Individual Rights, Mass Markets, and the Judge-Jury Issue in Tort Law

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Introduction

Following the abolition of the writ system in the mid-nineteenth century, courts and scholars organized the new field of tort law around the principle of negligence liability.[1] In formulating negligence liability, courts retained the common-law rule that gives the jury a great deal of power to determine what the law requires, an important exception to the general decline of the jury's lawfinding function that otherwise occurred during the nineteenth century.[2] A generalized principle of negligence liability then fueled the considerable expansion of tort liability throughout most of the twentieth century. The evolution of tort law has not been accompanied by any basic changes in the decisionmaking roles of the judge and jury, a lack of development that has significantly contributed to the most important problem now faced by the tort system.

In a negligence case, the element of duty is a matter of law to be determined by the judge, and the remaining elements are all decided by the jury,

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[1] For an excellent discussion centered on the Holmesian formulation of tort law, see Thomas C. Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225 (2001).

[2] *See generally* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L. Rev. 377 (1999).

involving either so-called mixed questions of law and fact (the issues of breach and proximate cause) or more purely factual questions (like cause-in-fact and damages).[3] The behavior that negligence law requires of a duty-holder is largely determined by the jury, absent a statutory requirement to the contrary.

This allocation of decisionmaking made eminent sense when the common law first developed to redress the wrongs that individuals inflicted on one another. The tort right presumably has not changed over time, but the nature of an individual rights-violation is now quite different from the wrongdoings that were redressed by the early common law. With the rise of mass markets, the individual tort right now often depends on categorical considerations that were absent when courts adopted the rules governing the allocation of decisionmaking between judges and juries.

In a mass market, an individual rights-violation affects other right-holders in the market. A single claim seeking recovery for injuries caused by a defective drug, for example, often implicates the manufacturer's safety decisions with respect to the entire market. One claim can also influence the litigation decisions of similarly situated consumers, further influencing the manufacturer's safety decisions with respect to the entire market. In a mass market, the individual tort right is inextricably linked to other tort rights in that market.

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[3] *See* Dan B. Dobbs, The Law of Torts § 18 (2000). Some aspects of the elements other than duty are determined by the judge as a matter of law, such as the characteristics of the reasonable person. The jury, though, still decides whether the element has been proven.

By allowing the jury to determine the requirements of reasonable care in mass markets, tort law has given the jury a lawfinding function that considerably increases legal uncertainty. The problem has nothing to do with the nature of the jury as a decisionmaker, but instead resides in the nature of judicial review.[4] Judges defer to jury determinations, typically reversing a jury verdict only if a reasonable juror could not have made such a finding. This standard allows for a variety of possible outcomes. In order for the judge to give the issue to the jury in the first instance, the evidence must be capable of supporting different outcomes. The very nature of a jury verdict implies that reasonable jurors could reach different conclusions about the same issue, creating a range of outcomes that can survive judicial review. This outcome is not problematic for issues that are specific to the case, but the issue in question involves the jury's lawfinding function with respect to the standard of reasonable care. Why should the form of conduct required by tort law be resolved in a manner that allows for a range of permissible outcomes, when resolution of that issue in one case has categorical effects for other right-holders in the mass market?

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[4] *Cf.* George L. Priest, *Justifying the Civil Jury*, *in* Verdict: Assessing the Civil Jury System 103 (Robert E. Litan ed.1993) (relying on the "aresponsible character of jury decisionmaking" to question the prominent role currently played by the jury in tort cases). The problem of judicial review has not played a prominent role in the debate over jury reform. *See* Peter H. Schuck, *Mapping the Debate on Jury Reform*, *in* Verdict, *supra*, at 306-40 (discussing the different types of concerns involved in the debate over jury reform).

Part I explains why tort law gives the jury a lawfinding function with respect to conduct requirements in the typical case. Part II then shows how the identical tort right has different characteristics in a mass market, using the evolution of products liability to illustrate the point. By recognizing that the individual tort right depends on categorical considerations in mass markets, Part III argues that tort law could defensibly alter the allocation of decisionmaking between the judge and jury on these conduct issues. Under this approach, judicial review would focus on reaching the right outcome, thereby narrowing the range of possible outcomes and decreasing the associated legal uncertainty.

Legal uncertainty has always been part of the tort system, but the consequences are now amplified by the widespread effects of an individual tort claim in a mass market. This uncertainty is increased by the tort system's continued reliance on an outmoded allocation of decisionmaking between the judge and jury, a systematic failure rooted in the nature of judicial review that implies no criticism of the jury. By revisiting the judge-jury issue, the tort system may be able to change a practice that is both unfair to duty-holders and detrimental to the interests of right-holders in mass markets.

I. THE JUDGE-JURY ISSUE IN TORT LAW

The importance of the jury in the U.S. is hard to overstate. The right to be tried by a jury of one's peers is constitutionally guaranteed by the federal

constitution and the constitutions of forty-seven states.[5] The importance of the jury first stemmed from political considerations that are now largely irrelevant.[6] Today, the allocation of decisionmaking between the judge and jury largely depends on functional or institutional considerations. Due to changed social conditions, the reasons for initially giving an issue to the jury can instead justify judicial resolution of the matter. This dynamic has considerably reduced the role of the jury over time, even though the jury continues to be a cherished American institution.[7]

Until the early nineteenth century, the jury decided most issues of importance in a lawsuit. "American judges actually asserted an almost plenary power in the jury to decide the law as it saw fit."[8] The division of labor between judges and juries was dramatically altered in the nineteenth century. Instead of letting the jury determine the law, judges instructed jurors on each point of law in the case.[9] "At the same time, courts began to treat certain questions as 'matters of

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[5] *See* Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U.Chi. L. Rev. 179, 181 n.14 (1998) (listing the 47 states that provide a constitutional guarantee to jury trials).

[6] "[J]uries—both civil and criminal—were almost uniformly seen [by the colonists] as important actors in the American struggle for independence," explaining why the right to a jury trial is constitutionally guaranteed. Ellen E. Sward, *The Decline of the Civil Jury* 90-95 (2001). For a good historical overview, see Stephan Landsman, *The History and Objectives of the Civil Jury System*, *in* Verdict, *supra* note __, at 22-60.

[7] *See generally* Sward, *supra* note __ (describing decline of jury in various areas of law over time).

[8] Harrington, *supra* note __, at 378.

