opinion in *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), reflects the majority rule that industry custom influences, but does not control, negligence cases. *See infra* note 33 and accompanying text.

2. *See The T.J. Hooper*, 60 F.2d at 740.

3. *Id.*

reasonableness standard, whether the single case before it is extreme in relation to all the others?[4]

This Essay's second objective is to consider the extent to which changes in safety-related custom—toward greater or lesser caution—cause related legal standards to shift in the same direction, leading to further responsive shifts in custom followed by corresponding shifts in doctrine, and so on. In this fashion, custom and doctrine, linked sympathetically, ratchet downwards (or upwards) regarding levels of caution both called for and taken. If such custom-related processes, which scholars have deemed "doctrinal feedback,"[5] are socially undesirable[6] and stopping or preventing them requires judicial intervention, then these circumstances may help to explain why Hand insists that courts must have the final say.[7]

I.
WHY NEGLIGENCE STANDARDS GENERALLY CONDONE CUSTOMARY BEHAVIOR

To start, it will be useful to identify the purposes served by ensuring that the reasonableness norms of negligence almost always draw content from—and thus impliedly condone—customary behavior. Substantively, customs that account for all affected interests are generally fair and efficient.[8] Legal process considerations also support a legal standard that integrates custom. For example, Lon Fuller offers a basic psychological reason that negligence law should embrace customary behavior, drawing a distinction between what he terms "the morality of duty" and "the morality of aspiration."[9] The morality of duty justifies imposing liability for the failures of human actors to respect the basic and commonly recognized requirements of social interaction—the

4. The author has addressed this problem elsewhere, referring to it as "seriatim" decision making and concluding that there is no easy solution. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 302–03 (1990).

5. *See, e.g.*, James Gibson, *Doctrinal Feedback and (Un)Reasonable Care*, 94 VA. L. REV. 1641, 1644–45 (2008).

6. Assuming customs reflecting all affected interests are fair and efficient, *see infra* note 8 and accompanying text, doctrinal feedback that gives advantage to injurers or victims is, by definition, unfair and inefficient. And to the extent that doctrinal feedback leads to extreme unfairness and inefficiency, it is extremely undesirable. Unsurprisingly, the scholar who coined the phrase "doctrinal feedback" refers to the phenomenon as "pernicious," "wasteful," and "a perfect storm of dysfunctionality." *Id.* at 1641–44.

7. *See supra* note 2 and accompanying text.

8. *See generally* Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1797–98 (2009) (discussing custom's fairness rationale); Richard A. Epstein, *The Path to* The T.J. Hooper*: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992) (discussing custom's efficiency rationale); James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 CORNELL L. REV. 1382, 1388–89 (1994) (arguing that adequate consideration of all affected interests justifies deference to custom).

9. LON L. FULLER, THE MORALITY OF LAW 10 (1964).

necessary conditions for living an acceptably safe and satisfactory life.[10] Threats of civil liability, aimed at deterring unreasonably dangerous conduct, work well in this context. By contrast, the morality of aspiration relates to the failures of individual actors to achieve the "fullest realization" of their human capabilities.[11] Imposition of tort liability is an inappropriate response to these latter sorts of shortcomings, which are best left to personal, aspirational strivings.

Fuller argues that extending moral and legal duties too far into the realm of aspirational behavior or, by implication, regularly condemning widely shared patterns of social interaction, will harm public morale by giving the idea of moral or legal duty a bad name: "Too long an exposure to [a regime of overblown obligations] may leave in the victim a lifelong distaste for the whole notion of moral duty."[12] If Fuller's observations based on human psychology ring true, one can begin to understand why legal reasonableness norms should aim to condone common patterns of social behavior in most instances.

In addition to Fuller's psychologically oriented reasons for not imposing negligence-based liability on customary conduct, reducing the transaction costs of negligence litigation creates social benefits.[13] In particular, deference to custom in negligence litigation can provide judges relatively specific bases to rule as a matter of law and give juries compelling reasons to rule as a matter of fact. Without the need for protracted, complex deliberation, tort law delegates to nonjudicial actors the responsibility of making risk-utility decisions, thereby reducing the transaction costs of applying vague reasonableness standards in court.

