

ESSAY

CUSTOM, NONCUSTOMARY PRACTICE, AND NEGLIGENCE

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The rule that evidence of compliance with or departure from custom is admissible to prove negligence reflects the notion that recurring patterns of conduct have a bearing on what constitutes reasonable care. In contrast, evidence of the incidence of practices that are not sufficiently widespread to qualify as customs is not admissible to prove negligence. This latter rule treats each negligence case as more nearly unique. In other words, the traditional custom rule reflects an “experiential” conception of negligence, whereas the practice rule reflects an “individuated” conception. This Essay examines precisely what makes custom evidence at least potentially probative of reasonable care, and analyzes the arguments for and against permitting the introduction of evidence of the incidence of noncustomary practices. In addition, because negligence law permits the parties to deploy, and juries to consider, evidence and arguments based on the different perspectives that the custom and practice rules reflect, we have a conception of negligence that is often ambiguous. In a concluding discussion, this Essay considers the varying sources of authority underlying negligence law, and teases out some of the broader implications these differences reveal for our understanding of negligence.

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* David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law. Thanks to Vincent Blasi, Leslie Kendrick, Frederick Schauer, and Benjamin Zipursky for comments on a draft of the Essay, and to Larry Stewart and Bill Wagner for helpful discussions about practice evidence. I am also grateful to participants in a Wake Forest Law School Symposium on the Restatement (Third) of Torts and to my colleagues in a workshop at the University of Virginia School of Law for their insights.

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INTRODUCTION

The forms of evidence that are considered relevant to the negligence question both reflect our understanding of what negligence is and influence that understanding. They tell us what to consider and what to ignore in thinking about negligence. One such form of evidence concerns custom. The custom rule tells us when we can get a reasonable care “ought” from the “is” of custom.¹ Admitting custom evidence reflects the idea that recurring patterns of conduct have a bearing on what constitutes reasonable care. In contrast, evidence of the incidence of practices that are not sufficiently widespread to qualify as customs is not admissible. In uniformly excluding evidence of practices that regularly recur but are not so widespread as to constitute customs, the practice rule treats each negligence case as more nearly unique, and leaves greater room for the risk-benefit and reasonable prudence conceptions of negligence to operate.² These different perspectives typically are not mutually exclu-

1. Cf. John R. Searle, How to Derive “Ought” from “Is,” 73 *Phil. Rev.* 43, 56–58 (1964) (addressing circumstances under which statements of fact can give rise to normative statements).

2. The risk-benefit conception of negligence compares the risks posed by an act or omission with its benefits in order to determine whether an actor was negligent. This conception found its most famous expression in Judge Learned Hand’s opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (suggesting that whether act or omission is negligent is function of probability of injury, magnitude of injury if it occurs, and burden of avoiding injury). See Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal*

sive. In many negligence cases there is evidence and there are arguments from each perspective. But the different perspectives reflect, and in negligence litigation are likely to lead to, different emphases.

The rule regarding evidence of compliance with and departure from custom is well settled. The new Restatement of Torts, for example, sets it out with admirable clarity. Evidence of an actor's compliance with custom is admissible for use defensively (as a "shield") to show reasonable care, and evidence of an actor's departure from custom is admissible for use offensively (as a "sword") to show negligence. But neither form of evidence is conclusive. The finder of fact may determine that an actor who complied with custom was negligent, or that an actor who departed from custom exercised reasonable care.³

In a classic article nearly seventy years ago, Clarence Morris articulated the arguments for the custom rule.⁴ Although the role played by custom in tort law has received a bit of attention from legal scholars over the past two decades,⁵ the custom rule itself has not been carefully examined since Morris wrote. Indeed, it is a testament to the clarity of his insights that many of the comments to section 13 of the new Restatement of Torts, which states the custom rule, echo Morris's articulation of the rule.⁶

Morris's arguments, and the arguments of those who have followed him, are accounts of the "affirmative" side of the custom rule. These ar-

Stud. 29, 32–33 (1972) (describing Hand's opinion as adumbrating economic theory of negligence). In contrast, the reasonable prudence conception of negligence is the more traditional notion that negligence is determined by reference to the conduct of the reasonably prudent person. See, e.g., *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490, 490 (C.P.) (holding care taken by prudent man is test for negligence); see also Benjamin C. Zipursky, *Slight of Hand*, 48 Wm. & Mary L. Rev. 1999, 2034–40 (2007) (suggesting "civil competency" best expresses notion of ordinary care).

3. Restatement (Third) of Torts: Liab. for Physical Harm § 13 (Proposed Final Draft No. 1, 2005).

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

5. See, e.g., William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 131–33 (1987) (arguing law should treat custom differently in high and low transaction cost situations); Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. Legal Stud. 1, 4 (1992) (contending custom should govern situations in which transaction costs are low); Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. Cal. L. Rev. 1, 4–8 (1999) [hereinafter Hetcher, *Safe Social Norms*] (examining sources and functions of customs); Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 Geo. L.J. 633, 634–36 (2003) (identifying different ways in which norms interact with jury's role in negligence cases); Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 Mich. L. Rev. 285, 286 (2008) (arguing admission of custom evidence in negligence, medical malpractice, and products liability actions inhibits innovation).

6. See Restatement (Third) of Torts: Liab. for Physical Harm § 13 cmt. b (indicating evidence of compliance with custom bears on whether further precautions were available to actor and cautions jury that its ruling has implications for many other parties); *id.* cmt. c (indicating evidence of departure from custom tends to answer relevant questions regarding availability and feasibility of appropriate precautions).

guments concern the justifications for admitting custom evidence. They identify the inferences that may be drawn when evidence of compliance with or departure from custom is admitted, and explain how these inferences might properly influence resolution of the negligence issue.⁷ In addition, however, there is a “negative” side of the custom rule. The rule not only expressly dictates the admission of custom evidence, but also logically implies, at the least, that evidence of the incidence of compliance with or departure from a practice that is not sufficiently widespread to constitute a custom (what I will call “practice evidence”) is not categorically admissible. And the custom rule may well go further. Judging from the almost complete absence of cases authorizing the admission of practice evidence, the custom rule can be understood to imply that practice evidence is categorically inadmissible.

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

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

7. See, e.g., Morris, *supra* note 4, at 1147–53.

Interestingly, there is virtually no case law addressing the admissibility or inadmissibility of practice evidence.⁸ I will identify what I think are the reasons for this case law vacuum and consider the arguments for and against permitting the introduction of such evidence. Under certain circumstances, practice evidence may also be probative of what constitutes reasonable care, and might serve the same educational and inference-forestalling functions that custom evidence serves. Additionally, admitting practice evidence might help neutralize one of the disadvantages of the custom rule—its potential to discourage innovation. Admitting practice evidence, however, would threaten to complicate negligence trials and could actually disadvantage the first actors to undertake innovations. The possible admissibility of practice evidence is therefore worthy of analysis in its own right.

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

I. CUSTOM

A custom is a widespread and, for some courts, nearly universal practice.⁹ The black letter rule governing custom evidence has been enshrined in two restatements and is a fixture in torts treatises and casebooks. But these sources contain little or no discussion of the operational role that evidence of custom plays in negligence trials. Torts teachers and scholars tend to imply that the admissibility of custom evidence is substantively significant, focusing on the justifications for admitting custom evidence—on the inferences that a jury might reasonably draw from evidence of compliance with or departure from custom. These discussions often ignore the way the rule is implemented and actually figures in negligence trials.

The admission of custom evidence, however, may entail a good deal more than the simple presentation of that evidence through direct testimony. Because the impact of the admission of custom evidence in a negligence trial may be significant, it will be useful to begin by identifying

8. The only important exceptions are certain product design and medical malpractice cases, whose significance I discuss *infra* Part II.

9. Dan B. Dobbs, *The Law of Torts* § 163, at 394 (2000) (citing *Rentz v. Brown*, 464 S.E.2d 617 (Ga. Ct. App. 1995)). Although the courts rarely engage in an express headcount, discussions of the custom rule seem to me to presuppose that a practice must be followed by at least a majority of relevant actors in order to qualify as a custom. See, e.g., W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 33, at 193 (5th ed. 1984) (referring, in discussing custom rule, to “usual” conduct of others and to actor who “does only what everyone else has done”).

each step in the implementation of the rule. An appreciation of the way custom evidence operates in negligence trials will set the stage for assessing the reasons we have a rule governing custom evidence at all and the arguments for the rule in its current form.

When the plaintiff seeks to use custom evidence offensively¹⁰ because the defendant is alleged to have departed from custom, the steps in implementing the custom rule are as follows: As part of the plaintiff's case-in-chief, the plaintiff introduces evidence (1) identifying the practice that it alleges is a custom; (2) that the practice is sufficiently widespread to constitute a custom; and (3) that the defendant departed from the alleged custom. This evidence might come from the same source, but is more likely to come from two or even three different sources. For example, the evidence in steps (1) and (2) usually, though not always, comes from an expert, whereas the evidence in step (3) is likely to come from a fact witness. The defendant is then entitled to (4) cross-examine the sole witness or witnesses presenting the plaintiff's custom evidence.

