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TORT LAW AS CORRECTIVE JUSTICE: A PRAGMATIC JUSTIFICATION FOR JURY ADJUDICATION

*Catharine Pierce Wells**

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INTRODUCTION: TORT LAW AS CORRECTIVE JUSTICE

The past few years have seen a great deal of controversy concerning the continued viability of the tort system as a remedy for accidental injuries. Talk of a "torts crisis" has been widespread in both the public media and the scholarly community. While some accuse the insurance industry of orchestrating the crisis,[1] there can be no question that lack of confidence in the tort system is both widespread and deeply felt. The depth of this feeling can be seen in the frequent proposals by respectable scholars and responsible officials that the system as a whole should be radically altered or abolished.[2] What is new and surprising in these developments is the widespread dissatisfaction with the alleged "generosity" of the tort system. Many tort plaintiffs are sympathetic claimants while defendants are often large and seemingly callous institutions. Beyond this, the system itself — with its reliance on jury verdicts and its emphasis on public accountability — has served as a deeply democratic symbol of the state's commitment to individualized justice. Nevertheless, there is a growing perception that

1. *See, e.g.*, Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401, 408-14 (1988).

2. *See, e.g.*, Meese, *Address on Tort Reform Given Before the National Legal Center for the Public Interest*, 23 IDAHO L. REV. 343 (1987) (urging a package of state legislative proposals that would drastically curtail the ability of ordinary citizens to pursue tort claims).

the system is arbitrary and excessive and that its costs far outweigh its benefits.[3]

I believe that the chief reason for the perception of failure in the tort system is confusion and disagreement over its legitimate goals.[4] Without real consensus over goals, there is no clear way to measure the system's gains against its substantial costs. Comparing real economic costs with speculative and uncertain gains creates an exaggerated atmosphere of crisis in which it is easier to attack than to defend the system. To dispel this atmosphere, it is necessary to focus our attention on certain fundamental questions about the tort system. One such question is: Why is it important that tort litigants should have an opportunity to try their cases in a legal forum? One possible answer is: A legal forum is important because it has the potential to provide a just outcome to the parties. The purpose of this article is to explore the use of this answer as a justification for tort law.

The notion of corrective justice stems from Aristotle's distinction between distributive and corrective justice. Distributive justice addresses the issue of how the benefits of an organized society should be distributed among its members.[5] Corrective justice, on the other hand, is concerned with a local or temporary distortion in the distributive scheme: if *A* takes a loaf of bread from *B* by violence or stealth, then corrective justice requires that an adjustment be made in favor of *B*. Aristotle thought that the adjustment should be "arithmetic" in the sense that we look to measure what *A* gained and what *B* lost with a view toward restoring the balance between them. Further, he believed that issues of corrective justice should be weighed independently of any concern for distributive questions.[6] Thus, judgments about corrective justice relate to the equities of the particular transaction rather than to the distributional entitlements of the individual parties.

Tort cases arising from accidental injuries[7] can be understood as problems in corrective justice. *A* sues *B* alleging that an event has

3. *See, e.g.*, Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 558 (1985) (arguing that the reduction in dangerous activity attributed to tort law is exaggerated).

4. This disagreement is apparent in the growing scholarly literature on the tort crisis and has been noted by several commentators. *See, e.g.*, Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13 (1988).

5. ARISTOTLE, NICOMACHEAN ETHICS Book V at 1130b (J.A.K. Thomson trans. rev. ed. 1976) (rev. trans. by H. Tredennick). Aristotle argues that justice requires distributions to be made in proportion to each member's merit.

6. *Id.* at 1132a. Aristotle writes: "For it makes no difference whether a good man has defrauded a bad one or vice versa, nor whether a good man or a bad man has committed adultery; all that the law considers is the difference caused by the injury; and it treats the parties as equals."