Reducing the need for judges and juries to decide negligence claims based on vague normative standards also reduces the extent to which judges and juries must address what scholars have termed "polycentric"—essentially nonjudicable—planning problems.[14] A problem is polycentric when the elements relevant to its solution relate to one another in such a manner that consideration of any one element necessitates simultaneous consideration of most of the others. Risk managers, including private individuals, solve polycentric planning problems in everyday life in much the same way as architects design construction projects: by relying on heuristics and exercising

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10. *Id.* at 5–6.
11. *Id.* at 5.
12. *Id.* at 10.
13. *See generally* Abraham, *supra* note 8, at 1800–02.
14. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (defining and discussing adjudication of polycentric tasks). For an earlier application of polycentric problem solving to the judicial review of product designs, see James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). For a more recent treatment, see James A. Henderson, Jr., *Contract's Constitutive Core: Solving Problems by Making Deals*, 2012 U. ILL. L. REV. 89, 98–101 (2012) [hereinafter Henderson, *Solving Problems*].

experienced-based discretion.[15] And the legal system promises litigants an opportunity to participate in adjudication by making proofs and arguments that support demands for a favorable outcome as a matter of right. To achieve this, the substantive rules that guide judicial decisions must sufficiently segregate the major conceptual components of polycentric problems to allow a litigant to take a tribunal through linear chains of logic and, assuming the tribunal accepts the litigant's factual proofs, to be able to insist on a favorable outcome.[16]

In the absence of sufficiently specific rules to segregate component issues and guide decision, litigants must address open-ended, polycentric planning problems "of a whole" at trial. In turn, they can only entreat judges and juries to exercise broad discretion in granting their requests, which, in tort cases, transforms judges and juries into risk managers, relying on their intuitions, and litigants into supplicants, begging for judicial empathy. By largely defining reasonable conduct by reference to actual common conduct, however, the negligence system transforms an issue of polycentric normativity—how people in defendant's position should behave under all the interconnected circumstances—into an issue of historical fact concerning how reasonable people actually behave in those circumstances.[17] This transformation helps to reduce the extent to which judges and juries must exercise discretion in addressing the polycentric problems involved in determining fault guided only by vague, open-ended, normative standards.

II.
WHY NEGLIGENCE STANDARDS MUST SOMETIMES OVERRIDE SAFETY-RELATED CUSTOM: DOCTRINAL FEEDBACK AND MARKET FAILURES

If customary patterns of actual behavior generally influence negligence standards in most cases, why should not they control in all cases? Why should not courts conclude in every instance that customary behavior satisfies legal norms? Under a regime of total deference to safety-related custom, courts would impose liability on actors who depart dangerously from customary patterns of behavior, but courts would never second-guess these customary patterns to determine the requisite levels of care in the first instance. Why, in

15. Henderson, *Solving Problems*, *supra* note 14, at 106 (citing DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 49–50 (1983)). Fuller would consider both to be examples of aspirational problem solving. *See supra* notes 8, 10, and accompanying text.

16. *See* Henderson, *Solving Problems*, *supra* note 14, at 118–19 (citing Fuller, *supra* note 14).

17. Whether reasonableness—presumably reflected in social customs—refers to moral norms or historical facts is a controversial proposition. *See, e.g.*, Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 324 (2012) (discussing "the most fundamental inquiry about the reasonable person in tort law: Should reasonableness be a *normative* or a *positive* notion?"). For a view that the "reasonable person" standard refers to actual behavior, see Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 620–21 (2002). For a general discussion of how social customs fit into the mix, see Abraham, *supra* note 8, at 1798–99.

other words, having observed that deference to custom is almost always appropriate and bearing in mind the difficulties of seriatim decision making, does Hand insist that "Courts must in the end say what is required"?[18]