[9] William B. Nelson, The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society 168 (1975) (finding that this practice first began in Massachusetts in 1808).

law' for the first time."[10] "[A]s part of the expanding notion of what constituted a 'question of law,' courts for the first time ordered new trials on the ground that the jury verdict was contrary to the weight of evidence…."[11] By the 1830s, the procedure for granting a new trial for a verdict against law was widely adopted.[12] By the close of the century, courts had defined the respective roles of the judge and jury in the now familiar terms that distinguish lawmaking from factfinding: "the duty of the court is to expound the law and that of the jury to apply the law as thus declared."[13]

The jury's lawfinding powers diminished during the nineteenth century for various reasons.[14] Chief among them was the desire to reduce legal uncertainty. "In the nineteenth century, … legal certainty was conceived of as important primarily to the extent that it enabled individuals to plan their affairs more rationally."[15] For the first time, judicial decisions about points of law in a case were published and widely distributed, creating the necessary data for judges to formulate rules that could displace the jury's lawfinding function. In doing so, judges could create the more complex legal rules required by an increasingly

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[10] Morton J. Horwitz, The Transformation of American Law: 1780-1860, at 28 (1977).
[11] *Id*. at 29.
[12] Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 Notre Dame L. Rev. 505, 525 (1996).
[13] Sparf v. United States, 156 U.S. 51, 106 (1895).
[14] *See generally* Harrington, *supra* note __.
[15] Horwitz, *supra* note __, at 26.

complex society.[16] Unlike the legal rulings of the jury that were necessarily limited to the individual case, judicially formulated rules could apply more generally, thereby satisfying the "intensely practical concern" of the business community to have predictable legal rules.[17] Due to these comparative institutional advantages, legal certainty was promoted by reallocating the lawfinding function from the jury to the judge.

The same considerations also justify the jury's role as the finder of facts. As conventionally understood, "[q]uestions of fact are particular to the case before the court."[18] Resolution of such a matter is not relevant for guiding future decisions, and a group of individuals—the jury—ordinarily holds a decisive comparative advantage for assessing case-specific facts over a single decisionmaker—the trial judge.

Considerations of comparative institutional advantage also explain the nature of judicial review. To overturn a finding by the jury, the reviewing judge must conclude that no reasonable juror could have made such a finding. An appellate court then gives *de novo* review to findings of law, but otherwise defers (like the trial judge) to the jury's findings of fact. "This simple, two-part model

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[16] Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 917 (1994).
[17] Larry D. Kramer, *The Pace and Cause of Change*, 37 J. Marshall L. Rev. 357, 386-87 (2004); *see also* Harrington, *supra* note __, at 379 ("In civil cases, judges and lawyers joined with merchant interests to limit the jury's law-finding function as a means of promoting a stable commercial environment.").
[18] Sward, *supra* note __, at 272 (discussing the law/fact distinction).

derives from the well-established belief that given 'the respective institutional advantages of trial and appellate courts,' lawmaking is best performed at the appellate level and factfinding at the trial level."[19]

As is widely recognized, however, the function of lawmaking is not always distinct from that of factfinding:

> When … a controlling law is defined pursuant only to abstract legal norms or principles, trial level decisionmaking necessarily involves more than a neat comparison of fact to law. It requires, instead, a nuanced assessment or characterization of the historical facts in light of the governing legal norms. In other words, when a legal principle is only abstractly defined, it serves not as a standard against which they historical facts can be measured, but rather as something more akin to a general guide for the exercise of considered judgment. The conclusions resulting from the exercise of this sort of judgment are referred to as "mixed finding[s] of law and fact," and, on appeal, are commonly characterized as "mixed question[s] of law and fact." As the labels suggest, mixed findings or mixed questions generally defy ready categorization as either law or fact.[20]

Perhaps more than any other body of the common law, tort law involves mixed questions of law and fact. Tort law is predominantly concerned about the problem of accidental harm, and the default rule for accidental harms—negligence liability—is the paradigmatic example of a mixed question of law and fact.

> At the heart of negligence law is a standard of conduct of the reasonably prudent person. The jury administers this standard by making a normative

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[19] Harry T. Edwards & Linda A. Elliott, Federal Standards of Review: Review of District Court Decisions and Agency Actions 6 (2007) (explaining practice of federal appellate review) (quoting Salve Regina Coll. v. Russell, 499 U.S. 225, 231-33 (1991)).
[20] *Id*. at 7-8 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 & n.17 (1984); United States v. Gaudin, 515 U.S. 506, 512 (1995)) (other citation omitted).

> determination of what constitutes appropriate conduct in a given situation along with a factual determination as to whether the defendant's conduct met the standard. The jury has a great deal of normative discretion in deciding what is reasonably prudent conduct.[21]

Even "in a case where the facts are undisputed but breach is contested," the "issue of breach goes to the jury."[22] The jury must resolve both factual questions and legal or normative questions to determine what reasonable care requires in a particular case. Unlike other areas of the common law, the jury in the ordinary tort case continues to have an important lawfinding function.

This practice has a straightforward historical explanation. As Oliver Wendell Holmes famously observed, "Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment."[23] Within this social context, it is easy to understand why the jury had a great deal of power to decide tort cases. In a case relying on legal rules that are now part of tort law, the alleged wrongdoing involved violation of customary practices within the community. The jury—a representative group of individuals from the community—could more capably identify those practices than a judge, particularly one who had not lived in the area. "The fact that juries rather than judges regularly decided the law applicable to litigated cases [demonstrates] that

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[21] Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in American Common Law*, 68 Fordham L. Rev. 407, 424-25 (1999) (citations omitted).
[22] *Id*. at 434 (citations omitted).
[23] Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 467 (1897).

the law applied … reflected jurors' experiences with the common law as it had customarily been applied in their towns or with other customs that their towns observed as law."[24] In determining the law (custom), the jury could only affect the case at hand, precisely the type of outcome that is appropriate for the cases of "isolated, ungeneralized wrongs" that were first redressed by the common law.

The tort system has considerably evolved in the past century. Courts consolidated the varied individuated liability rules under the writ system into a general principle of negligence liability, which then supplied the necessary justification for eliminating numerous immunities and other limitations of liability that had been recognized by the common law.[25] The growth of tort law during the twentieth century has made it the most salient and politically controversial component of the civil-justice system.

In contrast to the substantial changes that have occurred within the tort system, the jury's role in a negligence case has not largely changed since the late

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[24] Nelson, *supra* note __, at 3-4. *See also* James B. Thayer, *"Law and Fact" in Jury Trials,* 15 Harv. L. Rev. 147, 148 (1890) (observing that one of the initial roles for the jury in England was to determine "the *consuetudo*, the custom, of such a place").

[25] *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925 (1981) (discussing the numerous limitations of liability in the writ system that were subsequently eliminated by the growth of negligence liability); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601, 605-06 (1992) (concluding that judicial tort opinions until the 1960s, "for the most part, sharpened and clarified tort doctrines that had been presented somewhat more crudely in nineteenth-century cases," and that the "vitality of negligence" then caused an expansion of tort liability lasting until the 1980s); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 Cal. L. Rev. 2403, 2407 (2000) ("The central change in personal injury law doctrine that has taken place since 1900 is the evolution of a robust law of negligence….").

nineteenth century. According to the conventional rationale for the continuation of this practice, the jury in a negligence case today does nothing fundamentally different from what juries did centuries ago: "[B]y determining that the defendant's conduct was unreasonably risky and amounted to negligence, [the jurors] bring their own knowledge of 'social facts' to bear on the case."[26] Insofar as juries in the contemporary tort system only identify the relevant "social facts" for determining whether the defendant behaved in the manner required by tort law, they perform a decisionmaking function that is substantively equivalent to the jury's historical role of identifying customary forms of behavior.