As part of its case, the defendant is entitled to introduce evidence (5) that the practice in question is not a custom; (6) that the defendant did not depart from the practice in question; and (7) that even if the practice is a custom, and even if the defendant did depart from the custom, this departure was not negligent. The defendant's evidence also may come from both expert and fact witnesses. The plaintiff is then entitled to (8) cross-examine the witness or witnesses presenting the defendant's evidence.

When the defendant alleges that it complied with a custom, analogous evidence is introduced, first as part of the defendant's case, and then in rebuttal testimony on behalf of the plaintiff.¹¹ Moreover, it is possible that the parties will each seek to use the custom rule. That is, the plaintiff may contend that the defendant's conduct, whatever the plaintiff contends that conduct was, departed from custom. The defendant may contend that its conduct, whatever the defendant contends that conduct was, complied with custom. In such instances there is competing testi-

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

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

mony, possibly about both empirical facts and the question of whether there is a custom accompanying whatever conduct occurred. This testimony is admitted as part of the plaintiff's case-in-chief, the defendant's case, and the plaintiff's rebuttal case.

Next, in closing argument, (9) counsel for the plaintiff and (10) counsel for the defendant are permitted to make reference to each of the above items of evidence and to argue the significance of this evidence to the jury.

Finally, there are jury instructions from the court regarding the significance of this evidence. If there is a dispute about whether the practice in question is a custom,¹² (11) there is likely to be a separate instruction regarding that dispute. Additionally, in such situations there is also an instruction indicating that (12) if the practice is a custom, then the evidence of the custom may be taken into account as the jury wishes; but if the practice is not a custom, then the jury should not consider the evidence regarding the practice. In a jurisdiction where the question of custom is one for the court—and the court has decided that the practice in question is a custom—there is an instruction similar to (12) above, indicating that the jury may take the evidence regarding departure from or compliance with custom into account as it wishes.¹³ On the other hand, if the custom evidence has been admitted provisionally or for another purpose, there may be an instruction (13) indicating that the practice about which evidence was introduced does not constitute a custom and that the evidence therefore should be considered only for the limited purpose for which it remains admissible or not at all.

This breakdown of the thirteen or more steps that may be required to implement the custom rule demonstrates that the rule does not simply dictate the admission of a simple form of factual evidence. Rather, the admission of custom evidence may have substantial and complex repercussions throughout a negligence trial. The fact that admitting custom

12. In the majority of jurisdictions this is a question for the finder of fact; however, in some jurisdictions this issue is for the court but depends on the resolution of a question of fact. See, e.g., *Askin v. Dalgarno*, 293 F.2d 424, 426 (10th Cir. 1961) (stating whether a practice constitutes a custom is a question of fact); *Sanders v. City of Chicago*, 714 N.E.2d 547, 554–55 (Ill. App. Ct. 1999) (same); *Walters v. Kellam & Foley*, 360 N.E.2d 199, 216 (Ind. Ct. App. 1977) (same); *Davis v. Gatewood*, 299 S.W.2d 504, 509 (Mo. 1957) (same); *Dallas v. F.M. Oxford, Inc.*, 552 A.2d 1109, 1113 (Pa. Super. Ct. 1989) (same).

13. A number of states have pattern jury instructions regarding compliance with or departure from custom specifying precisely such an instruction. See, e.g., Judicial Council of Cal., New, Revised, and Revoked Civil Jury Instructions 413 (2009) (“You may consider customs or practices in the community in deciding whether [*name of plaintiff/defendant*] acted reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in [*name of plaintiff/defendant*]’s situation. They are only factors for you to consider.”); 1A Comm. on Pattern Jury Instructions, Ass’n of Justices of the Supreme Court of the State of N.Y., *New York Pattern Jury Instructions: Civil 2:16* (3d ed. 2009) (“[Y]ou may take that general custom or practice into account in considering the care used by defendant in this case. However, a general custom or practice is not the only test . . .”).

evidence implicates these repercussions may help explain the existence of a separate rule confirming the admissibility of custom evidence.

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

A. *Why Have a Custom Rule at All?*

Ordinarily, we simply rely on general rules of evidence—in particular the rule that relevant evidence is admissible unless there is a specific reason for rendering the evidence inadmissible—to determine whether evidence that purports to prove or disprove negligence should be admitted.¹⁴ In contrast, what we think of as the rules of tort law typically do not merely confirm or provide for the admissibility or inadmissibility of evidence; instead they specify rules that determine or help to determine liability.

Even the few tort law rules that do deal with merely evidentiary issues are more directive than the custom rule. For example, unlike the rule regarding evidence of sudden emergencies or the rule regarding evidence of above-average skills and knowledge, the custom rule does not require that such evidence be “taken into account,”¹⁵ but only permits the jury to consider custom evidence if it wishes to do so. The jury may wholly disregard custom evidence without violating the custom rule. Similarly, unlike the rule governing an actor's mental or emotional disabilities—which confirms the objective standard by providing that evidence of these disabilities may not be “considered”¹⁶—the custom rule does not seek to define an aspect of reasonable care by expressly rendering a category of evidence immaterial and therefore inadmissible. However, this is of course precisely what the rule impliedly does by excluding evidence of the incidence of noncustomary practices.

14. See, e.g., Fed. R. Evid. 401–402 (stating all relevant evidence is admissible, with certain exceptions).

15. See Restatement (Third) of Torts: Liab. for Physical Harm § 9 (Proposed Final Draft No. 1, 2005) (suggesting existence of unexpected emergency is circumstance “to be taken into account” in determining whether actor has exercised reasonable care); *id.* § 12 (suggesting above-average skills or knowledge are “to be taken into account” in determining whether actor has exercised reasonable care). Interestingly, a comment to § 295A of the Second Restatement does indicate that custom evidence is to be taken into account. Restatement (Second) of Torts § 295A cmt. b (1965).

16. See, e.g., Restatement (Third) of Torts: Liab. for Physical Harm § 11(c) (suggesting adult actor's mental or emotional disability “is not considered” in determining whether conduct is negligent).

Why, then, does tort law have a separate custom rule that addresses a merely evidentiary issue? I think that the explanations for having a particular rule about custom, as well as for the distinctive form this rule takes,¹⁷ are both historical and substantive.

1. *History*. — The historical explanation for having a separate, merely evidentiary rule about custom begins with the recognition that there was a time when the now-dominant custom rule had two competitors. Each of these rules addressed the significance of compliance with custom. One competitor—the safe harbor rule—was the rule that compliance with custom is conclusive on the issue of negligence. The leading case on the subject held that business custom was the “unbending test of negligence.”¹⁸ Under this rule, proof of compliance with custom provided a safe harbor and resulted in a holding that the defendant was free from negligence as a matter of law.¹⁹ This rule was a feature of the strand of nineteenth-century negligence law that tended to use *per se* no-duty and no-breach-of-duty rules to insulate defendants from under-all-the-circumstances liability for negligence;²⁰ the rule was therefore sometimes justified by reference to assumption of risk in the no-breach-of-duty as a matter of law sense of this concept.²¹

The other competing custom rule—the irrelevance rule—was that compliance with custom was immaterial and therefore that evidence of compliance was not even admissible.²² As Richard Epstein has observed,

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

18. *Titus v. Bradford, B. & K. R. Co.*, 20 A. 517, 518 (Pa. 1890) (holding compliance with custom constitutes reasonable care as a matter of law).

19. *Id.*; see also *Shadford v. Ann Arbor St. Ry. Co.*, 69 N.W. 661, 662 (Mich. 1897) (holding compliance with custom is conclusive on issue of reasonable care). Before the celebrated case of *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), adopted the modern rule, there were even some Second Circuit decisions adopting the safe harbor rule. See, e.g., *Adams v. Bortz*, 279 F. 521, 525 (2d Cir. 1922) (adopting safe harbor rule); *Ketterer v. Armour & Co.*, 247 F. 921, 931 (2d Cir. 1917) (same). For discussion, see Hetcher, *Safe Social Norms*, *supra* note 5, at 14–15 (discussing rule).

20. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 948–58 (1981) (discussing no-duty rules).

21. See Kenneth S. Abraham, *The Forms and Functions of Tort Law* 161–63 (3d ed. 2007) (explaining concept of assumption of risk sometimes refers to whether defendant breached a duty, i.e., was negligent, but at other times refers to whether plaintiff consciously and negligently took a risk); Stephen D. Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 Val. U. L. Rev. 833, 841–43, 851–52 (1997) (distinguishing these two senses of assumption of risk). Thus, in *Titus* the entire discussion of the safe harbor rule was buttressed by reference to the victim’s familiarity with the custom at issue, and his “ample opportunity to know the risks” in question. *Titus*, 20 A. at 518.