The answer cannot be simply that every so often, on a random basis, in a variety of contexts, a majority of actors happen to engage in common patterns of unreasonably dangerous conduct, and courts must correct such errors. If that were the rationale for Hand's assertion that courts must have the final say, then one could nevertheless argue that customary patterns of behavior should always prevail. On this view, having deemed customary behavior presumptively reasonable in most cases, courts should sensibly be willing to accept the possibility of occasional substantive errors as a small price to pay for avoiding the transaction costs—and presumably more frequent substantive errors—associated with independently reviewing the reasonableness of customary conduct in every instance. From this perspective, courts would delegate standard-of-care choices entirely to the realm of customary social interactions. Would the benefits of avoiding costly and error-prone judicial review of the reasonableness of customary behavior justify incurring the costs of courts occasionally condoning customary, but nevertheless negligent, behavior?

As long as one assumes that instances of negligent customary behavior develop only rarely and randomly and are relatively stable over the time that they develop, courts would be well advised not to incur the cumulative costs of reviewing the reasonableness of existing custom in every instance.[19] However, in a negligence regime in which customary behavior strongly influences the legal standard, a phenomenon others have termed "doctrinal feedback" would arguably ensure that a number of common patterns of risk-creating behavior would not be stable. Instead, standards would drift over time in the direction of actors increasingly investing either too little or too much in care when measured by traditional, judicially-created standards of reasonableness.[20] These continuing and socially costly shifts toward the extremes of excessive risk-taking and excessive caretaking would be initiated by actors' self-interest in seeking to externalize the costs of both accidents and accident avoidance measures and would be fueled thereafter by the mutually-referential link between the negligence standard and customary conduct.

Thus, as actors prone to risk-taking give in to the temptation to test applicable negligence standards by marginally reducing investments in care over time, some of these patterns of lessened care will evolve into custom, thereby lowering the relevant legal standards. Once lowered in this fashion, the negligence standards would face yet another round of marginal lowering, and so on, as newer customs undermine existing customs and the standards of care

18. *See supra* note 2 and accompanying text.

19. These costs would include courts having to address polycentric problems. *See supra* notes 15–16 and accompanying text.

20. *See* Gibson, *supra* note 5 and accompanying text.

ratchet downward. In the same manner, but in the opposite direction, one could expect actors prone to excessive caretaking—perhaps in part because insurance carriers bear the relevant costs of care—to overinvest in caution from a broader social perspective. In a fashion similar to the cycles of underinvestment just described, when overinvestments in care become customary, they influence courts to raise the standard of reasonable care, pressuring most similarly situated actors to take the same excessive precautions, thereby exposing the negligence system to yet another round of incremental increases in care.[21] By hypothesis these so-called doctrinal feedback loops represent extreme examples of market failures that are significantly detrimental to the professed objectives of the negligence-based liability system.[22] It follows that judicial efforts to prevent and reverse these feedback loops would constitute a reason Hand insists that courts applying the negligence standard must not defer to custom in every instance—that courts must have the final say.[23]

Two basic questions remain. First, as a general matter, how likely are doctrinal feedback loops to occur in a negligence system that routinely defers to customary patterns of behavior? Second, given that feedback loops are extremely undesirable, what forms of judicial oversight of customary conduct are likely to prevent them from occurring? To answer these questions, it will be necessary to examine more closely the basic types of customary behavior and the different mechanisms of judicial deferral to such behavior.

III.
TWO BASIC TYPES OF CUSTOMARY BEHAVIOR AND HOW COURTS DEFER TO EACH

In litigating negligence cases, courts encounter two basic types of custom relating to the levels of caution actors owe others. The first, which have been the primary focus thus far, are the informal, safety-related social customs that arise from personal interactions in noncommercial, nonprofessional contexts. The social behaviors involved are as often collaborative as they are competitive, and the norms involved are typically vague and imprecise.[24] Courts defer to these informal social customs by inviting triers of fact to apply a reasonable-person standard, allowing triers to rely on their own experiences and social customs to determine whether a reasonable person would have acted similarly under similar circumstances.[25] Rather than rely on proof regarding

21. For a discussion of this phenomenon in the context of medical care provision, see Gibson, *supra* note 5.

22. *See supra* note 6 and accompanying text.