7. Throughout this article, I use the term "tort law" to encompass what are essentially negligence and product liability claims. These are typically claims for damages that are tried to juries.

occurred in which *A* and *B* were both involved and that in the course of this occurrence *A*'s health, wealth, or happiness has been unjustly diminished by *B*. Tort cases are local in the sense that they focus upon the equities created by a single event or by a series of related events. Whether *A* is better off prior to the transaction than she deserves, whether *B* is so worthless that she ought to stay at home and bother no one — these are not issues that the court can decide. The court's attention is focused on what happened — the specific event that allegedly necessitates the adjustment *A* seeks.[8] Furthermore, the court may only help *A* at *B*'s expense. It may not order recovery from government funds or from third parties.[9] Jurors who are sympathetic to *A* but unconvinced that *B* should pay cannot, in their role as jurors, take up a collection for *A*'s benefit. Thus, tort cases, like corrective justice cases, require an allocative solution that results in an "arithmetic" adjustment between the parties.[10]

A corrective justice justification for tort law has a strong intuitive basis — if one party wrongfully injures another, our deepest intuitions seem to argue that justice requires a remedy. Furthermore, the pursuit of justice is itself an important goal and one that has strong justificatory force in maintaining public institutions. Nevertheless, ever since Justice Traynor's celebrated concurrence in *Escola*,[11] judges and scholars have focused on tort law as a system of regulation and compensation and assessed its performance with respect to these functions. Thus, one way to understand the need for a corrective justice justification is to focus upon the multitude of arguments that scholars have made against a compensatory or regulatory justification for modern tort law.

The tort law operates as a system of case-by-case adjudication in which victim-plaintiffs sue injurer-defendants. This structure is well

8. It is difficult to determine whether, in fact, juries are influenced by their appraisal of the relative worthiness of the parties. They are usually instructed, however, to ignore this factor. *See infra* note 199 and accompanying text. *But see* Bailey, *Tort Damages: The Plaintiff's Case*, 41 B.U. L. REV. 281, 284-93 (1961) (noting that although the law theoretically makes no distinction between the worthiness of the parties, it is clear that juries do).

9. Of course, many tort recoveries are ultimately funded through insurance coverage that is arranged and paid for by the defendant. It may seem that Aristotle's conception of "arithmetic" payments is violated by allowing defendants to pay premiums rather than damages. Premiums, however, represent the magnitude of the harm discounted by the probability of its occurrence. This, in effect, represents the prospective value of the harm that will be caused.

10. Obviously the corrective justice interpretation of tort law does not extend to punitive damage awards nor to state statutes that limit or multiply tort damages under certain circumstances.

11. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (majority upheld a verdict for plaintiff in a case involving an exploding bottle on grounds of *res ipsa loquitur*).

suited to handling corrective justice disputes but not well adapted to compensating accidental injuries.

It is possible, however, to construct arguments on behalf of compensation and regulation that accommodate this infelicity of structure.[12] Such arguments overlook one very important consideration. An emerging body of tort scholarship strongly indicates that the tort system, considered as a system of compensation and regulation, has serious inadequacies.[13] For example, it seems clear that the tort system systematically undercompensates some victims[14] while overcompensating others.[15] In addition, its reliance on insurance to spread costs may not be feasible given the recent suggestion by George Priest that the pursuit of broad compensation goals undermines the underwriting function.[16] As regulation, tort law is vulnerable to arguments that courts are not in a good position to assess the efficiency effects of their rulings;[17] that uncertainty in the current system makes it difficult for firms to make realistic decisions concerning profit-maximizing levels of safety;[18] that litigation presents opportunities for delay and

12. For a series of arguments on behalf of the regulatory function, see Coleman, *The Structure of Tort Law,* 97 YALE L.J. 1233, 1237-40 (1988).

13. Comprehensive statements of these arguments can be found in Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation,* 33 VAND. L. REV. 1281 (1980); Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law,* 72 CORNELL L. REV. 765, 768-75 (1987); Sugarman, *supra* note 3, at 559-603.

14. The tort system undercompensates in at least four ways. First, high transaction costs deter worthy plaintiffs from seeking compensation for their injuries; victims may not file or may settle too cheaply. *See, e.g.,* Pierce, *supra* note 13, at 1296; Sugarman, *supra* note 3, at 593-94. Second, proof problems substantially impair the ability of many plaintiffs to obtain recoveries. Sugarman, *supra* note 3, at 594. Third, defendants are often insolvent. *Id.* at 593. And, fourth, corporate defendants may disappear or reorganize, precluding plaintiff recovery. *See, e.g.,* Siliciano, *The Limits of Tort Reform,* 14 CORNELL L.F. 8 (1988).