This rationale, while defensible in important respects, assumes that there has been no change in the types of cases adjudicated by the tort system.[27] Having recognized that "[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs," Holmes then observed that "the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like."[28] Holmes then argued that judges had "failed adequately to recognize their duty of weighing considerations of social advantage," although he never succeeded in displacing the jury determination of reasonable care with judge-

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[26] Dobbs, *supra* note __, § 18 at 33-34.
[27] For a prominent defense of this role for the jury, see Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158 (1958); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055 (1964).
[28] Holmes, *supra* note __, at 467.

made rules.[29] At the dawn of the twentieth century, however, it was not apparent how the rise of mass markets would affect the substantive nature of the individual tort right and the associated duty to exercise reasonable care. Tort litigation in mass-market settings involves a set of categorical issues that did not exist when tort law first allocated decisionmaking between the judge and jury.

II. TORT LIABILITY IN MASS MARKETS

The evolution of products liability illustrates how tort liability over the twentieth century moved from instances of isolated wrongdoing to the redress of widespread wrongs in mass markets. This expansion of liability was predicated on a generalized principle of negligence liability that did not require any change of the underlying tort right. The rise of mass markets created new conditions requiring new liability rules, making products liability particularly useful for studying the evolution of tort law.[30]

A. The Evolution of Strict Products Liability

In the 1840s, the English case *Winterbottom v. Wright* concluded that the seller of a defective product could be liable only to the buyer but not third

[29] *Compare* Baltimore and Ohio R.R. v. Goodman, 275 U.S. 66, 69-70 (1927) (Holmes, J.) (adopting rule that automobile drivers must "stop, look, and listen" before proceeding over railroad tracks), *with* Pokora v. Wabash Ry., 292 U.S. 98, 106 (1934) (The "stop, look, and listen" rule "has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.").

[30] *See* Mark A. Geistfeld, Tort Law: The Essentials (forthcoming 2008) (showing more extensively how the evolution of strict products liability reflected all of the important developments that occurred within tort law during the twentieth century).

parties.[31] At this time, the common law was still governed by the writ system, and so the resolution of *Winterbottom* depended on whether the plaintiff's claim fit within a recognized writ or cause of action. On the alleged facts, "[t]here simply were no precedents authorizing recovery in tort."[32] The plaintiff had to argue that the contract itself provided the basis for recovery, and the *Winterbottom* court concluded that one must be a party to the contract or be in privity with the defendant in order to have any contractually based rights. This limitation of liability for third-party injuries was widely adopted by the states.

The privity rule was not absolute, however, because the case law had previously recognized a legal duty involving the delivery of dangerous chattels. Shortly after *Winterbottom* was decided, the New York Court of Appeals affirmed that a defendant could be liable in tort for selling a bottle of mislabeled poison that "put human life in imminent danger," despite the absence of contractual privity between the defendant and poisoned plaintiff.[33] The courts also relied upon another exception for cases involving "inherently dangerous" defective products. These cases were consistent with *Winterbottom*, as liability was based upon a previously established legal duty and not the contract alone.

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[31] 152 Eng. Rep. 402 (Ex. 1842).
[32] Vernon Palmer, *Why Privity Entered Tort—An Historical Reexamination of* Winterbottom v. Wright, 27 Am. J. Legal Hist. 85, 94 (1983).
[33] Thomas v. Winchester, 6 N.Y. 397, 409 (1852).

This inquiry forced the courts to confront a difficult question. Why were some defective products "imminently or inherently dangerous" and subject to the tort duty, while other defective products were governed by the privity-based immunity? The decided cases provided no clear answer, as illustrated by the cases finding defective bottles of water under gas pressure to be inherently more dangerous than defective automobiles.[34] The courts could not identify a defensible distinction between an "imminently or inherently dangerous" defective product and other defective products, even though the distinction was of critical importance for determining whether the privity-based immunity applied to the case at hand.

The distinction was finally demolished by Judge Benjamin Cardozo in the 1916 landmark opinion *MacPherson v. Buick Motor Company*.[35] According to Cardozo, "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger [and subject to a tort duty]." By making the tort duty dependent on the foreseeable risk of physical harm posed by the defect, Cardozo turned the "imminently or inherently dangerous" exception to the privity requirement into a general rule of negligence liability. The fact of injury would seem to establish conclusively that the alleged defect was a "thing of danger" subject to the tort duty. Any defective product is

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[34] Cadillac v. Johnson, 221 F. 801, 803 (2d Cir. 1915).
[35] 111 N.E. 1050 (N.Y. 1916).

governed by the tort duty, eliminating any general requirement of contractual privity.

In the following years "this decision swept the country" and was "extended by degrees" until it became "in short, a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel."[36]

The widespread adoption of negligence liability for dangerous products then created a rationale for strict liability. In the landmark case *Escola v. Coca Cola Bottling Company*, Justice Roger Traynor of the California Supreme Court argued in a concurring opinion that the negligence rule, if properly applied, would involve insurmountable problems of proof: "An injured person … is not ordinarily in a position to refute [the manufacturer's evidence of reasonable care] or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is."[37] According to Traynor, strict liability would give product sellers an incentive to distribute nondefective products, and the availability of tort damages for the product-caused injuries was a valuable form of insurance for consumers.

The claim that strict liability could be justified by the difficulties of proving legal fault or negligence was supported by established rules. For example, common carriers had long been strictly liable for lost or damaged goods

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[36] William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1100-1102 (1960).
[37] 150 P.2d 436, 441 (Cal. 1944).

due to the difficulty plaintiffs would otherwise face in proving negligence.[38] The evidentiary rationale for strict liability was also an important justification for the statutory schemes of workers' compensation that were widely adopted by the states in the early 1900s.[39] Finally, the rule of strict liability was firmly supported by the implied warranty of merchantability and the ancient rule that imposed strict liability on the sellers of contaminated food.[40]

The doctrinal and policy arguments for strict liability were compelling. In 1963, the California Supreme Court accepted Traynor's argument for strict products liability.[41] The rule of strict products liability was then adopted by the *Restatement (Second) of Torts* in 1965.[42] By 1971, 28 states had adopted the *Restatement (Second)* rule of strict liability for product defects; by 1976, 41 states had adopted it.

The growth of products liability has been astounding, with much of it attributable to issues that had not been extensively considered when the *Restatement (Second)* rule of strict products liability was promulgated in the

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[38] *See generally* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth Century Tort Law*, 51 Ohio St. L. J. 1127 (1990).
[39] For a more detailed exposition of this range of issues, see John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law (2004).
[40] *See* Mark A. Geistfeld, Principles of Products Liability 10-19, 29-33 (2006) (showing how the implied warranty provided a sufficient doctrinal rationale for the rule of strict products liability, and locating that rationale in the difficulty of proving unreasonable care).
[41] Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1963).
[42] Restatement (Second) of Torts § 402A (1965).

1960s.[43] Products liability initially involved cases in which a defect caused the product to malfunction and injure the user, such as an exploding bottle of soda. By the 1970s, the allegations of defect moved beyond malfunctioning products. Even if the product functioned according to design, plaintiffs began claiming that the design itself was defective for not containing a particular safety feature, like a guard on a machine. Plaintiffs also claimed that properly designed and manufactured products were defective for not adequately warning consumers about product risks. The claims of design and warning defects now constitute the bulk of products liability suits. Allegations of warning defects, for example, are involved in the massive number of suits involving asbestos liability. "From an inauspicious beginning in the late 1960s, asbestos litigation has generated over 730,000 claims, at an overall cost of at least $70 billion."[44] The asbestos cases are an extreme example, but they illustrate how the scope of tort liability far exceeds that which was contemplated when state courts first adopted the rule of strict products liability.