22. For examples of cases adopting this rule, see *Redfield v. Oakland Consol. St.-Ry. Co.*, 43 P. 1117, 1119 (Cal. 1896); *Phoenix Assurance Co., of London v. Tex. Holding Co.*, 252 P. 1082, 1087 (Cal. Dist. Ct. App. 1927); *Burke v. S. Boulder Canon Ditch Co.*, 203 P. 1098, 1099 (Colo. 1922); *Bassett v. Shares*, 27 A. 421, 423 (Conn. 1893); *Mayhew v. Sullivan Mining Co.*, 76 Me. 100, 112 (1884); *Jenkins v. Hooper Irrigation Co.*, 44 P. 829, 831 (Utah 1896).

a number of the cases that took this approach involved accidents between strangers, for whom the cost of transactions between these parties expressly or impliedly agreeing to be bound by a custom would have been high.²³ Because an actor can more easily externalize risk to strangers than to those in a preexisting relationship (where the cost of transactions leading to an optimal level of safety is less likely to be prohibitive), there is an argument for applying the safe harbor rule to accidents between parties in a relationship, and the irrelevance rule to accidents between strangers.²⁴ The result would be that, where the parties' conduct reflected an assumption that customary conduct could be expected, custom would determine what constituted reasonable care. And where no such assumption was warranted, custom would have no bearing at all on the issue. But few cases applying either rule were ever sensitive to this distinction.²⁵ Rather, each rule applied across the board.

The custom rule as we now know it competed with the safe harbor and irrelevance rules. The rule was reflected in a series of late nineteenth- and early twentieth-century cases²⁶ and was most famously articulated in the canonical opinion by Judge Learned Hand in *The T.J. Hooper*.²⁷ Both competitors of the modern custom rule had strong outcomes. The safe harbor rule was a per se no liability rule, and the irrelevance rule precluded the jury from even considering custom. In contrast, the modern custom rule has what might appear to be a weaker outcome—it is merely evidentiary. But the modern custom rule originated as an outright rejection of both of the two rules that once competed with it, and in this sense has a stronger reason for being than appears on its face.

Interestingly, the two competitors of the modern rule said nothing about how to treat departures from custom. These rules addressed only the defensive use of evidence of compliance with custom, not the offensive use of evidence of departure from custom. Yet modern scholars have

23. Epstein, *supra* note 5, at 5, 9–10.

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

25. For at least a time, California applied the irrelevance rule to accidents involving strangers but the safe harbor rule to accidents involving those in relationships. For instance, *Phoenix Assurance Co.*, 252 P. at 1087, distinguishes *Webber v. Bank of Tracy*, 225 P. 41 (Cal. Dist. Ct. App. 1924), on this basis. Similarly, Utah applied the irrelevance rule to accidents between strangers, *Jenkins*, 44 P. at 830, but the safe harbor rule to accidents involving those in relationships, *Roth v. Eccles*, 79 P. 918, 919 (Utah 1905). But these distinctive treatments long ago disappeared.

26. See, e.g., *Tex. & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) (holding that “[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence,” not by custom); *Wabash Ry. Co. v. McDaniels*, 107 U.S. 454, 458–61 (1882) (rejecting defendant’s contention that compliance with custom satisfied its duty as a matter of law); *Shandrew v. Chi. St., P., M. & O. Ry. Co.*, 142 F. 320, 324–25 (8th Cir. 1905) (holding that what other railroads customarily do is only evidence of reasonable care).

27. 60 F.2d 737, 740 (2d Cir. 1932).

not considered the way the states that applied these rules treated the departure from custom. In safe harbor states, where custom was the “unbending test of negligence,” it could easily have followed that, just as following custom constituted reasonable care as a matter of law, so departure from custom constituted negligence as a matter of law. But safe harbor states did not take that approach. Rather, evidence of departure from custom was admissible but not conclusive. The Supreme Court of Pennsylvania, author of the rule that custom is the “unbending test of negligence,” held that custom was the “unbending test” only

to disprove negligence, not to prove it. The party charged with negligence disproves it by showing that the tools he employed were those in general use in the business, but the converse does not follow. . . . If it should be so held, the use of the newest and best machine, if not yet generally adopted, could be adduced as evidence of negligence.²⁸

Other safe harbor states followed Pennsylvania’s lead.²⁹ Thus, the safe harbor rule differed from the modern custom rule when there was compliance with custom, but when there was departure from custom the rules were identical.

I have found no discussion or case law regarding the way the states that applied the irrelevance rule treated departure from custom. Here too it would have been logical for the rule to provide that, just as compliance with custom is irrelevant, so departure from custom is irrelevant. But I doubt that the irrelevance rule was applied to departure from custom. The purpose of the irrelevance rule was to prevent an industry from hiding behind its compliance with an obviously negligent custom.³⁰ Permitting a jury to consider a defendant’s departure from custom would have been perfectly consistent with this purpose. Like the safe harbor rule, then, the irrelevance rule differed from the modern rule in cases where there had been compliance with custom, but probably was identical to the modern rule when there was evidence of departure from custom.

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

28. *Cunningham v. Fort Pitt Bridge Works*, 47 A. 846, 846 (Pa. 1901).

29. See, e.g., *Cent. Granaries Co. v. Ault*, 107 N.W. 1015, 1016 (Neb. 1906) (holding custom is the “unbending test of negligence”).

30. As the court in *Mayhew v. Sullivan Mining Co.*, 76 Me. 100, 112 (1884), put it, “[t]he gross carelessness of the act appears conclusively upon its recital.”

Perhaps because the now-prevailing rule that evidence of both compliance with and departure from custom is admissible had only recently become dominant at the time that the First Restatement was published in 1934, it was silent about custom. On the other hand, the Second Restatement contained a straightforward section addressing the subject and stating that the rule had by then become dominant, thus silently rejecting the two earlier, competing alternatives.³¹ The subject of custom then became a fixture in the casebooks and treatises. But because today the custom rule is uncontroversial and does not carry its historical significance on its face, the rule may seem less necessary, and less significant, than it actually is.

2. *Substance.* — A second possible reason for the custom rule is not merely to confirm that custom evidence is admissible, but also to identify and distinguish evidence that is not categorically admissible. The custom rule does this only indirectly and by implication, but does it nonetheless. Though statements of the custom rule, and most discussions of the rule, are not explicit, they imply that some version of the converse of the rule also applies. That is, the rule can be understood to imply that evidence of compliance with, or departure from, practices that are not sufficiently widespread to qualify as customs is inadmissible, or at least that such evidence is admissible only case by case upon a necessary showing of relevance. Evidently, practice evidence is thought not to have the same automatic probative value that characterizes custom evidence, because practices do not have the same generality of compliance.

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

B. *The Relevance of Custom*

Precisely what makes custom relevant to determinations of reasonable care? How is what is ordinarily done probative of what ought to be done? We need answers to these questions in order to understand the custom rule itself. In addition, in order to evaluate the implicit component of the custom rule, we need first to have on the table the arguments for the explicit component. That is, we need to know what makes custom evidence admissible in order to identify the characteristics that practice

31. Restatement (Second) of Torts § 295A & cmt. b (1965). The only explanation for the addition of this Section that I have been able to locate in the ALI annals is a 1958 note that the Section is new. *Id.* § 295A note, at 108 (Council Draft No. 4, 1958).

evidence does and does not share with custom evidence. We will then be in a position to determine whether the exclusion of practice evidence makes sense.

1. *The Traditional Account.* — In his classic analysis of the modern custom rule, Clarence Morris identified three arguments for admitting evidence of compliance with and departure from custom.³² First, admitting evidence of compliance with custom cautions the jury that if it finds that an actor was negligent despite compliance, the jury is in effect finding that an entire industry, and not a single actor, is behaving unreasonably. On the other hand, evidence of an actor's departure from custom assures the jury that in finding the conduct in question negligent, it is not finding that the conduct of an entire industry is unreasonable. Second, evidence of an actor's compliance with custom acts as a check on the jury's hasty acceptance of experts from "esoteric" fields, who are "prone to set impractical standards."³³ Third, evidence of compliance with custom is some evidence of the lack of an opportunity to learn of other precautions that might have been taken.³⁴ And evidence of departure from custom demonstrates the opportunity to learn of a feasible precaution that might have been taken.³⁵ Thus, for Morris the arguments for admitting custom evidence turn on the way that this evidence cautions the jury about its task and provides a sense of whether an alternative to the conduct at issue was feasible.

It is interesting that neither Morris nor either of the Restatements that adopt the custom rule emphasizes what would seem to be most straightforwardly probative about custom evidence—its tendency to show what constitutes reasonable care. Morris almost completely avoids making this point, asserting that his cautionary and feasibility arguments, which are a step or two removed from the ultimate negligence issue, identify the "[o]nly" ways in which evidence of conformity with custom is relevant.³⁶ And while devoting five pages to its comments about the custom rule, the Third Restatement's only mention of the notion that custom is directly probative of reasonable care is the almost grudging statement that "'ordinary care' has at least some bearing on 'reasonable care.'"³⁷

The two cases that are most closely identified with the modern custom rule also avoid stating forcefully that evidence of custom is directly probative of what constitutes reasonable care. In fact, *The T.J. Hooper* is best known for its dictum that a custom followed by a "whole calling" may

32. See Morris, *supra* note 4, at 1147–53.

33. *Id.* at 1148.