23. *See supra* note 3 and accompanying text.

24. This is in sharp contrast to the industry customs discussed below, which arise in competitive markets and are quite specific. *See infra* Part IV.

25. For an analysis emphasizing "juror norms" as a major factor in determining outcomes in jury-tried negligence cases, see Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633 (2003).

common behavior, triers of fact apply their own life experiences in reaching outcomes that are essentially unreviewable.[26] Thus, under this standard, judicial delegation to the jury's interpretation of social custom is total.

Courts recognize formal exceptions to this basic approach when triers of fact may not rely on their own life experiences in formulating reasonableness standards. These exceptions include individual conduct that violates an explicit norm established by a safety statute;[27] conduct that, although unreasonable, escapes liability because the conduct constitutes a failure to rescue a stranger from danger;[28] and conduct that breaches a special norm arising out of a preexisting relationship between the parties.[29] All of these formal exceptions involve courts delegating standard-setting responsibilities to external sources other than the informal social customs previously encountered by triers of fact in their life experiences. Once proven by evidence at trial, they establish the relevant standards of care.[30]

In addition to informal social customs that arise from personal interactions, courts also confront more formal safety-related customs originating in the contexts of commercial competition and professional practice. These customs arise when a substantial majority of actors in a particular industry or profession adopt the same solutions to polycentric problems involving how best to manage risks of harm to others.[31] Patterns of common commercial and professional behavior are what most courts and commentators have in mind when they invoke the general rule that customary behavior patterns either establish or significantly influence legal standards of care.[32]

Like the exceptions to informal social customs,[33] industry and professional customs are proven by evidence at trial and are quite specific. The fact that nearly all actors competing in a commercial market or practicing in the same professional field adopt the same solution to a recurring problem strongly implies that the solution is reasonable to all affected interests. For this reason, customs exert significant influence in establishing the applicable standards of

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26. *See generally* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 176 (8th ed. 2012) ("The large majority of negligence cases brought to trial are sent to the jury, on instructions that give the jury great latitude in its determination of the negligence issue. Actually, it is only a slight exaggeration to assert that negligence in most cases is whatever the jury says it is.").

27. *See, e.g.*, Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920) ("The omission of these lights [i.e., traveling on a highway at night without lights, as required by highway law] was a wrong, and, being wholly unexcused, was also a negligent wrong.").

28. For an articulation of this doctrine, see HENDERSON ET AL., *supra* note 26, at 244–72.

29. *Id.* at 230–44.

30. *See, e.g.*, *Martin*, 126 N.E. at 815 ("We think the unexcused [violation of a safety statute] is more than some evidence of negligence. It *is* negligence in itself.").

31. For an analysis of the nature and sources of commercial customs, see Henderson & Siliciano, *supra* note 8, at 1382–89.

32. For example, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), involved an industry custom.

33. *See supra* notes 26–28 and accompanying text.

care. Courts admit industry customs into evidence and allow triers to give them weight.[34] Regarding professional customs, practitioners adopt common solutions not because they compete with each other but primarily because the professions aim cooperatively and self-consciously to develop optimal solutions for the profession and their clients as a whole.[35] Perhaps reflecting a greater level of trust in fellow professionals, as compared with commercial firms, courts explicitly and completely defer to professional standard-setters, treating professional custom as the applicable legal standard of care.[36]