Tort liability could grow in this fashion because of the inherent logic of a generalized principle of negligence liability. The rule of strict products liability makes a product seller strictly liable for injuries caused by a defect in the product.

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[43] *See* George L. Priest, *Strict Products Liability: The Original Intent*, 10 Cardozo L. Rev. 2301 (1989).
[44] Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 526-27 (2007) (citing Stephen J. Carroll et al., Asbestos Litigation (2005)).

When the product performed as intended, the defect cannot be defined by reference to a product malfunction, as in the case of an exploding soda bottle. Absent any malfunction, what makes a design or warning defective? In addressing this issue, most courts have concluded that a design or warning is defective if it creates an unreasonably high risk of physical harm. Under this formulation, the seller continues to be strictly liable for injuries caused by the defect, defined as the absence of a safety feature (like a protective guard or a particular safety instruction) that created an unreasonable risk of harm. The same outcome, though, is obtained under a rule of negligence, which also makes the seller liable for injuries caused by an unreasonable product risk (the defect in design or warning). The issue of defective design or warning depends on a finding of negligence liability.[45]

The evolution of negligence liability placed tort law in the center of disputes involving widespread harms. Whereas product cases initially involved instances of isolated harms caused by a product malfunction, like the exploding bottle of soda, the extension of products liability to encompass product designs and warnings implicates all consumers in the market. Like tort law more generally, products liability no longer is limited to ungeneralized wrongs, but now redresses the widespread accidental harms that can occur in mass markets.

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[45] Restatement (Third): Products Liability § 2 (1998).

B. Mass Markets and the Demise of Custom

In addition to vastly increasing the scope of tort liability, the rise of mass markets has also affected the way in which courts determine the requirements of reasonable care.

Under the early common law, customary safety practices largely determined the requirements of reasonable care. As one court explained:

> No one is held by law to a higher degree of care than the *average* in the trade or business in which he is engaged…. A man, in conducting his business in the way that everyone else in a like business does, has measured up to the standard demanded by the law and has exercised the *ordinary* care of prudent men engaged in the business.[46]

During the twentieth century, judges questioned whether customary safety practices are necessarily reasonable. These doubts produced a new rule that was famously articulated by Judge Learned Hand in *The T.J. Hooper*:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[47]

The decline of custom corresponds with the rise of mass markets. In any market, customs are created by the safety practices agreed upon by buyers and sellers. To employ the language of economics, custom is the market equilibrium. By rejecting custom, courts effectively concluded that the market equilibrium

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[46] McClaren v. G.S. Robins & Co., 162 S.W.2d 856, 858 (Mo. 1942) (emphasis added).
[47] 60 F.2d 737 (2d Cir. 1932).

produced unreasonably dangerous products, an outcome characteristic of mass product markets.

The problem stems from the difficulty faced by consumers in evaluating product risk. Of course, consumers do not have to be uninformed. A consumer can learn about product risk, presumably in the hope of making fewer mistaken product choices. The increased knowledge, however, typically comes at a cost—the additional time and effort the consumer must expend to acquire and process the information. In mass markets, information costs prevent consumers from being adequately informed about product risk, resulting in customary safety practices that can be unreasonably dangerous.

For example, suppose there are two types of consumers. One type is completely uninformed of product risk. The other type is well informed, having incurred the necessary information costs. If there are enough well-informed buyers in the market, their aggregate demand for product quality will induce sellers to supply reasonably safe products.[48] The information held by some consumers can benefit others who are not well informed of product risk. But since the information is costly to acquire and process, any consumer may rationally decide to "free ride" on the informed choices of others, thereby saving the information costs. The consumer can get the benefits of information (safe

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[48] *See* Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 Va. L. Rev. 1387 (1983); Louis L. Wilde & Alan Schwartz, *Equilibrium Comparison Shopping*, 46 Rev. Econ. Stud. 543 (1979).

products) without incurring the information costs. Reasoning similarly, other consumers will make the same choice. The "free rider" problem may result in no consumer incurring the information costs necessary for making decisions about product safety.

Even if the market does not suffer from this problem, information costs can induce each consumer to forego the evaluation of numerous product risks. The benefit of learning about a one in 10,000 risk of being injured by a particular configuration of a car's steering wheel, for example, is likely to be lower than the cost the consumer would incur to become informed of the risk. For such risks, the ordinary consumer would rationally decide to remain uninformed.[49]

The rise of mass markets has exacerbated this informational problem. Consumers face a bewildering array of product choices. Over 30,000 items are available in the typical supermarket.[50] Experience with a brand may provide the consumer with some knowledge, but even that is short-lived. For U.S. manufacturing firms that remain in operation over a manufacturing census period (every five years), almost two-thirds of the firms change their product mixes, with the product switches involving almost half of existing products.[51] The

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[49] *Compare* Xavier Gabaix et al., *The Allocation of Attention: Theory and Evidence* (M.I.T. Dep't of Econ., Working Paper No. 03-31, 2003) (analyzing attention as a scarce resource allocated by cost-benefit principles and providing empirical support that individuals act in this manner).
[50] G. Cross, An All-Consuming Century: Why Commercialism Won in Modern America (2000).
[51] *See* Andrew B. Bernard et al., Product Choice and Product Switching (Nat'l Bureau of Econ. Research, Working Paper No. 9789, 2003).

consumer's ability to evaluate risk is then made even more difficult by the increased complexity of products. Who has the time, energy and desire to evaluate each of these product risks, particularly given the range of other decisions we face on a daily basis?

The rise of mass markets has predictably caused consumers to be less informed about product risk. Due to this informational problem, unregulated market transactions do not reliably produce reasonably safe products, explaining why courts in the twentieth century rejected customary market practices in favor of an independent standard of tort liability.

Consider a manufacturer's decision of whether to install a costly safety device in order to eliminate an unreasonable product risk of which the ordinary consumer is unaware. By installing the safety device, the manufacturer increases cost and the price of the product. Without the device, the product would expose consumers to the associated risk of injury. Unless consumers have adequate knowledge of this risk, they will not be willing to pay for the safety device, leading them to purchase the lower priced product without the device. Manufacturers will not typically tell consumers about these risks, since doing so would only increase product price and decrease sales. What is the point of advertising negative product attributes to the consumer? The process of price competition predictably forces manufacturers to forego these types of safety investments, resulting in unreasonably dangerous products. The ensuing safety

problem both justifies the tort duty and explains why customary product-safety practices can be unreasonably dangerous.[52]

During the 1920s, for example, the president of the automobile manufacturer General Motors "insisted that the company could not make windshields with safety glass because doing so would harm the bottom line." The automobile manufacturers were simply responding to misinformed consumer demand. "G.M. believed that consumers weren't prepared to pay more for cars with safety glass." The same dynamic has occurred throughout the history of automotive safety. During the 1950s, "auto executives told Congress that making seat belts compulsory would slash industry profits." The industry had the same response to air bags. As the president of the Chrysler Motors lamented, "safety has really killed all our business."[53]

Without the intervention of tort law or other forms of safety regulation, mass markets would have adopted customary practices (no safety glass, no seat belts, no air bags) that were unreasonably dangerous. Since customary safety practices no longer defined the requirements of reasonable care, courts had to determine the safety practices that were required by the individual tort right in a mass market.