34. *Id.* at 1148–49.

35. *Id.* at 1151–52.

36. *Id.* at 1149.

37. Restatement (Third) of Torts: Liab. for Physical Harm § 13 cmt. b (Proposed Final Draft No. 1, 2005). Similarly, in his treatise, Professor Dobbs devotes only one sentence, albeit a thorough one, to this point. See Dobbs, *supra* note 9, § 164, at 396.

itself be negligent³⁸—a backhanded way of acknowledging that compliance with custom is evidence of reasonable care, if there ever was one. And Holmes’s famous line in *Behymer*, “[w]hat usually is done may be evidence of what ought to be done,”³⁹ actually reads in his opinion not like an affirmation of the probative value of custom evidence, but like a reluctant concession, made in the course of rejecting the defendant’s contention that its compliance with a custom constituted reasonable care as a matter of law.

Thus, at most it can be said that Morris, Hand, and Holmes conceded that evidence of custom is probative of reasonable care. They certainly did not strongly endorse this point. Part of the explanation for their posture, I think, is that they were reacting to a past in which application of the rule that custom was the “unbending test of negligence” by industrial defendants had sometimes been perceived as abusive.⁴⁰ These jurists were therefore reluctant to provide an enthusiastic endorsement of the probative value of custom evidence, especially when this evidence was used defensively. Consequently, they did not build affirmative arguments or theory based on the notion that custom was directly probative of reasonable care, but simply accepted that this proposition logically followed from the admissibility of custom evidence, even when custom evidence was used for defensive purposes.

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

2. *The Normative Force of Custom.* — Custom has normative force—that is, custom is probative of what constitutes reasonable care—only if what is usually done tends to be what ought to be done. The ambiguous language that we use to discuss admissibility, however, sidesteps this issue. Saying that custom is “evidence of reasonable care” or is “relevant to reasonable care” means only that evidence of custom is potentially probative of reasonable care, not that it is always probative in the sense of consistently having some normative force.

In contrast, the new Restatement of Torts comes very close to directing that evidence of an emergency, or that an actor possessed above-average skills or knowledge, always be given weight, by requiring that these facts “be taken into account.”⁴¹ If the existence of an emergency or of an actor’s above-average skills must “be taken into account,” then they would seem always to have some normative force. But neither the custom rule nor the Restatement’s formulation of that rule requires that the exis-

38. 60 F.2d 737, 740 (2d Cir. 1932).

39. *Tex. & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903).

40. See, e.g., Henry R. Miller, Jr., *The So-Called Unbending Test of Negligence*, 3 Va. L. Rev. 537, 537 (1915) (arguing safe harbor test is “unsound” and is “likely to foster injustice and even iniquitous practices on the part of employers and others”).

41. Restatement (Third) of Torts: Liab. for Physical Harm §§ 9, 12.

tence of a custom “be taken into account.” Custom evidence must be admitted, but then it may nonetheless be disregarded.⁴² If the difference between these formulations is anything more than an accident of phrasing, then it appears that the jury is permitted to get a reasonable care “ought” from a customary “is,” but not because custom always has at least some normative force. Whether evidence of any particular custom is at all probative of reasonable care is apparently an issue unique to each case and to be decided by the finder of fact.

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

All three of these explanations ground reasonable care on average care, identifying the former with the latter. They seek to persuade the jury to base the negligence determination on what might be called “normative experience.” Interestingly, other components of the standard negligence trial tend to encourage the jury to identify reasonable care with average care in just this experiential way. First, the more evidence there is in a negligence trial regarding custom, the greater will be the inclination of the jury to focus on what is usually done—on average care. And since in most jurisdictions whether a practice constitutes a custom is itself a question of fact,⁴³ in some cases there will be considerable evidence about custom. Moreover, evidence of what is usually done is concrete whereas testimony about what ought to be done (at least when custom evidence is used defensively) is likely to be more abstract, and therefore less salient, when the time comes for jury deliberation.⁴⁴

Second, many states’ jury instructions first define negligence by ambiguous reference to “ordinary care,” and only then go on to explain that ordinary care should be understood as the degree of care that would be

42. *Id.* § 13 (“An actor’s compliance with the custom of the community . . . is evidence that the actor’s conduct is not negligent but does not preclude a finding of negligence.”).

43. See *supra* note 12 (listing cases).

44. See *Old Chief v. United States*, 519 U.S. 172, 187 (1997) (“Unlike an abstract premise . . . a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once . . .”).

exercised by the reasonably prudent person.⁴⁵ New York, for example, instructs juries that “[n]egligence is lack of ordinary care.”⁴⁶ The Idaho instruction provides that “[i]t was the duty of the defendant, before and at the time of the occurrence, to use ordinary care.”⁴⁷ And in Ohio the jury is told that “[n]egligence is a failure to use ordinary care. Every person is required to use ordinary care to avoid injuring (another person) (another’s property).”⁴⁸ Especially if the trial that jurors have just witnessed has emphasized what is customary or average conduct, the phrase “ordinary care” in the standard instruction is likely to lead at least some jurors to believe that negligence is the failure to exercise an average amount of care. The standard instruction on custom is designed, among other things, to neutralize this effect, by indicating that custom is only relevant, and not conclusive, on the issue of what constitutes reasonable care.⁴⁹ However, because the initial instruction on the meaning of negligence as “ordinary care” typically precedes an instruction that evidence of compliance with or departure from custom is not conclusive, the ordinary care instruction will often have more primacy in jurors’ minds than the instruction on custom.

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

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

45. Patrick J. Kelley & Laurel A. Wendt, What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions, 77 *Chi.-Kent L. Rev.* 587, 595, 625–82 (2002) (quoting pattern jury instructions on negligence); Zipursky, *supra* note 2, at 2014–17 (discussing instructions).

46. *Comm. on Pattern Jury Instructions*, *supra* note 13, at 2:10.

47. *Civil Jury Instructions Comm.*, *Idaho Civil Jury Instructions* 2.00.1 (2003).

48. *Jury Instructions Comm.*, *Ohio Judicial Conference*, *Ohio Jury Instructions: Civil Instructions* 404.01 (2008).

49. For example, the New York instruction on custom provides, among other things, that “a general custom or practice is not the only test; what you must decide is whether, taking all the facts and circumstances into account, defendant acted with reasonable care.” *Comm. on Pattern Jury Instructions*, *supra* note 13, at 2:16.

standard, or by reference to a risk-benefit test.⁵⁰ Custom then either passes the reasonableness or risk-benefit tests or it does not.

The law's ambivalence about what constitutes negligence is further reflected in the fact that the jury is free to use each of these approaches in making the negligence determination.⁵¹ Custom may be given weight by some metric (or none) of the jury's choice, and considered together with whatever inferences the reasonable person and risk-benefit tests support. The jury then considers the normative force of custom alongside these other incommensurables in making the negligence determination.

3. *Administrative Costs and the Custom Rule.* — In recent years the most significant enrichment of traditional custom analysis has come in the form of a series of explanations for the reasons that customs arise. The most prominent explanation depends on the distinction noted above, between situations in which transaction costs are low and those in which they are high, typically relational as opposed to stranger-to-stranger accidents.⁵²

Other things being equal, a custom that arises when the parties are in a relationship is more likely to be optimal than a custom that risks injury to strangers.⁵³ The rationale for this distinction is the familiar Coasian insight that the parties to a relationship may bargain about the precautions they will take, and that such bargains have the potential to optimize risk.⁵⁴ In contrast, when the principal risk of an activity is to third parties, a custom is more likely to externalize risk to these parties because they have no opportunity to bargain.

There are two additional explanations for the rise of customs that are relevant here.⁵⁵ Sometimes customs emerge merely as conventions, because it is important for those affected by a particular form of conduct to coordinate their behavior in some way. It is safer for everyone to drive on either the left or the right side of the road, for example, although

50. See Dobbs, *supra* note 9, § 165, at 400 (noting parties may contest whether custom has been justifiably adopted based on risk-benefit test).

51. Even the Third Restatement, which comes close to adopting the risk-benefit approach, indicates only that risk and benefit are the “[p]rimary factors” in ascertaining whether conduct is reasonable. Restatement (Third) of Torts: Liab. for Physical Harm § 3 (Proposed Final Draft No. 1, 2005).

52. See Landes & Posner, *supra* note 5, at 132–33 (predicting custom will be defense in low transaction cost relational situations but not in high transaction cost stranger situations); Epstein, *supra* note 5, at 4–5 (discussing relevance of custom in stranger cases and disputes arising out of consensual arrangements); see also Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 4 (1991) (explaining how utilitarian norms arise among neighbors).

53. See Epstein, *supra* note 5, at 4–5 (arguing custom “should be regarded as conclusive evidence of due care” for parties in relationship).