15. The tort system requires courts to place a dollar amount on such items as pain and suffering, physical impairment, and death. Some commentators have suggested that compensation for these items is generally too high. Meese, *supra* note 2, at 346-47; Sugarman, *supra* note 3, at 595-96. *But see* Pierce, *supra* note 13, at 1293-95. Another view is that monetizing these elements is inappropriate and that therefore no recovery should be allowed for these items. *See* Abel, *A Critique of American Tort Law,* 8 BRIT. J.L. & SOCY. 199, 207-08 (1981); *see also* Radin, *Market Inalienability,* 100 HARV. L. REV. 1849, 1876-77 (1987).

16. *See* Priest, *The Current Insurance Crisis and Modern Tort Law,* 96 YALE L.J. 1521 (1987) [hereinafter Priest, *The Current Insurance Crisis*]; *see also* Priest, *Puzzles of the Tort Crisis,* 48 OHIO ST. L.J. 497 (1987). Priest argues that the pursuit of broad compensation goals undermines the insurability of liability claims because it shifts payments from first-party insurance to third-party insurance where potential liabilities of individual insureds are harder to estimate. Priest, *The Current Insurance Crisis, supra.*

17. One reason for this is that courts rarely have sufficient economic data to assess efficiency claims. A second reason is that economic analysis has not produced decisive conclusions concerning the efficiency effects of various liability rules. *See, e.g.,* Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law,* 87 COLUM. L. REV. 1385 (1987), and works there cited at note 1 and note 2.

18. The system can only deter to the extent that it sends clear messages to firms about the conditions under which they will be held liable. The tort law, as it currently stands, is an amal-

avoidance that discount the present value of avoiding tort liability;[19] and that tort judgments are routinely "reexternalized" to insurance companies.[20]

Collectively, these arguments suggest that it is not realistic to evaluate the various courts that make up the tort "system" as though they were an agency charged with full responsibility for victim compensation and safety regulation. Compensation and regulation are important goals but they cannot serve as the justification for the tort system. Instead, we should recognize that courts engage in case-specific normative decisionmaking of a kind that is most readily explained by a corrective justice model. For this reason, it seems reasonable to seek justification for the tort system in its corrective justice function.

Corrective justice only justifies the tort system if the results that the system produces can themselves be defended as just outcomes. Thus, a corrective justice theory must provide a basis for justifying the outcomes of individual tort cases. There are two possible approaches to this justification argument. One approach is "rule based" in the sense that it focuses on the justification of substantive tort rules. Those who adopt this approach presuppose that the use of justified rules will lead to just outcomes and then proceed to justify tort rules by comparing them to abstract statements of corrective justice principles. A second approach is to view tort law as a collection of adjudicatory practices that are employed to resolve private disputes. This results in a pragmatic theory that evaluates these practices in terms of their ability to reach just outcomes in individual cases. In developing a corrective justice justification for modern tort practices, I will adopt the pragmatic approach.

Properly understood, a pragmatic approach is not committed to the position that legal rules are "shams" or that they are not important. Indeed, some tort practices are "rule based" in the sense that they specify a formal rule or standard that is relevant to deciding the individual case.[21] Assessing their fairness requires that we evaluate

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gam of general standards, special doctrines, and evidentiary presumptions that change from state to state. *See, e.g.*, Sugarman, *supra* note 3, at 565-67.

19. *See, e.g.*, *id.* at 569. This discount may be magnified by the psychological tendency of irrationally discounting dangers that will not be manifested until some time after exposure to the risk. *See, e.g.*, Pierce, *supra* note 13, at 1301.

20. Because of insurance coverage, a firm has little incentive to take cost-effective steps to avoid accidents unless its tort liability can be "reinternalized" through higher insurance premiums that reflect the additional risk. *See* Pierce, *supra* note 13, at 1298-300; *see also* Sugarman, *supra* note 3, at 573-81.