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[52] For a more complete analysis, including other economic rationales for regulating product safety with tort law, see Geistfeld, *Products Liability*, *supra* note __, at 34-50.
[53] James Surowiecki, *Fuel for Thought*, The New Yorker, July 23, 2007, at 25.

C. The Individual Tort Right in a Mass Market

The changed social conditions associated with the rise of mass markets made it necessary for courts to alter liability rules in order to protect established tort rights. Due to the demise of reasonably safe customs, courts then had to determine the safety behavior required by the tort right. Regardless of the safety behavior required of duty-holders in the ordinary case, the tort right in a market relationship creates an unambiguous safety obligation. The fair protection of the right-holder's interests in a mass market ordinarily requires safety decisions that minimize consumer costs—the result attained by cost-benefit analysis. With the development of products liability, the requirements of reasonable care were transformed from an unspecified norm of behavior into one that ordinarily depends on cost-benefit analysis.[54]

In the vast majority of product cases, the right-holder can be analyzed as a consumer who both pays for and benefits from the tort duty faced by the product seller.[55] Any tort burdens incurred by the manufacturer or other product sellers, including the cost of product-safety improvements and liability for injury

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[54] *See* Geistfeld, *Products Liability*, *supra* note __, at 35-40 (explaining why efficient products liability rules fairly protect the individual tort right).

[55] A consumer for this purpose includes one who uses the product with the purchaser's permission, typically family and friends. The purchaser presumably fully accounts for the user's interests, making it appropriate to conceptualize both types of individuals as right-holders who fully internalize the benefits and burdens of tort liability. So conceptualized, products liability only implicates consumer interests unless the product risk threatens bystander injuries. These injuries require separate analysis, although courts typically have not recognized the issue. *See id.* at 252-59 (identifying the issue and explaining why bystander injuries should be governed by ordinary tort doctrines and not those based on consumer choice).

compensation, are passed onto the consumer in the form of higher prices. These cases only implicate consumer interests, and so the liability rule recognizes that "it is not a factor … that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry."[56] In considering her own interests, the consumer prefers to pay for product safety only if the benefit of risk reduction (fully accruing to the consumer) exceeds the cost of the safety investment (also fully borne by the consumer in the form of higher prices). The ordinary consumer reasonably expects these safety decisions to satisfy cost-benefit analysis, a difference recognized by courts. Unlike other cases in which the judge tells the jury to evaluate the defendant's conduct under the reasonable-person standard, in product cases the requirements of reasonable care are defined in the cost-benefit terms of the risk-utility test.[57]

To be sure, a number of jurisdictions employ the consumer-expectations test rather than the risk-utility test for evaluating product defects.[58] An analysis of consumer expectations further confirms that the appropriate safety norm is one of cost minimization.

As previously discussed, the tort duty is predicated on the assumption that the ordinary consumer does not have sufficient information about product risks,

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[56] Restatement (Third): Products Liability § 2 cmt. f, at 23 (1998).
[57] *See id.* § 2.
[58] *E.g.*, Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319 (Conn. 1997) (describing controversy over the choice of tests and adopting the consumer-expectations test).

causing her to undervalue product safety. Due to the process of price competition, these uninformed consumer choices give manufacturers an incentive to supply unreasonably dangerous products. These products are more risky than expected by the ordinary (uninformed) consumer, resulting in the frustration of consumer safety expectations. To protect consumer expectations of product safety, tort law overrides these uninformed contractual choices (and customary product-safety practices more generally), subjecting product sellers to a tort duty.

Once the existence of the tort duty has been established, the legal inquiry must then determine whether the product is defective. The tort duty is predicated on the product attribute frustrating the *actual* (uninformed) safety expectations of the ordinary consumer, and so the separate element of defect must be defined in some other manner. Otherwise, the existence of duty would necessarily establish the existence of defect. To keep the two elements separate, the consumer-expectations test must define defect by reference to the *reasonable* safety expectations of the ordinary consumer. Actual safety expectations (the element of duty) depend on the information actually held by the ordinary consumer, whereas reasonable safety expectations (the element of defect) are defined by the well-informed safety choices of the ordinary consumer. To be nondefective, the

product design and the accompanying warnings must satisfy the well-informed safety expectations of the ordinary consumer.[59]

What does the ordinary consumer reasonably expect about product safety? The consumer as right-holder benefits from tort liability (due to increased product safety and the prospect of compensation for injuries caused by defective products), while also incurring the burdens of that liability (via the increase in product price for the cost of safety features and the seller's liabilities for product-caused injuries). The benefits and burdens of products liability, therefore, are fully internalized by the right-holder. As previously discussed, the right-holder's full set of interests is best protected by a duty of reasonable care defined in cost-benefit terms. The ordinary consumer's well-informed preference for product safety—the concept of reasonable expectations—yields the risk-utility test for design and warning defects, uniting the consumer expectations test and the risk-utility test.[60]

In applying either test, courts define the relevant costs and benefits by reference to the market as a whole, virtually eliminating any case-specific features from the safety decision. Individual consumers have different preferences for product safety and other aspects of quality, making it ordinarily infeasible for

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[59] *See* Geistfeld, *Products Liability*, *supra* note __, at 85-159 (showing how the satisfaction of actual expectations absolves the seller of any duty regarding product design or warning, whereas the satisfaction of reasonable expectations renders the product design or warning nondefective).
[60] *See, e.g.*, *Potter*, 694 A.2d at 1334 (affirming the consumer-expectations test and adopting the risk-utility test as a method for determining consumer expectations of safety).

product sellers to satisfy completely the preferences of everyone (as you undoubtedly have experienced). Product sellers in competitive markets respond to aggregate consumer demand. Consumer expectations are formed by the *market* transaction, and each consumer should know that the market contains other buyers with differing preferences. As long as the product satisfies the reasonable expectations of the ordinary consumer, any individual consumer usually has no reasonable basis for expecting otherwise. Products liability rules are formulated by reference to the safety needs of the ordinary or average consumer, not the particular plaintiff.[61]

Since a manufacturer's safety decision depends on the safety needs of the average or ordinary consumer, the individual tort right of each consumer in the market is necessarily interrelated. Any particular rights-violation can have categorical effects for similarly situated right-holders. Litigation of the individual tort case does not involve an isolated instance of wrongdoing that was characteristic of the claims adjudicated by the early common law, but can now affect other right-holders (consumers) in the mass market.

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[61] *E.g.*, Campbell v. General Motor Corp., 649 P.2d 224, 233 n.6 (Cal. 1982) (holding that under the consumer-expectations test, "the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case"). When the individual consumer has expectations that differ from those of other participants in the market, and the transaction proceeds on that basis, seller liability is governed by the implied warranty of fitness for the buyer's particular purpose. *See generally* William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117 (1943).