54. See generally R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

55. See Hetcher, *Safe Social Norms*, *supra* note 5, at 42–55 (describing emergence and functioning of coordination customs).

there is nothing inherently safer about either custom.⁵⁶ Or a custom may arise for information-cost reducing reasons: An existing practice may simply become a reference point that others adopt in order to save the cost of independently determining what practice to follow. The practice may then become entrenched because of the collective action problem arising from the fact that it is not worthwhile for any individual actor to invest what may be necessary to identify a safer, reasonable precaution.

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

Similarly, in general, evidence of departure from custom is probably more probative than evidence of compliance. An entire industry may well be negligent, but it would be rare indeed for an entire industry to exercise more care than is reasonable. Self-interested actors tend not to invest more in safety than they expect those with whom they deal or the law to require. So evidence that a defendant exercised less than an average amount of care is likely to be highly probative of negligence. There is therefore a potential argument for privileging evidence of departure from custom over evidence of compliance with custom. Some actors who depart from custom, however, do so not by exercising less care than is customary, but by exercising a different form of care than is customary. Evidence of subconformity is likely to be more probative of the failure to exercise reasonable care than evidence of nonconformity.⁵⁷ But applying this distinction between subconformity to custom and nonconformity with custom would be necessary to invoke a rule that privileged evidence of certain forms of departure from custom over others, and it would be administratively costly to draw this distinction in every case.

56. Eric A. Posner, *Law and Social Norms* 177–78 (2000); Hetcher, *Safe Social Norms*, *supra* note 5, at 44.

57. See Morris, *supra* note 4, at 1152 (“A craftsman who departs from the methods of his craft is not necessarily a wrongdoer; he may be innocuously asserting his individuality, or he may be ahead of his times.”).

Therefore, instead of fine tuning admissibility determinations based on the comparative probative value of different forms of custom evidence, we have adopted a bright-line rule presupposing that, on balance, custom evidence is more likely than not to be at least modestly probative of an issue or issues relevant to what constitutes reasonable care. Then, in situations in which the other party has evidence tending to refute this permissible inference—including evidence of the sort that I have just identified—this party's evidence is also likely to be admissible. It is open to the plaintiff to prove, for example, that the custom followed by the defendant is one that simply saved everyone the cost of determining the best way to behave and that the "whole calling" had thereby "unduly lagged in the adoption of new and available devices."⁵⁸ The defendant may then prove that the precaution it employed is more cost-effective, all things considered, than the customary precaution, and that, in addition, the customary practice is the one that is negligent.

In short, the administrative costs that would accompany requiring evidence of the functions of customs lead negligence law to set the custom rule at a high level of generality. But negligence law permits the parties to introduce evidence of the function of the custom at issue in order to show that the custom is not in fact probative of reasonable care, or not as probative as might otherwise appear.

C. *Additional Arguments for the Relevance of Custom*

Two additional arguments regarding the custom rule are worth exploring. Each further supports the rule. First, evidence of custom helps to educate or orient the jury to the field of activity at issue. Second, admitting evidence of custom serves to preempt the jury from drawing unwarranted inferences from the absence of such evidence.⁵⁹

1. *Educating the Jury.* — Custom evidence has a potential educational value—both for the party introducing it and for the legal system's interest in reliable, accurate decisions—beyond any immediate or direct relevance of such evidence to the reasonable care issue. A trial with no evidence about how others engage in the same activity as the defendant would be curiously devoid of information that would be considered rele-

58. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

59. A third argument that is occasionally made concerns the role of custom in inducing reliance. The amount of care that is reasonable may depend on the level of care that is typically taken by others. Custom that induces, or may induce, reliance is relevant because the level of care that is reasonable for a potential injurer to take depends on the level of care that potential victims take. The Third Restatement makes this point cryptically, indicating that when there is reliance on a custom, then the custom "establishes the standard by which those engaging in the activity assume they are bound." Restatement (Third) of Torts: Liab. for Physical Harm § 13 cmt. d (Proposed Final Draft No. 1, 2005). The important point, however, is not that reliance by potential victims creates an awareness on the part of potential injurers that they are "bound" by the custom relied upon. The point is that if reliance results in less care by potential victims, this may make it unreasonable for potential injurers to depart from the custom in question.

vant to decisionmaking in almost any other context. Custom evidence may orient the jury to a field, provide the jury with some of the specialized knowledge possessed by those within the field, give the jury a feel for the way activity in the field is conducted, and increase the jury's level of confidence about its ability to judge the conduct at issue.⁶⁰

2. *Forestalling Unwarranted Inferences.* — A second argument that extends beyond existing accounts of the custom rule is that admitting custom evidence may help to forestall the jury from drawing invalid or unwarranted inferences resulting from the absence of such evidence. The arguments in the case law and in the scholarly literature about the value of custom evidence are based on the role played by custom evidence once it is admitted. They emphasize the advantages of admitting custom evidence, by reference to the inferences a jury is permitted to draw from this evidence.⁶¹ These inferences (for example, that an entire industry does or does not behave in a particular way, or that certain precautions are feasible), so the arguments go, help the jury to determine whether compliance with or departure from custom constitutes reasonable care.

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

On certain occasions, the jury might also draw unwarranted inferences based on inaccurate suppositions about the law governing the admissibility of custom evidence. For example, a jury might suppose that only evidence of compliance, or only evidence of departure, is admissible, and in the absence of what it supposes is the admissible category of evidence, incorrectly infer that there has not been compliance with or that there has not been departure from custom. The negligence determination might then be influenced by the unwarranted inference. We cannot know how often this would occur; juries may or may not think about the

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

61. See, e.g., Morris, *supra* note 4, at 1147–53 (analyzing advantages and disadvantages of admission of custom evidence).

law governing evidence that is not admitted. But because we do have the custom rule, we do not need to worry about how often this may occur.

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

II. NONCUSTOMARY PRACTICE

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

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

At first glance one might think that the almost complete absence of case law on the issue would be substantial evidence of the existence of the strong version of the practice rule. After all, the absence of any case law permitting the introduction of such evidence under at least some circumstances suggests that it is categorically inadmissible. Ultimately, I think that this is the correct conclusion: The strong version of the practice rule

is in force. But the basis for this conclusion is not as straightforward as it might seem, because there are a number of plausible reasons for the absence of case law about practice evidence that do not depend on the existence of either the strong or the weak version of the practice rule.

A. *Why There Is So Little Law About Practice Evidence*

The most striking thing about the law governing the converse of the custom rule is that there is almost none of it. There are very few reported cases in which the courts have squarely held that evidence of the incidence of a practice that is not widespread enough to constitute a custom is, or is not, admissible.⁶² There are of course many cases in which the party offering evidence of the incidence of a practice unsuccessfully contended that the evidence proved that there was a custom.⁶³ But the proponents of the putative custom evidence in these cases did not make the contention, or at least not one reflected in the opinions, that such evidence would be admissible even if it were about a mere practice that was not widespread enough to qualify as a custom. Rather, they seem to have accepted the proposition that if a practice did not qualify as a custom, then evidence of the incidence of the practice was not relevant to the negligence determination.⁶⁴ There are also a handful of cases in which evidence of practices that did not qualify as customs was admitted, apparently because the proponents of the evidence did argue that the evidence should be admitted even if it did not qualify as customary. For example, in a case that has become prominent in the casebooks, *Andrews v. United Airlines, Inc.*, the court admitted evidence that some other airlines had retrofitted their overhead bins with baggage nets.⁶⁵ But this scattering of cases is not large enough to amount even to a minority approach to the issue.

62. For two of the few relevant holdings, see *Rentz v. Brown*, 464 S.E.2d 617, 619 (Ga. Ct. App. 1995) (holding evidence of mere practice to be unable to support a jury verdict); *Garthe v. Ruppert*, 190 N.E. 643, 646 (N.Y. 1934) (holding evidence of practices that are not customs to be “incompetent”).

63. Learned Hand’s canonical decision in *The T.J. Hooper*, 60 F.2d at 740, is only the most prominent example. For others, see *Rhine v. Duluth, M. & I. Ry. Co.*, 297 N.W. 852, 854 (Minn. 1941) (holding evidence “fell far short of establishing a custom”); *Davis v. Gatewood*, 299 S.W.2d 504, 511 (Mo. 1957) (holding testimony regarding putative custom “failed to show a general uniform, certain and notorious practice and usage”).

64. This rule of law is set out clearly in *Dobbs*, supra note 9, § 165, at 400–03.

65. 24 F.3d 39, 41 (9th Cir. 1994). It is not clear from the opinion in *Andrews* whether the evidence of “some” other airlines was admitted to show the frequency with which other airlines took this precaution or merely to show the availability of this precaution. See also *Schillie v. Atchison, Topeka & Santa Fe Ry. Co.*, 222 F.2d 810, 814 (8th Cir. 1955) (upholding admission of practice evidence); *Lee v. Pa. R.R. Co.*, 192 F.2d 226, 229–30 (2d Cir. 1951) (upholding admission of evidence of a practice that had been used widely but not universally); *DeLibero v. Q Clubs, Inc.*, 956 So. 2d 1286, 1287–88 (Fla. Dist. Ct. App. 2007) (stating in dicta that practice evidence would be admissible only with cautionary instruction).