21. Practices that are rule-based in this sense include judicial instructions and appellate review. Practices that are not rule-based in this sense include those that govern the presentation of evidence and the parties' summations to the jury. In a highly formal legal system, virtually all legal practices can be codified by rules. Even, for example, the wearing of judicial robes may be

the rules they specify. For example, suppose a given practice requires judges to give the following instruction: "You should disregard the testimony of any person who wears a hat." A rule-based evaluation of this practice would analyze, as a matter of grammar and logic, the meaning of these words. It would then consider whether the substance of the instruction was correct as a matter of legal or political theory. A pragmatic analysis, on the other hand, would look at the rule in the context of other adjudicatory practices to determine whether its use is justified. This requires consideration of the following issues: How do juries understand the instruction? What effect does it have on jury deliberation? Does the effect of this practice conform to prevailing community standards? Thus, the pragmatic focus on decisionmaking practices does not eliminate the need to think about substantive requirements. It merely suggests that it is wrong to think of these requirements as rigid embodiments of normative theory. Instead, the pragmatic conception understands tort rules as flexible standards and evaluates their use by considering whether they are effective in helping decisionmakers sort out conflicting intuitions about the requirements of justice in particular cases.

The purpose of this article is to develop a pragmatic analysis of corrective justice that will serve as a partial justification for current practices of tort adjudication. Part I discusses the concept of corrective justice and explores its relationship to the problem of justifying tort law. Part II argues that certain contemporary theories of corrective justice fail to provide an adequate basis for regarding individual tort outcomes as just. Part III develops a pragmatic account of corrective justice and argues that it accurately describes current practices of tort adjudication. Finally, Part IV argues that these practices are justified in the sense that they are reasonably calculated to resolve the problems that are inherent in judging corrective justice cases.

I. Corrective Justice and the Problem of Justification

A. *Corrective Justice*

The Aristotelian conception of corrective justice describes a type of justice problem.[22] It provides a structure but not a principle of liability for resolving corrective justice cases.[23] A corrective justice case is structured by matching an injured plaintiff with a defendant who may

the subject of a specific regulation. But the existence of a rule that governs the practice does not make the practice "rule-based" in the above sense.

22. *See infra* text preceding note 55.

23. Weinrib, *Toward a Moral Theory of Negligence Law,* 2 LAW & PHIL. 37, 39-40 (1983).

be responsible for the injury; it is resolved by a court whose job it is to achieve justice between the parties by making a justifiable judgment that fairly allocates the loss. Thus, the point of corrective justice is to redress unjust gains and losses by means of a financial adjustment.

In modern times, corrective justice has been closely identified with the fault principle. This identification has led many scholars to conclude that tort law fails its corrective justice function if it does not assign liability based on fault.[24] Unlike these scholars, I will use the term "corrective justice" solely to denote the Aristotelian structure. In what follows, I will argue that the fault principle is not an adequate explanation for corrective justice liability. As an alternative, I will develop a theory that analyzes corrective justice in terms of the processes used to adjudicate tort cases. This alternative is "pragmatic" in the sense that it conceives of tort law as a collection of adjudicatory practices rather than as a set of substantive tort rules.

1. *Corrective Justice and Moral Fault*

The fault principle became an important component of American tort law during the late nineteenth century. The classic statement of fault theory is contained in Holmes' *The Common Law.* Holmes began with the premise that "[t]he general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune."[25] He then argued that losses can be shifted from plaintiff to defendant only if (1) the defendant chooses to act, and (2) the chosen act creates a foreseeable danger to the plaintiff. Choice and foreseeability are essential to the fault standard because they lay the basis for moral censure of the defendant and the consequent money judgment in favor of the plaintiff.[26] This limitation on tort liability is not only fair, Holmes argues, but good policy as well: "[T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no [sound] policy in throwing the hazard of

24. *See, e.g.,* Stewart, *Crisis in Tort Law? The Institutional Perspective,* 54 U. CHI. L. REV. 184, 187 (1987); *see also* Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform,* 73 VA. L. REV. 845, 848 (1987); Meese, *supra* note 2, at 345-46; U.S. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 30-33 (1986) [hereinafter REPORT]. These authors argue that the corrective justice basis for tort law disappears as courts extend the rule of strict liability, *see, e.g., id.;* Stewart, *supra,* at 186, reduce plaintiff's burdens of proof, *see* Abraham, *supra,* at 860-63, relax causation requirements, *see, e.g., id.;* REPORT, *supra,* at 33-35, and replace the bar of contributory negligence with the more liberal doctrine of comparative negligence, *see* Pierce, *Institutional Aspects of Tort Reform,* 73 CALIF. L. REV. 917, 917 (1985).