III. THE JUDGE-JURY ISSUE REVISITED

Unlike the traditional torts context in which the rights of one individual do not depend on those of another, the individual rights in a mass market are interrelated. The jury's imposition of liability in a single case involves conduct directed towards the market as a whole, creating categorical effects that are not present in the traditional torts context. The nature of this decision is fundamentally different from the decision that the early common law gave to the jury, and yet the tort system has not revisited the issue of how decisionmaking should be allocated between the judge and jury in these cases.

A. Reasonable Care and the Law/Fact Distinction in Mass Markets

An individual right in a mass market requires liability rules quite different from those that the same right would require in other contexts. "In many tort cases, community values form the basis for moral judgment about the parties' fault and justifications. In those cases, a significant role for the jury may be especially desirable."[62] In product cases or those otherwise involving conduct in a mass market, community values are not relevant to the safety decision, and the issue does not turn on customary safety practices. The correct result in each case largely depends on an accurate measuring of the costs and benefits of the safety

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[62] Dobbs, *supra* note __, § 18 at 35.

decision. Disputed issues should only involve problems of measurement, not the disagreements about cultural or moral values that characterize other tort disputes.

This attribute of a mass-market case makes conduct questions more factual in nature and less like the mixed question of law and fact that the jury decides in an ordinary negligence case. Some courts, for example, have characterized the jury's determination of product defect in these terms. As one court observed:

> The argument has been made that the question of the ordinary consumer's expectations should be treated for jury purposes in the same way that the question of reasonable conduct in a negligence case is treated. But in deciding in a negligence case what is reasonable conduct, the jury is deciding in a context of "right and wrong" how someone *should* have behaved. In making this decision they are presumed to know the relevant factors….
>
> In the defective-product area, courts have already decided how strong products *should* be: they should be strong enough to perform as the ordinary consumer expects. In deciding what the reasonable consumer expects, the jury is not permitted to decide how strong products should be, nor even what consumers should expect, for this would in effect be the same thing. *The jury is supposed to determine the basically factual question of what reasonable consumers do expect from the product*.[63]

Conduct issues in a mass market depend on the safety preferences of the reasonable consumer, a factual determination of costs and benefits that fundamentally differs from the ordinary negligence case in which the jury

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[63] Heaton v. Ford Motor Co., 435 P.2d 806, 809 (Or. 1967) (emphasis added). The quotation deletes a sentence pertaining to medical malpractice in which the court recognizes that the standard of care is supplied by expert testimony and is not determined by the jury. Medical malpractice occurs in a market setting, making the standard one of cost-benefit analysis. *See supra* Part II (explaining why the tort right in a contractual relationship justifies safety decisions governed by cost-benefit analysis).

determines how someone should have behaved. The absence of normative judgment, however, does not necessarily turn the conduct issue into a jury question. A primary rationale for allocating negligence decisions to the jury involves the normative nature of the decision. The jury, as a repository of community values, is particularly well-suited for making that determination. When a decision does not require normative judgment, the value of the jury's determination is reduced.

When the resolution of a factual issue has social ramifications beyond the case at hand, policy reasons can justify a judicial determination of the matter. The difference is captured by the distinction between an adjudicative fact that is case-specific and must be determined by the jury, and a legislative fact that has categorical importance requiring resolution by the judge.[64]

As Professor Thayer observed over a century ago, "judges have always answered a multitude of questions of ultimate fact involved in the issue. It is true that this has often been disguised by calling them questions of law."[65] The passage indicates the extent to which the law/fact distinction is misleading. "[C]ourts assume that the properly affixed characterization necessarily determines which legal actor is assigned to the decisionmaking task," leading them to

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[64] *E.g.*, Restatement (Third) of Torts: Liability for Physical Harm § 7 cmt. b (using the distinction to discuss decisionmaking roles of judge and jury with respect to the element of duty).
[65] James B. Thayer, *"Law and Fact" in Jury Trials*, 4 Harv. L. Rev. 147, 159 (1890).

characterize certain factual findings as ones of "law" merely to justify taking the issue from the jury.[66]

Consider the common-law rule that gives judges the power to interpret written documents.

> The reasons for leaving questions as to the meaning and construction of writing to the judges appear to be historical and administrative; they do not rest on the ground that these are questions of law, for, mainly, they are not. They are not, as a class, decided by the application of legal rules, but by a critical reading of the document in the light of the circumstances attending the making of it. Some legal rules there are, for the interpretation of writings, but in a great degree this is a question of the intention of the writer, and so a question of fact.[67]

Even though the issue is largely one of fact, courts deem it to be one of law simply because the jury does not resolve the issue. For example, "courts have traditionally stated that, where evidence extrinsic to the undisputed terms of a contract is not presented, the interpretation of the contract is 'a pure question of law.'"[68] The issue is not truly one of law, but is only given that label in order to explain why the finding is subject to *de novo* judicial review.[69]

As Professor Monaghan has persuasively argued, "[t]here is no imperative that a properly affixed characterization necessarily controls allocation of

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[66] Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 234 (1985).
[67] Thayer, *supra* note __, at 160.
[68] Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate, 733 F.2d 195, 206 (2d Cir. 1984) (Newman, J., concurring) (quoting Hamilton v. Liverpool, London and Globe Insur. Co., 136 U.S. 242, 255 (1890)) (other citations omitted).
[69] *Id.* at 207 n.7 ("By whatever label one characterizes the issue of textual interpretation, it is important to recognize that its determination by a [federal] trial judge is not insulated upon review by the 'clearly erroneous' standard.") (citations omitted).

functions. And, quite plainly, the actual distribution of authority between judges and other decisionmakers has often been governed by other factors, such as the nature of the substantive issue and the character of the decisionmakers."[70]

Policy reasons explain why judges interpret the meaning of written documents. "Such things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents."[71] Judges interpret written documents because of comparative institutional advantage and the social consequences of the decision, not because the exercise is one of lawfinding rather than factfinding.

These policy considerations also govern the allocation of decisionmaking between judges and juries for other types of issues. "It is on this ground of policy, or on like legislative considerations … that many other questions of fact have at one time or another been taken possession of by judges."[72]

Tort law has recognized that in libel cases, "the jury may lose sight of the value of free speech when faced with derogatory statements about the plaintiff.

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[70] Monaghan, *supra* note __, at 234 (citations omitted).
[71] Thayer, *supra* note __, at 161.
[72] *Id*. (also observing that the most important reason involves "fear the jury should decide some question of law complicated with the fact").

Accordingly, legal rules constrain liability and give judges more power in these cases."[73]

These policy reasons also explain why judges determine whether an activity is abnormally dangerous and subject to strict liability in tort:

> The imposition of strict liability … involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without become subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.[74]

This rationale then carries over into negligence liability. The element of duty depends on categorical considerations, explaining why the element is a matter of law to be determined by the judge.

> For example, a number of modern cases involve efforts to impose liability on social hosts for serving alcohol to their guests. A jury might plausibly find the social host negligent in providing alcohol to a guest who will depart in an automobile. Nevertheless, imposing liability is potentially problematic because of its impact on a substantial slice of social relations. Courts appropriately address whether such liability should be permitted as a matter of duty.[75]

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[73] Dobbs, *supra* note __, § 18 at 36.
[74] Restatement (Second) of Torts § 520 cmt. l.
[75] Restatement (Third) of Torts: Liability for Physical Harm § 7 cmt. a. *See also id. cmt. c* (explaining that "adjudicate facts" which are relevant to the duty question must be determined by the jury, whereas "legislative facts" are determined by the judge).