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

There are at least five reasons why litigants, apparently, do not press the issue. First, there are not as many situations as might be supposed in which it would be useful to introduce practice evidence in order to show reasonable care. Second, the litigation risks to a party sponsoring practice evidence frequently would outweigh the potential benefits that the party would derive from introducing such evidence. Third, in those instances in which a practice is arguably widespread enough to constitute a custom, evidence of the incidence of the practice is likely to be admitted conditionally anyway, as relevant to the question of whether the practice is a custom. Even if it later turns out that the practice is not a custom, the conditional admission will have acquainted the jury with the existence and incidence of the practice. Fourth, sometimes it is possible to circumscribe the geographical or industry-specific scope of a mere practice, characterize the practice as a local custom, and thereby admit it as evidence of custom. Finally, even when practice evidence would benefit a party, and even when it is not admitted as relevant to the putative existence of a custom, often there is a “backdoor” basis for admitting such evidence that does not violate the custom rule. In these situations, there is no need to press the issue of whether practice evidence is directly admissible. For all these reasons, the question of whether practice evidence is admissible to prove reasonable care is rarely raised squarely, and therefore simply does not find its way into appellate decisions.

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

The admission of practice evidence might produce a similar, though more limited, designation effect. When only one or a few actors follow a practice, however, that fact will have little or no normative force. Therefore, even a limited designation effect could be produced only when the

evidence showed that a significant number of actors—even if not a majority—followed the practice in question. Such a situation is likely to occur less frequently than might be supposed. For example, instances in which there are two or three practices being followed, each by a substantial number of actors but none by a majority, probably are rare. Similarly, it would be unusual for most of those in an industry each to follow a different practice, but for one practice to be followed by a plurality, though not a majority, of actors.

Although these situations are likely to be rare, it is more common for a substantial number of actors to take a particular precaution while the majority does not. A limited designation effect might well be available if practice evidence were admissible in this situation. But notice that this situation actually involves a custom followed by the majority—a custom of not taking the noncustomary precaution. For example, suppose that thirty percent of all fitness facilities maintain automated external defibrillators (AEDs) on their premises to combat cardiac arrest. As this new technology is introduced, some actors have adopted the new technology during the period of transition, but most have not. This was the very pattern reflected in *The T.J. Hooper*, in which some tugs in the 1920s carried radio sets but the defendant did not.⁶⁶ Because these particular situations arise more frequently than the others I envisioned, we must seek other explanations for the absence of case law addressing the admissibility of practice evidence in these situations.

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

66. 60 F.2d at 739–40. The structure of the situation is the same when there is already an affirmative precaution that is customarily taken—for example, having radios—but there is an additional practice that is not, or is not yet, customary, such as also having a global positioning system (GPS) on board.

already adopted it, especially if its prospects for success are strong and the admission of practice evidence might constitute reversible error on appeal.

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

3. *Admission of Practice Evidence as Conditionally Relevant to the Existence of a Custom.* — In the majority of jurisdictions, whether a practice is sufficiently widespread to constitute a custom is a question of fact for the jury. There are likely to be cases in which a practice is sufficiently widespread for the parties to have legitimate arguments about whether it is a custom.⁶⁷ It follows that where a litigant can defeat a motion in limine or objection at trial on the ground that evidence of the incidence of a practice could support an inference that the practice constitutes a custom, evidence of the practice will be admitted as conditionally relevant. In fact, in such situations incidence evidence is likely to be admitted twice—first by its proponent and then by its opponent, whose evidence presumably will be that the practice is not as widespread as its proponent contends. It is true that the jury will be instructed that this evidence is only conditionally relevant, and that if it finds that the practice is not a custom, then it should ignore the evidence of its incidence. At this point the cat will be out of the bag.

4. *Practices as Circumscribed Customs.* — A custom is a practice that is very widespread—in the view of some courts, nearly universal. But what is the relevant geographical, demographic, or industrial universe? On this issue custom law is largely silent. Consequently, it may be that practices

67. See, e.g., *supra* note 63 (citing cases where parties argued that incidence of practice proved custom).

that are nearly universal in a limited area or within a limited group of similar actors, even if they are not followed elsewhere or by others, occasionally qualify as customs. A practice that is followed widely in Detroit but not in the rest of Michigan might qualify as a Detroit custom. A practice followed by most carpenters but not by most cabinetmakers might qualify as a carpenters' custom. Practice evidence of this sort, therefore, may sometimes be admitted as evidence of a circumscribed custom.

5. *“Backdoor” Routes to the Introduction of Practice Evidence.* — In the unusual case in which a party does want to bring practice evidence to the jury's attention, at least four backdoor bases for introducing such evidence are sometimes available. First, a plaintiff wishing to use practice evidence offensively may be able to introduce the evidence through an expert testifying as to the basis for his opinion. At the discretion of the trial court, an expert testifying that the defendant should have adopted a particular precaution, for example, may be allowed to indicate that one of the bases for his testimony is the fact that a substantial group of other actors takes that precaution.⁶⁸

Second, if the defendant wishes to show that the practice recommended by the plaintiff's expert is followed by only a minority of the industry, it likely will be able to bring this fact out in cross-examination on the ground that this evidence goes to the expert's credibility.⁶⁹

Third, evidence of the availability of a precaution is admissible to show that taking the precaution was feasible and that the defendant should have known about it.⁷⁰ Evidence of availability (especially given the “should have known” dimension of availability) will often involve evidence that a substantial number of other actors take the precaution.⁷¹ To avoid admission of practice evidence on this basis, the defendant may have to stipulate to the feasibility of the plaintiff's proposed precaution.

Finally, practice evidence is admissible to prove foreseeability.⁷² The plaintiff must show that the harm it suffered resulted from a risk that made the defendant's conduct negligent. Ordinarily this requirement involves showing, among other things, that the risk was reasonably foreseeable. If some others take a particular precaution that the defendant did not take, and they take it in order to avoid causing the type of harm that the plaintiff suffered, then evidence to this effect will tend to show that the harm the plaintiff suffered was reasonably foreseeable.

68. See Fed. R. Evid. 703 (providing experts can reasonably rely upon facts or data in forming opinions or making inferences, even if those facts or data would not be admissible evidence).

69. See Fed. R. Evid. 705 (providing experts are not required to disclose underlying facts or data upon which their opinions are based, but may be required to disclose them on cross-examination).

70. Dobbs, *supra* note 9, § 165, at 401.

71. See *id.* (suggesting there must be evidence that practice is well known and well defined).

72. See *id.* (“Even an occasional practice may show . . . that the harm addressed by the practice is foreseeable . . .”).

The availability of these basis-of-opinion, credibility, feasibility, and foreseeability routes to admitting practice evidence substantially reduces the need for directly confronting the question of whether such evidence is admissible on the ultimate issue of reasonable care.

B. *Arguments for Admitting Practice Evidence*

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

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

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

In addition, in the absence of practice evidence, the jury may be forced to assess the reasonableness of the defendant's failure to take the proposed precaution without any appreciation of the fact that it is resolving a difference of opinion within the relevant industry as to the appropriate precaution to take. Just as custom evidence performs this sort of cautionary function,⁷³ practice evidence might perform an analogous cautionary function.

73. See Morris, *supra* note 4, at 1147–50.

For example, suppose that the plaintiff contends that drivers of trucks that break down on highways at night should pull onto the shoulder and place flares behind the truck in order to warn approaching vehicles.⁷⁴ The defendant instead placed strobe lights behind its truck. The plaintiff's contention is that flares provide the necessary warning to approaching traffic without the tendency of strobe lights to cause drivers to steer toward them, thus increasing the danger of collision. The defendant contends that a considerable number of truckers use strobe lights because, regardless of whether strobe lights have this tendency, the fact that they pulsate provides an additional alert that on balance makes them more effective than flares.

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

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

In contrast to the treatment of practice evidence in mainstream negligence cases, in products liability actions, evidence analogous to noncustomary practice evidence is indisputably admissible, at least partly for educational reasons. In design defect litigation, for example, except in unusual cases, the plaintiff must prove that there was a reasonable alternative to the design adopted by the defendant.⁷⁵ In adducing such proof, the plaintiff is entitled to show the designs that others have adopted, whether or not such designs are so widespread as to amount to a cus-

74. In practice, federal statutes and regulations, rather than the purely common law considerations in this hypothetical, address much of the conduct of trucks on the highways, pursuant to rules promulgated by the Federal Motor Carrier Safety Administration under 49 U.S.C. §§ 30101–30170 (2006). See, e.g., 49 C.F.R. § 391.11 (2008) (specifying truck driver qualifications); *id.* § 395.3 (specifying number of hours truck drivers may spend on road).