25. O.W. HOLMES, THE COMMON LAW 94 (1923).

26. *Id.* at 91-92.

what is at once desirable and inevitable upon the actor."[27] Thus, he concludes, compensation for accident victims should be handled primarily by private insurance rather than through the tort system.[28]

Holmes' argument forms a kind of "top down" justification for existing tort doctrine. The doctrine is abstracted to an all-encompassing principle of tort liability and then the principle is justified by general considerations of policy. The chief difficulty with this form of justification is its excessive generality. Moral fault may be a good reason for shifting losses in some cases, but it need not always be the dominant factor.[29] Similarly, the value of private activity is often a relevant consideration, but this does not mean that it can operate as a wholesale justification for limiting liability to cases of fault.[30] Nevertheless, when we look at concrete cases rather than abstract propositions, the moral fault standard seems to be strongly supported by common sense. Intuitions that a particular defendant should pay damages normally arise only in cases where the defendant could be said to be at fault and these intuitions seem to form a strong "bottom up" justification for the fault standard.

The general applicability of the fault standard suggests that we should look more carefully at the concept of fault. In the moral sense, "fault" means wrongful conduct or moral failing such that the party had "the power of avoiding the evil complained of" and failed to do so.[31] This definition invokes the two elements — choice and foresight — that Holmes thought essential to tort liability. In the legal sense, "fault" is identified with the concept of negligence. Negligence has been a strong component of the fault theory because it can be applied in a wide variety of circumstances to achieve an ostensibly just result. Thus, an act may be considered negligent when (1) the actor has failed to take cost effective steps to avoid foreseeable injury,[32] (2) the actor has failed to conform to professional standards that govern the activity,[33] or (3) the actor has violated a statute that is meant to protect

27. *Id.* at 95.

28. *Id.* at 96.

29. *See infra* notes 39-42 and accompanying text.

30. Not all activity benefits society as well as the actor. A person who takes a Sunday drive may derive a great deal of pleasure from his outing but it is of dubious benefit to society as a whole.

31. *See, e.g.,* O.W. HOLMES, *supra* note 25, at 95.

32. *See, e.g.,* United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947) (owner must protect against possible unmooring of barge if probability of event happening times cost of injury is greater than cost of prevention).

33. *See, e.g.,* Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968) (standard of care in medical malpractice suit judged by skill of average member of profession, taking into account advances in profession and available medical facilities).

public safety.[34] The negligence standard lends flexibility to the fault theory by using these several overlapping but not identical standards,[35] where each of these standards has something to do with "fault" and each leaves considerable discretion to define the standard anew in applying it to the individual circumstances of succeeding cases.

Despite its initial plausibility, the fault principle is an inadequate justification for tort law. One problem is that the negligence standard is not entirely consistent with the concept of moral fault. As Holmes acknowledged long ago, the negligence standard is "objective" in the sense that a person may violate it without conscious choice or actual foresight:

> The rule that the law does, in general determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence and determines liability by that.[36]

The reason for this, Holmes thought, is utilitarian: "[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare."[37] Thus, even in many negligence cases, the supposed fairness of the moral fault requirement may be outweighed by utilitarian considerations.[38]

A second problem with the fault justification is that the negligence standard has never been universally applied to tort cases. To find actors "at fault," courts employ a series of normative questions: What should the actor have foreseen? What should he have considered by way of precautions? Which of these precautions should he have taken? These questions all focus on the defendant as a moral agent. Some liability problems require, however, that we consider not just the moral status of the defendant but also the defendant's relationship to

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34. *See, e.g.,* Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920) (violation of a safety statute as *negligence per se*).