The requirements of reasonable care can also be determined by the judge as a matter of law. According to the *Restatement (Third)*, judicial rules of reasonable care are appropriate when

> the need for providing a clear and stable answer to the question of negligence is so overwhelming as to justify a court in withdrawing the negligence evaluation from the jury…. [There are also] some intermediate issue[s] that can clearly profit from the clarity and finality of a judicial resolution. For example, in cases involving plaintiffs who are injured by railroad trains at highway crossings, courts have decided on their own that despite motorists' ability to observe approaching trains, the negligence doctrine imposes on railroads the "duty" to give an adequate warning to highway users. Of course, even given this decision by the court, what counts as an adequate warning is often determined by the jury on a case-by-case basis.[76]

For rules of both negligence and strict liability, judges can resolve an issue that "is likely to have a broad societal impact" and the judicial ruling would "give parties fair notice, avoid unequal results, and reduce subsequent litigation costs."[77] As a matter of tort law, the judge-jury issue turns on the nature of the decision and its social consequences. The matter is not simply resolved by reference to any intrinsic distinction between fact and law.[78]

The conduct issue in a mass market involves a factual determination of the relevant costs and benefits, eliminating the role of normative judgment that can

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[76] Restatement (Third) of Torts: Liability for Physical Harm § 8 cmt. c

[77] *Id*. § 20 cmt. c. *See also id.* § 8 cmt. c (identifying same advantages for judicial rules).

[78] *See* Leon Green, Judge and Jury 279 (1930) ("[B]y and large the terms 'law' and 'fact' are merely short terms for the respective functions of the judge and jury. And to discover these functions no *a priori* understanding of 'law' and 'fact' is sufficient. Nothing less than an historical survey of the numerous cases which come before juries can determine the respective functions of judge and jury with any precision.").

otherwise turn an issue into a jury question. Since the duty-holder's conduct is directed towards the market as a whole, the issue also has a "broad social impact" that is appropriate for judicial resolution. Whether the issue should be resolved by the judge or jury accordingly depends on comparative institutional advantage.

B. Judge or Jury?

The comparative institutional advantages of the judge and jury in mass-market cases are usefully considered in relation to *Dawson v. Chrysler Corp.*, a products liability case in which the court discusses the troubling features of the modern products liability regime.[79] The facts of the case highlight these dimensions of the liability rule, making the case particularly instructive for evaluating whether the jury or judge should determine the conduct at issue in the case—how an automobile should be designed.

Dawson involved a police officer who was badly injured when his car crashed into a steel pole. "As a result of the force of the collision, the vehicle literally wrapped itself around the pole." According to the plaintiffs, "the patrol car was defective because it did not have a full, continuous steel frame extending through the door panels, and a cross-member running through the floor board between the posts located between the front and rear doors of the vehicle." The plaintiffs claimed that with such a design, the vehicle "would have 'bounced' off

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[79] 630 F.2d 950 (3d Cir. 1980) (applying New Jersey law), cert. denied, 450 U.S. 959 (1981).

the pole following relatively slight penetration by the pole into the passenger space." In response, the defendant argued that "deformation of the body of the vehicle is desirable in most crashes because it absorbs the impact of the crash and decreases the rate of deceleration on the occupants of the vehicle." According to the defendant's experts, "for most types of automobile accidents," the plaintiffs' proposed design "would be less safe than the existing design." To resolve this issue, the jury had to trade off the risks posed by the existing design with those posed by the plaintiffs' proposed alternative design, the type of issue characteristic of many product cases. The jury concluded that the automobile was defectively designed.

After upholding the jury's determination of defect as a finding of fact subject to "limited" judicial review, the federal appellate court made a number of observations about its ruling:

> Although we affirm the judgment of the district court, we do so with uneasiness regarding the consequences of our decision and of the decisions of other courts throughout the country in cases of this kind.
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> … In the present situation, … the New Jersey Supreme Court has instituted a strict liability standard for cases involving defective products, has defined the term "defective product" to mean any such item that is not "reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes," and has left to the jury the task of determining whether the product at issue measures up to this standard.
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> The result of such arrangement is that while the jury found Chrysler liable for not producing a rigid enough vehicular frame, a factfinder in another case might well hold the manufacturer liable for producing a frame that is too rigid. Yet, as pointed out at trial, in certain types of accidents—head-

> on collisions—it is desirable to have a car designed to collapse upon impact because the deformation would absorb much of the shock of the collision, and divert the force of deceleration away from the vehicle's passengers. In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design.[80]

The *Dawson* court was clearly troubled by the possibility that different jurisdictions can apply different liability rules that produce conflicting results for the same issue of product design. This concern about conflicting liability rules, though, has become substantially less important over time. *Dawson* was decided during a period of considerable ferment in the liability rules. In the ensuing decades, the liability rules have evolved and "[c]onsensus has been achieved."[81]

Consensus cannot be achieved, however, if juries continue to resolve the issue of defect. Consider the form of judicial review exercised by the *Dawson* court. Despite its misgivings about the jury's finding of defect, the reviewing court could not overturn the jury verdict because the record was not "critically deficient of that minimum quantity of evidence from which a jury might

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[80] *Id.* at 962.

[81] James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 869 (1998). For an evolutionary analysis of why the initial disarray in the case law ultimately converged upon substantively equivalent liability rules, see Geistfeld, *Products Liability*, *supra* note __, at 86-102. For analytic discussion showing the substantive equivalence of the risk-utility and consumer-expectations tests for defective design, see *supra* Part II.

reasonably afford relief."[82] By its very nature, this standard allows for different conclusions about the same issue governed by the same liability rule. The "minimum quantity of evidence" can ordinarily support more than one conclusion with respect to a complicated decision like the design of an automobile. The decision involves numerous tradeoffs, and the available data will rarely provide a definitive answer to all relevant questions. One jury could find that the automobile is defectively designed for being "too rigid," and another could find a design defective for being "too flexible." Unless the evidence in a case is sufficiently complete, the same liability rule can support different jury verdicts on the identical question, undermining the uniformity that might otherwise be achieved by a consensus on liability rules.

The problem would be ameliorated if the issue of defect were resolved by judges. The issue of defect reduces to a comparison of costs and benefits. The evidence does not need to be complete in order for judges to settle upon a single answer to the issue. A reviewing court can give *de novo* review to the findings of the trial judge. In a case like *Dawson*, plenary review would allow "federal appellate courts to achieve their principal functions of dispute resolution (through correction of individual errors) and lawmaking (through the declaration of legal principles)."[83] A conclusion regarding defective design, though one of fact,

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[82] *Dawson*, 630 F.2d at 962.
[83] Edwards & Elliot, *supra* note __, at 23.

functions like a legal principle in that the decision has categorical implications for others in the market. The fact, in other words, is legislative and not adjudicative. *De novo* judicial review of such a finding of fact would help the tort system achieve consensus on the issues of defective product design and warnings.