75. Restatement (Third) of Torts: Prods. Liab. § 2(b) (1997).

tom.⁷⁶ For all intents and purposes, evidence of a reasonable alternative design that is actually in use is evidence of a noncustomary precautionary practice. On a narrow view of the issue, evidence that there was a reasonable alternative design goes only to the feasibility of taking an alternative precaution. But the Products Liability Restatement makes it clear that evidence of a reasonable alternative design may be considered in connection with the “broad range of factors” that bear on whether the omission of a reasonable alternative design renders a product defective.⁷⁷ And although the Restatement does not expressly state that evidence of the incidence of products incorporating the alternative design is admissible, it implies as much.⁷⁸ Evidence of a reasonable alternative design in a product liability case is thus the functional equivalent of practice evidence.

Similarly, in medical malpractice, evidence of compliance with noncustomary practices, if they reflect a “respectable minority” school of thought, is not only admissible, but in some states is conclusive.⁷⁹ Even if a majority follows another practice, testimony is commonly admitted showing that a considerable number of physicians, sufficient to create another school of thought, follow the practice that the defendant followed.⁸⁰ This too is evidence of noncustomary practice.

The characteristic that products liability and medical malpractice cases share, of course, is that they are routinely complex and likely to involve technical issues with which jurors have no expertise, personal knowledge, or even familiarity. Among other things, admitting practice evidence in such cases performs an educational function by helping to inform the jury about these issues. Products liability and medical malpractice cases, however, are not the only forms of modern tort litigation that involve complex, technical issues with which the jury is unlikely to be personally familiar. Cases involving building construction, transportation, mining, and waste disposal, to name only a few categories, are likely

76. See *id.* cmt. d (“How the defendant’s design compares with other, competing designs in actual use is relevant to the issue of whether the defendant’s design is defective.”); *id.* cmt. f (“Furthermore, other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question.”); see also *Linegar v. Armour of Am., Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990) (“The Missouri Highway Patrol could have chosen to buy, and Armour could have sold the Patrol, a [bullet proof] vest with more coverage . . .”). See generally David A. Urban, *Custom’s Proper Role in Strict Products Liability Actions Based on Design Defect*, 38 UCLA L. Rev. 439 (1990) (analyzing the role played by custom in products liability).

77. Restatement (Third) of Torts: Prods. Liab. § 2 cmt. f.

78. See *id.* cmt. f, illus. 8 (stating that plaintiff could provide widespread use of traditional products as reasonable alternative design).

79. See Dobbs, *supra* note 9, § 242, at 633–34 (“When there are two schools of thought or custom in the medical community about a given procedure, the defendant is free to follow either custom without liability.”).

80. See, e.g., *Katsetos v. Nolan*, 368 A.2d 172, 181 (Conn. 1976) (discussing “two schools of thought” rule); *Jones v. Chidester*, 610 A.2d 964, 969 (Pa. 1992) (adopting respectable minority rule).

to be every bit as complex, technically difficult, and to involve conduct outside of jurors' personal experiences and knowledge. Therefore, the notion that the special treatment of practice evidence in products liability and medical malpractice is justified by the greater average complexity of issues in these fields—if it was ever defensible—is less defensible than it once was.

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

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

In response to this concern, Gideon Parchomovsky and Alex Stein recently have argued that the custom rule should be abolished because it disincentivizes innovation.⁸¹ In their view, a cost-benefit test should be the exclusive means of determining negligence.⁸² Alternatively, they suggest, special boards of industry experts should be established to approve or disapprove scientific and technological innovations.⁸³ Courts would then recognize the findings of such boards and accord a board's approval of an innovation a status equivalent to a custom.⁸⁴

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

81. Parchomovsky & Stein, *supra* note 5, at 310–12.

82. *Id.* at 289.

83. *Id.*

84. *Id.* at 312–14.

Nor is creating special boards to assess innovative practices a workable solution. Such a procedure would be potentially cumbersome, since parties would undoubtedly introduce expert evidence disputing the board's finding. In addition, as has been recognized in connection with the proposed court appointment of experts, everything would turn on who was chosen to serve on a board, since most experts are not and could not be truly "neutral"—they have a prior point of view about their area of expertise that is almost certain to influence the opinions they give in court or to the court.⁸⁵

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

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

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

Such an approach, however, would run contrary to the rarely mentioned but strongly implied proposition that, ordinarily, relevant evi-

85. See Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 *Or. L. Rev.* 59, 101 (1998) (“[R]emoving party sponsorship of expert testimony does not eliminate all significant sources of expert bias.”).

dence is relevant evidence, regardless of who sponsors it.⁸⁶ In addition, not all idiosyncratic actors are innovators. In fact, some are laggards. A rule that made practice evidence admissible defensively but not offensively would prevent a plaintiff from showing directly the extent to which the defendant was a laggard. Custom evidence would be admissible to show that the defendant had not adopted a customary precaution, but practice evidence would not be admissible to show that the defendant was the only actor or one of only a few actors that had not yet adopted the precaution. Since currently under the custom rule, however, the plaintiff is entitled to prove that the defendant departed from custom, but not that the defendant is the only actor who departs from custom, it is difficult to see how plaintiffs could reasonably complain about this asymmetry.

In short, making practice evidence admissible defensively but not offensively, or generally admissible, would seem to be preferable to repealing the custom rule or to establishing a regime of scientific and technology boards whose findings could be used to counterbalance custom evidence. As a way of dealing with the anti-innovation bias of the custom rule, Parchomovsky and Stein's proposals probably are overkill. We might well be able to retain the benefits of the custom rule, but reduce some of its anti-innovation effect, simply by making practice evidence admissible.

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

How should jury instructions handle the corresponding issue regarding the significance of practice evidence? One approach would simply be to ignore it. This solution would still permit the parties to make reference to the evidence in closing argument. But it could leave the jury uncertain about what to make of practice evidence, and could lead the jury to draw inferences from this evidence that are not warranted. A preferable approach, I think, would be to instruct the jury that, if it finds that a practice is not widespread enough to constitute a custom, and even if the jury finds that the custom is not to follow the practice, the jury is entitled to take the incidence of the practice into account in deciding

86. See Fed. R. Evid. 401 (defining relevant evidence without reference to party sponsoring it); James Bradley Thayer, *A Preliminary Treatise on Evidence* 269 (1898) (presupposing same proposition in asserting that relevance is "an affair of logic and experience, and not at all of law").

what constitutes reasonable care. In effect, the practice instruction would constitute a minor modification of the custom instruction, when the custom instruction is given. Correspondingly, the jury would be instructed that if it finds that there is no applicable custom, it may take into account the evidence of the incidence of a relevant practice or practices that has been introduced in deciding what constitutes reasonable care.

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

C. *The Arguments Against Admitting Practice Evidence*

Based on the analysis thus far, there are plausible arguments for a rule that evidence of compliance with or departure from a practice should not be automatically inadmissible. But there are also arguments against permitting the introduction of practice evidence, even if it is potentially relevant. The Federal Rules of Evidence, for example, and the many state rules of evidence that follow the Federal Rules, provide that otherwise relevant evidence is admissible unless its probative value is "substantially outweighed" by potential prejudice, jury confusion, undue delay, or waste of time.⁸⁷ This test is applied on a case-by-case basis, but the values that it balances can also help us to analyze whether the current rule that practice evidence is categorically inadmissible should be set aside.

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

It is unclear whether a jury instruction could help to neutralize these forms of prejudice. For example, the jury could be instructed that the existence of a genuine difference of opinion among relevant actors about what constitutes reasonable care does not necessarily show that those who follow the minority practice have exercised reasonable care, and that the mere fact that the defendant is the only actor who follows a particular

87. Fed. R. Evid. 403.

practice does not necessarily mean that the defendant was negligent. This sort of instruction would be analogous to the jury instruction that neither compliance with nor departure from custom is conclusive. Because we do not know how effective this instruction is in custom cases, we cannot know how effective its analog would be in practice cases.

2. *Confusion.* — Jurors might sometimes be confused by practice evidence. But such evidence might also help to dispel confusion. I have certainly never seen any studies finding—or even any arguments asserting—that jurors are confused by evidence about custom. There is no reason to think that they are. So the question is whether they might nonetheless be confused by evidence about noncustomary practice.

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

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

3. *Waste of Time and Undue Delay.* — Whether the relevance of practice evidence would be substantially outweighed by the time factor also is unclear. We can take it as given that evidence about custom is admitted without unduly wasting time. But as I demonstrate in Part I, the admission of custom evidence is likely to involve much more than mere testimony from the proponent of that evidence. Admitting such evidence has repercussions for opposing testimony about both the existence of the custom *vel non* and the opposing party's compliance with or departure from it, for closing arguments, and for jury instructions. The same will be true for practice evidence. Indeed, admitting practice evidence may have more repercussions than admitting custom evidence, because there may be several different practices in existence. If demonstrating that there are widespread differences of opinion about how to engage in the conduct in question is in the interest of one of the parties, that party may

wish to introduce evidence that multiple practices are followed. In short, although admitting practice evidence may not be a waste of time, doing so will sometimes require a considerable *expenditure* of time, and that expenditure might well be considered an undue delay of time.⁸⁸

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

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

III. NEGLIGENCE

This last section considers what the custom rule and the rule precluding practice evidence reveal about the meaning of negligence. By admitting evidence regarding custom, and excluding evidence regarding the incidence of practices that are not sufficiently widespread to constitute custom, these rules specify the role that the forms of normative experience are permitted to play in the negligence determination. In my view, the custom rule roughly reflects an “experiential” conception of negligence, whereas the practice rule reflects a more nearly “individuated” conception.