IV.
THE EXTENT TO WHICH DOCTRINAL FEEDBACK LOOPS ARE LIKELY TO OCCUR IN CONNECTION WITH EACH BASIC TYPE OF CUSTOM

Two conditions are necessary for doctrinal feedback loops to occur: first, the relevant legal standards of reasonable care must take their content from established custom; and second, those standards must be articulated explicitly.[37] Regarding informal social customs, the likelihood that doctrinal feedback will cause the reasonable-person standard to evolve toward more or less caution than reasonably necessary is nil. In connection with the recognized exceptions to judicial deferral to social custom, of course, the applicable legal standards do not take their content from customary patterns of conduct, so doctrinal feedback cannot occur. But even when informal social customs inform the legal standards in what might be deemed mainstream negligence litigation, feedback loops will not occur because neither the customs nor the responsive adjustments of legal standards are explicitly articulated and hence cannot self-consciously influence outcomes in subsequent cases.[38]

Turning to judicial deferral to commercial and professional customs, doctrinal feedback is possible because the necessary conditions are satisfied: the customs provide content for the relevant legal standards; and those standards are explicitly articulated so that they can, at least in theory, affect future negligence litigation. To assess the likelihood of market failure and the feedback-loop phenomenon that will follow, it is necessary to consider

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34. *See, e.g.*, *The T.J. Hooper*, 60 F.2d at 738. *See generally* Abraham, *supra* note 8, at 1797–99 (discussing judicial consideration of custom). Scholars have recently argued that evidence that a defendant deviated from safety-related custom exerts strong influence on jury decision making. *See* Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285 (2008).

35. Professionals do compete for prestige associated with being the first to develop creative new solutions, but those solutions become common out of a shared commitment to promote their clients' welfare.

36. *See generally* Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959) (discussing professional custom as the legal standard of care in medicine); Richard N. Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 IND. L.J. 528 (1976).

37. These requirements assure that the relevant customs are the causal agents of the inappropriate shifts in legal standards toward too little, or too much, caution.

38. Gradual shifts in negligence standards are to be expected, but they will occur as a result of a host of factors other than doctrinal feedback.

commercial and professional customs separately and to consider separately within each category the possibility of market failures resulting in some actors investing too little, and others too much, in precautionary measures.

Regarding safety-related customs that arise in commercial markets, when such markets are competitive and take into account—directly or indirectly—all interests at risk, departing from those customs in either direction is never in any market participant's self-interest.[39] Of course, the market may not adequately represent potential victims of suboptimal precautions. In that event, and in the absence of tort remedies, competition will pressure market participants to ignore, rather than protect, such victims' interests, resulting in market failures in the form of suboptimal investments in precautions aimed at protecting the interests of the underrepresented.[40] Moreover, these suboptimal investments might well lead to destructive cycles of doctrinal feedback.[41]

Would this same pattern of market failure prompt commercial firms into cycles of investing too much in caution? At first glance, overinvestment appears less likely than underinvestment. Self-interest understandably may tempt a firm to *under*invest, given that the savings redound directly to the firm's benefit. By contrast, *over*investment in care adds to the firm's costs of doing business and for that reason is ordinarily unattractive. Two circumstances, however, might plausibly encourage competing firms to overinvest in care. First, an outside source might customarily underwrite the relevant costs, encouraging firms to increase investments in care that cost them little or nothing in order to gain the benefits of reducing their subsequent exposures to negligence-based liabilities.[42] Second, firms might market their products and services in a manner that generates fear-based excessive consumer demand for wastefully high levels of safety.[43] The first possibility is admittedly unlikely to occur; the second is quite plausible, especially when firms distribute safety equipment as post-sale retrofits for inherently dangerous products.

The preceding discussion has focused on industry custom arising in competitive commercial markets. Does the same analysis lead to the same conclusions regarding customs arising in the context of professional practice? It would appear that professional customs embracing underinvestment in precautions are unlikely to develop. Regarding medical custom, for example,

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39. When these conditions are met, the resulting customs reflect optimal levels of care, from which departures are, by hypothesis, wasteful. *See supra* note 8.

40. Henderson & Siliciano, *supra* note 8, at 1383–84.

41. *See supra* notes 4–5 and accompanying text.