The federal judges in *Dawson* were constrained by the federal constitutional right to a jury trial, which "bars appellate review of facts found by a jury in actions at common law."[84] This right to a jury trial applies today if it existed in England in 1791.[85] The tort system did not adjudicate claims of defective design or warnings in 1791, but the issue is one of reasonable care, making it analogous to the ordinary negligence question decided by the jury in 1791. For this reason, the federal constitutional right to a jury trial may prevent the tort system from turning the issue of defect into a "legal" question for the judge in tort cases litigated in the federal system, although the changing nature of the decision and the importance of uniformity might enable the tort system to take the issue from the jury.[86] The federal constitutional right does not govern trials in

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[84] *Id*.
[85] *See* Dimick v. Schiedt, 293 U.S. 474, 476 (1935); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).
[86] *Compare* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 Geo. Wash. L. Rev. 183, 241 (2000) ("Seventh Amendment jurisprudence has for over a century imposed no impediment to developing modern jury practices and procedures unrestricted by particular practices that were or were not followed in 1791. [T]he Court [has] repeatedly held that such changes in practices and procedures were permitted, as long as they did not interfere with the critical element which must be preserved—the jury's fact-finding role in a common law suit."). Only legislative facts would be taken from the jury, leaving intact the jury's historical role of finding facts specific to the case.

state courts, but similar considerations determine whether a state constitutional right to a jury trial would prevent the tort system from reallocating the issue from the jury to the judge.[87]

Because the constitutional right to a jury trial depends on historical practices in the writ system, a historically static conception of the jury's role in deciding the issue of reasonable care may explain why the judge-jury issue has not evolved with the rest of tort law. In light of the problems that are now created by the static conception, perhaps courts will decide that an outmoded historical practice is not a sufficient reason for injecting substantial indeterminacy into the tort system.

CONCLUSION

The jury can determine the conduct that tort law requires of duty-holders in mass markets, a striking exception to the decline of the jury's lawfinding function that occurred in the nineteenth century:

> The drive to limit the law-finding function was entirely a judge-led exercise, carried out without legislative warrant and sometimes in the face of legislative enactments to the contrary. Three factors played a role in this effort: Foremost among these was the growing desire for stability in the law. Both judges and lawyers were concerned about the need to provide a stable legal regime. This was so not only to ensure stability in

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[87] *Compare* Michelle Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 Harv. J. on Legis. 59 (2008) (concluding that "there is … some diversity in how courts [in different states] approach right-to-jury claims, but the key issues are whether the right to have [the] claim heard by a jury existed at common law at the time of constitutional adoption, and, if so, the extent to which the reform intrudes on that right").

> the commercial law, but also to ensure that the criminal law might be fixed and uniform. The increasing diversity of juries was also a factor. The "men of the neighborhood" who adjudicated disputes in the town and county courts were no more. As the nation became diverse and jury service was opened to a wider segment of the population, juries could no longer be counted on to speak from a common set of beliefs and experiences. The way was cleared for inconsistent and contradictory verdicts. Perhaps worse, from the judges' point of view, was the increasing tendency of juries to bring in verdicts at odds with the judges' own views and experiences. Finally, the movement was also fueled by the increasing professionalization of the bench and bar. As legal education became more sophisticated, judges became more convinced that the bench was the proper place in which to lodge the law-finding function.
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> In the end, the American judiciary succeeded in delegitimizing the jury's power over law by means of a careful and creative reinterpretation of the common law governing the allocation of power between judge and jury. The transformation was long and arduous, marked by a great deal of hesitancy and many missteps; but, the results have been long lasting.[88]

Negligence liability has bucked this trend for reasons succinctly summarized by the *Restatement (Third) of Torts*:

> Tort law has … accepted an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation. Tort law's affirmation of this requirement highlights the primary role necessarily fulfilled by the jury.[89]

This rationale for the primary role of the jury has not evolved with the changing nature of tort litigation. The decisionmaking role of the jury in an ordinary negligence case involves the "ethics of particularism," but that type of decision is inapposite for conduct issues in a mass market. Protecting the

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[88] Harrington, *supra* note __, at 380.
[89] Restatement (Third) of Torts: Liability for Physical Harm § 8 cmt. c.

individual tort right in a mass market usually does not require any particularized moral judgments about the relevant safety decision. There is a single, right answer based on cost-benefit analysis. The appropriate design of an automobile is a matter of market-based economics that does not turn on the ethics of particularism.

By allowing the jury to decide these issues, the tort system produces a range of outcomes that can survive judicial review, a problematic outcome for the general class of right-holders. Without the ability to identify how an automobile should be designed, manufacturers will necessarily make compromises based on the realities of litigation rather than the needs of consumers. Variable outcomes result in unnecessary cost increases and inefficient safety decisions that are detrimental to consumer interests, thereby harming right-holders other than the plaintiff in a particular case.

In a national market, variable safety standards are problematic for other reasons. The pursuit of uniform, national standards explains the increased willingness of courts to displace state law with federal law. Most notably, "the U.S. Supreme Court has, in preemption and forum-allocation cases, attempted to capture the considerable benefits that flow from national regulatory uniformity

and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation."[90]

One does not need to conceive of the jury as an institution that is hostile to out-of-state interests in order to justify a rule that allocates an issue to the judge. Even if the jury and judge are equally capable of identifying the right outcome, the possibilities for error correction substantially differ for the two decisionmakers. Unlike the judicial review of a jury verdict, the trial judge's decisions can be subjected to *de novo* appellate review, substantially increasing the likelihood that substantively equivalent liability rules, when applied by different courts in different jurisdictions, will yield uniform results. Uniformity does not matter for the prototypical jury questions of "fact" that are specific to the case at hand. Uniformity, though, is critical for conduct issues in mass markets, creating a decisive comparative advantage for judicial resolution.

Whether tort law can alter the roles of the judge and jury in this manner ultimately depends on whether that change violates the constitutional right to a jury trial. That constitutional right, however, is not the only right in question. In subjecting punitive damage awards to the federal constitutional requirements of due process, the U.S. Supreme Court has relied on a set of constitutional concerns about overly vague liability rules that apply to other tort doctrines, particularly

[90] Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. Rev. 1353, 1356 (2006).

those governing the conduct of manufacturers in national product markets.[91] Overly vague liability rules undermine the due process values of notice, predictability, and reasoned decisionmaking. Those constitutional values are all compromised by jury determinations of conduct issues in mass markets. The constitutional right to due process may now be in conflict with the constitutional right to a jury trial.

A conflict of constitutional rights also occurs in libel cases, because the resolution of a factual issue by the jury could have a detrimental impact on First Amendment rights. In this area, judges have long exercised more power than in other tort cases, a practice now required by the U.S. Supreme Court: "Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact."[92] This kind of reasoning could support a reallocation of decisionmaking from the jury to the judge on conduct issues in mass markets. To reduce the substantial indeterminacy generated by the jury determinations of these conduct questions, the due process values of notice, predictability, and reasoned decisionmaking may require that these legislative facts be subject to *de novo* judicial review.

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[91] *See* Mark A. Geistfeld, *Constitutional Tort Reform*, 38 Loy. L.A. L. Rev. 1093 (2005).
[92] Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1984).