The custom rule simultaneously reflects an experiential conception of negligence and implements that conception. This conception sees reasonable care and negligence as being potentially constituted by actual normative experience. Both the traditional explanations for the custom rule and my suggestion that the rule performs an educational function fit comfortably within this conception. The rules for assessing the negli-

88. Courts commonly weigh the probative value of proffered evidence against the disruption and delay entailed in any “mini-trial” that would result from the admission of that evidence. See, e.g., *State v. Gibney*, 825 A.2d 32, 40 (Vt. 2003) (weighing “limited probative value of defendant’s proffered evidence” against “prospect of confusion of the issues by a twenty-witness mini-trial”).

gence of children,⁸⁹ the disabled,⁹⁰ and those possessing exceptional knowledge or skill⁹¹ also fall into this conception, for they derive from experience-based generalizations about what should be expected of these categories of actors. And the rule that violation of a safety statute is negligence per se largely fits within this conception, because it is derived from normative experience: Reasonable people ordinarily do not violate the law.

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

An alternative, “individuated” conception of negligence is implicitly reflected in another strand of negligence law and much of the law of evidence.⁹² Under this conception, negligence and negligence cases are atomistic and unique; each case stands on its own footing. Reasonable care is not what some others actually do, but what the abstract reasonable person in exactly the defendant’s circumstances should have done. In the world of the individuated negligence case, reasonable care is defined by reference to what would constitute reasonable prudence under the specific circumstances, or based on an objective risk-benefit test applied to the specific circumstances.⁹³ In either event, there is no evidence of how often others do or do not behave the way the defendant behaved—or how others make the risk-benefit tradeoff—unless there is a single, customary way of doing so. In this world, recurring situations and patterns of experience are regarded as sufficiently different in fine detail that per se rules are exceptional, and directed verdicts or judgments as a matter of law are rarely granted.⁹⁴ Direct evidence of what happened in

89. Restatement (Third) of Torts: Liab. for Physical Harm § 10 (Proposed Final Draft No. 1, 2005).

90. *Id.* § 11.

91. *Id.* § 12.

92. I am indebted to Frederick Schauer for acquainting me with this feature of the law of evidence, which reflects the view that juries are capable of determining what happened on a particular occasion without evidence of what generally happens in similar situations. For examples of this approach, see Fed. R. Evid. 404(a) (providing that evidence of character is not admissible to prove action in conformity with it on particular occasion); Fed. R. Evid. 404(b) (providing that evidence of past crimes, wrongs or acts is not admissible to prove character in order to show action in conformity therewith on particular occasion); *United States v. Fosher*, 449 F. Supp. 76, 77 (D. Mass. 1978), *aff’d*, 590 F.2d 381 (1st Cir. 1979) (excluding under Fed. R. Evid. 702 expert testimony regarding general unreliability of eyewitness testimony, offered to undermine eyewitness testimony in particular case).

93. Restatement (Third) of Torts: Liab. for Physical Harm § 3 cmt. e.

94. Morris made this point long ago: “Modern courts are curiously prone to dodge the responsibility of deciding the negligence issue—it goes to the jury even when the defendant’s conduct is not in dispute, and even though a verdict of negligence would be

the particular instance under scrutiny is privileged over statistical evidence about what generally happens in such instances, and inferences drawn from a party's own past practices have less probative value than actual observations of what that party did on a single occasion.⁹⁵

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

These two conceptions of negligence live uneasily together in the same body of law. When the jury finds that risk-benefit considerations and custom point in the same direction, however, there is no automatic conflict between them. Even when the evidence supporting these conceptions conflicts—in cases involving what might be called “ordinary accidents”—the jury can evaluate the conflicting evidence. That is, when an accident involves an activity with which the jury is familiar, the jury can make its own informed choice between the outcomes dictated by the competing conceptions. Either (i) the fair teaching of experience is that what usually is done is what ought to have been done in this case, or (ii) experience must be reconsidered, in light of what a risk-benefit evaluation of what usually is done has revealed. In this situation the reasonably prudent person standard is more than a mere emblem; the jury quite literally adjudicates between the two conflicting conceptions of negligence. Indeed, this is part of what I believe is meant when the jury is described as the conscience of the community in negligence cases.⁹⁶

outrageous.” *Morris*, supra note 4, at 1156. More recently, the Supreme Judicial Court of Massachusetts made the same point more succinctly, noting “judicial intrusion into jury decision-making in negligence cases is exceedingly rare.” *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 71 (Mass. 1985).

95. See, e.g., *Keeton et al.*, supra note 9, § 33, at 195 (indicating that evidence of actor's past conduct or habits is not evidence of reasonable care). An even more prominent example of this phenomenon is tort law's reluctance to permit the use of statistical evidence or evidence of market share to prove causation. Rather, the courts require proof of but for causation in the particular case at issue. See, e.g., *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 75 (Iowa 1986) (rejecting market-share liability); *Smith v. Rapid Transit*, 58 N.E.2d 754, 755 (Mass. 1945) (holding evidence that mathematical chances favored proposition that bus owned by defendant injured plaintiff was legally insufficient to support verdict for plaintiff); Frederick Schauer, *Profiles, Probabilities, and Stereotypes* 79–107 (2003) (discussing issues arising out of *Smith* and similar cases, including effectiveness of evidence relying on probabilistic inferences).

96. See Kenneth S. Abraham, *The Trouble with Negligence*, 54 *Vand. L. Rev.* 1187, 1195–97 (2001) (discussing “conscience of the community” argument for submitting negligence cases to juries).

Move from ordinary accidents to those involving activities with which the jury is not familiar, however, and evidence regarding recurring patterns of experience must take on an additional role if the negligence determination is to remain meaningful. When risk-benefit considerations conflict with what is customarily done, lay jurors unfamiliar with the activity in question do not have a source of normative authority for adjudicating between the two. Weighing whatever application of the risk-benefit test seems most persuasive against the burden of experience as expressed in a custom requires comparing incommensurables. Yet, in contrast to cases in which the jurors are familiar with the activity being evaluated, they cannot call on their own understanding of and experience with the activity in order to assess the conflicting evidence. In such cases the abstract standard of reasonable prudence gives jurors no purchase, no independent place from which they can adjudicate between competing conceptions of negligence.

This predicament can be ameliorated, however, if we understand custom not only to have normative force, but also to perform an educational function. When evidence of custom informs the jury of the nature of an activity, it provides a basis for adjudicating between the normative force of custom and a risk-benefit evaluation of that conduct. Through evidence about custom, the jury acquires a familiarity with the activity and thereby has a basis from which it can judge the activity in a manner analogous to what the jury does when it makes the negligence determination about an ordinary activity. The education provided by custom evidence gives the jury a basis for choosing between custom and conflicting risk-benefit considerations in making the negligence determination. The admission of practice evidence might also provide this benefit.

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

Even if the negligence determination can be made intelligibly, whether that determination can be principled or coherent when experience and risk-benefit considerations conflict, but both are relevant, is a different question. I am not at all sure that principle or coherence can be characteristic of decisions weighing incommensurables. Such decisions certainly are not law-like in substance, even if they may be law-like in procedure. As Leon Green once put it, "we may have a process for passing judgment in negligence cases, but practically no 'law of negligence' beyond the process itself."⁹⁷ Part of the reason we have juries in negli-

97. Leon Green, *Judge and Jury* 185 (1930).

gence cases is to deal with this kind of normative incoherence, or at least normative inconclusiveness, and to do so out of sight.

Going back at least to Holmes, however, the negligence system has struggled with the tension between two conceptions. Holmes believed, for example, that in highly similar situations that frequently recurred, the negligence issue should be decided as a matter of law.⁹⁸ Whether or not we go as far as he proposed, the more emphasis there is on the common, characteristic features that the conduct at issue in a negligence case shares with conduct in the rest of the world, the more likely it is that different cases will be identified as alike. However, tolerating the normative inconclusiveness that comes with competing conceptions of negligence makes it more difficult to treat like cases alike. When the regularities of normative experience are simply an optional ingredient of the negligence determination, the outcomes of negligence cases are more likely to vary than when such experience is given more probative force, either by the jury, or by the court in deciding whether to dispose of the case as a matter of law. Perhaps more than anything else, this is the price we pay for having competing conceptions of negligence.

CONCLUSION

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

98. Oliver Wendell Holmes, Jr., *The Common Law* 123 (1881).