42. The main benefit takes the form of allowing the commercial defendant in negligence litigation to show that it had bent over backwards trying to give the plaintiff every opportunity to avoid injury. To a lesser extent this tendency to overinvest in care will occur, for the same reasons, in the absence of insurance coverage. *See* HENDERSON ET AL., *supra* note 26, at 176.

43. *See* James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 245 (2000).

cutting-edge modes of health-care delivery most often find their sources in leading practitioners who work cooperatively with others in major medical centers and are subject to extensive peer review.[44] As a result, the relevant professional risk-management decisions are likely to represent all interests at stake. In addition, the very essence of a medical professional's commitment is to treat patients' interests as the primary consideration, and the availability of first-party insurance helps medical practitioners conform to the patient-first ideal.

In fact, the availability of insurance covering medical care is so supportive that *over*investment in medical care, rather than *under*investment, is the form of market failure more likely to occur. Such overinvestment in care, commonly termed "defensive medicine,"[45] benefits not only patients but also practitioners because subsequent malpractice claims are less likely to succeed when medical care providers appear to have gone out of their way to prevent harm to their patients.[46] In any event, insurance-supported overinvestment in caution certainly lends itself to becoming the focus of the doctrinal feedback phenomenon.

All told, doctrinal feedback poses a potentially significant impediment to what would otherwise be a worthwhile development in a system of negligence-based civil liability—deferral to customary behavior regarding how a reasonable actor should behave. Such an impediment does not arise in connection with informal social customs. Marketplace customs are more susceptible to misallocations of resources in the form of underinvestment in precautions. Of course, these types of market failures may be checked by judicial review or regulation. Further, professional and medical customs are chiefly susceptible to misallocations in the form of overinvestments in precautions. The discussion that follows considers the major ways that legal regulators, including courts, can reduce these potentially wasteful forms of market failure.

V.
MODES OF REGULATORY ADJUSTMENT AND JUDICIAL REVIEW THAT REDUCE FEEDBACK-RELATED MARKET FAILURES

Given that informal social customs establishing standards of reasonable care in noncommercial, nonprofessional settings are not susceptible to doctrinal

44. *See generally* Annetine C. Gelijns & Samuel O. Thier, *Medical Technology Development: An Introduction to the Innovation-Evaluation Nexus*, *in* 1 MODERN METHODS OF CLINICAL INNOVATION 1 (Annetine C. Geligns ed., 1990); Peter McCulloch, *Developing Appropriate Methodology for the Study of Surgical Techniques*, 102 J. ROYAL SOC'Y MED. 51 (2009).

45. *See generally* Laura D. Hermer & Howard Brody, *Defensive Medicine, Cost Containment, and Reform*, 25 J. GEN. INTERNAL MED. 470 (2010) (discussing the costs and policy implications of defensive medicine).

46. *See supra* note 42 and accompanying text.

feedback,[47] judicial review is not required. Regarding commercial markets, in which doctrinal feedback leading to underinvestment in care is possible, several legal responses are available. For example, courts might review the reasonableness of every litigant's proffered safety-related industry custom. The problem with this response is that it would all but eliminate the advantages of deferring issues of reasonable care to industry custom in the first place.[48] A marginal improvement might take the form of courts addressing not the substantive question of the reasonableness of suspect customs but the narrower, less polycentric-structural question of whether the interests of the plaintiff's group are adequately reflected in the allegedly suboptimal custom.[49] The question would not be whether a suspect custom is reasonable but whether it arose out of a process of interaction that arguably reflected the plaintiff's interests. The threat of doctrinal feedback helps to justify such judicial review but would not be its main focus once review is undertaken.

Regarding overinvestments in care in connection with the provision of medical services, recall that one of the circumstances giving rise to such overinvestments is the ready availability of first-party insurance.[50] Although medical care providers blame such overspending on their exposures to tort liability,[51] the major culprit in causing overinvestments in care appears to be the absence of professional or market controls that might inhibit the wasteful subsidies afforded by overly generous insurance outlays. It follows that the remedies for this form of overinvestment in care should include limiting the wasteful application of funding rather than simply cutting back on care-

47. *See supra* Part IV.

48. Courts would have sought to avoid independent assessments of the reasonableness of individual conduct that conforms to patterns of common behavior, only to be required to assess the reasonableness of the behavior patterns themselves.

49. The possibility that commercial and professional customs might condone inadequate investments in care on behalf of underrepresented interests is, interestingly enough, basically the same possibility that—on a much broader scale—gave rise to the American products liability revolution in the mid-twentieth century. Prior to the revolution, the tort system deferred products liability issues to the terms of contractual exchanges in a manner similar to how courts now defer non-products negligence issues to commercial and professional custom. The conceptual vehicle for this earlier deference was judicial reliance on implied warranties of merchantability, which presented serious doctrinal obstacles—e.g., requirement of privity and efficacy of disclaimers—to tort plaintiffs' chances of recovery. *See generally* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 14–15 (8th ed. 2016). This deference to contract in products liability claims rested on judicial assumptions that typical consumers of commercially distributed products understand the relevant benefits and risks, and thus, can adequately protect their interests in the market. As doubts arose regarding these traditional assumptions, courts began to replace their "caveat emptor" approach with one of "caveat vendor." *See id.* at 13–21. Thus, American products liability law is an example of an entire field of tort law subject to judicial intervention and oversight based on assessments of market failure similar to the assessments described in this Essay of the role of custom in non-products contexts.

50. *See supra* note 21 and accompanying text.

51. *See generally* Hermer & Brody, *supra* note 45, at 472 nn.11–18 and accompanying text.

providers' exposures to malpractice liability.[52] Presumably, nonjudicial regulators who administer systems of reimbursement for medical care would implement these remedies. Experimentation with cost-containment programs continues.[53]

Beyond such programs, it might be prudent to try to encourage care providers to avoid wasteful overinvestment in care through their own initiatives. Perhaps some type of constrained judicial review of arguably overcautious custom would be justified, accompanied by a rebuttable presumption that diagnostic redundancy is not medically necessary.

CONCLUSION

So long as one does not take Hand's dictum in *The T.J. Hooper* to suggest that courts must review the reasonableness of customs in every instance to identify the relatively few that do not deserve judicial deference, Hand's observations make sense. For that matter, total judicial deference to custom would be sensible were it not for the possibility, in the absence of review, of a particularly virulent form of market failure involving doctrinal feedback—doctrine influencing custom influencing doctrine and so forth—causing the negligence standard to drift toward the extremes of endorsing either too much risk or too much caution. Because doctrinal feedback loops cannot occur with regard to informal social custom, judicial interventions to prevent market failure are unnecessary. Regarding commercial and professional customs, where feedback loops are possible, courts must review the adequacy of the structures surrounding and supporting the relevant customary behavior, rather than try to judge the reasonableness of the customs, themselves.[54] It follows that Hand's paradox in *The T.J. Hooper* is not so paradoxical after all, once one recognizes and deals with the threat of doctrinal feedback.

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52. *See generally* Gibson, *supra* note 5, at 1692–710. Another way to discourage wasteful redundancy would be to revise insurance contracts to place dollar limits on coverage for each discrete medical ailment. *See id.* at 1702.

53. *See generally* Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 394–98 (1994) (discussing the historical evolution of health care cost containment toward group-purchasing plans spearheaded by the Clinton Administration).

54. Structural review is easier for courts to manage. Admittedly, the issue of structural adequacy is somewhat polycentric, but to a lesser extent than the reasonableness of customs when judged from a broad social perspective. For a discussion of polycentricity, see generally *supra* notes 14–15 and accompanying text. For a discussion of the analogous situation in connection with judicial review of actions by administrative agencies, see James A. Henderson, Jr., *A Process Perspective on Judicial Review: The Rights of Party-Litigants to Meaningful Participation*, 2014 MICH. ST. L. REV. 979.