35. In some cases, standards (1) and (2) both point to the same result; in other cases, selecting the standard is decisive. *See, e.g.,* Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974) (en banc) (court found liability under test (1) despite the fact that the defendant's conduct was not negligent under test (2)); *see also The T.J. Hooper,* 60 F.2d 737, 740 (2d Cir.) (same), *cert. denied,* 287 U.S. 662 (1932).

36. O.W. HOLMES, *supra* note 25, at 108.

37. *Id.*

38. Ames, as well as Holmes, also acknowledged that moral arguments must be balanced against various kinds of policy considerations by citing with approval the doctrines of vicarious liability and strict liability for injury caused by wild animals. Ames, *Law and Morals,* 22 HARV. L. REV. 97, 109 (1908); *see also* Terry, *Negligence,* 29 HARV. L. REV. 40, 40 (1915) ("Negligence is conduct, not a state of mind.").

the plaintiff, the impact of the defendant's lawful activities on the plaintiff's preexisting rights, and the nature of the hazards that those activities impose.[39] Thus, for example, contractual relationships may expand duties beyond ordinary care;[40] a trespass that is lawful may give rise to damages;[41] and useful but dangerous activities may give rise to liability even when the defendant conducts them with all possible care.[42]

The chief difficulty, however, with the fault theory is that it works largely because it equivocates between two meanings of the word "fault." Used in its moral sense — implying choice and foresight — the term is a grossly inadequate description of tort doctrine. Used in its legal sense — denoting negligence — it is more widely applicable but conveys fewer moral connotations, and this lessening of moral force reduces its justificatory significance.[43] A theory that is based on a fundamental equivocation does little to clarify the problem of corrective justice. Instead, it vastly oversimplifies the problem, on the one hand, by allowing us to find "fault" in accordance with widely varying interpretations of the term and, on the other, by overstating the moral basis for shifting losses.

2. *Corrective Justice as "Fairness . . . All Things Considered"*

A rejection of the fault principle does not require abandoning the effort to obtain a corrective justice justification for tort law. It is possible to develop a conception of corrective justice that does not appeal to the concept of fault. The central issue in a tort case is not whether the defendant is at fault but whether the defendant can fairly be held fi-

39. Besides traditional areas of "no fault" liability, many modern tort doctrines place little reliance on the concept of fault. *See supra* note 24.

40. *See, e.g.*, Springfield Crystallized Egg Co. v. Springfield Ice & Refrigeration Co., 259 Mo. 664, 168 S.W. 772 (1914).

41. *See, e.g.*, Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910). Coleman argues that liability in such cases may be explained in terms of an infringement of the plaintiff's preexisting right. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 2), 2 LAW & PHIL. 5, 26-28 (1983). Part One of this article may be found at 1 LAW & PHIL. 371 (1982).

42. Traditionally, strict liability has been imposed in connection with ultrahazardous activities and dangerous animals. Fletcher argues that liability for such activities is based on the nonreciprocal nature of the risks they impose. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Another area of strict liability is the liability of employers for the torts of their employees. The doctrine of vicarious liability imposes such liability even if the defendant can show that he used all possible care in their selection.

43. And, to add to the confusion, common usage allows us to use the term "fault" merely to ascribe responsibility without undertaking any commitments with respect to choice, foresight, or negligence. Thus, for example in Spano v. Perini Corp., 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969), we could say that the loss of Spano's garage was the fault of Perini's blasting without taking a position on whether Perini was negligent. 25 N.Y.2d at 15, 250 N.E.2d at 33, 302 N.Y.S.2d at 529-30.

nancially responsible for the plaintiff's injuries. This is the question posed by the pleadings and this is the question that the court must ultimately answer. Moral fault is one kind of answer to this question — the defendant is responsible because the defendant is at fault — but it is an appropriate answer only in the rare case where the defendant deliberately acts in the face of foreseeable harm.

In the course of this article, I will develop a broader conception of corrective justice. The central element of this conception is fairness rather than fault. It is fair, of course, to force a blameworthy defendant to pay for injuries he has caused. But it is also fair, I argue, to shift losses under other less blameworthy circumstances. This expanded conception of fairness is based on the common sense idea that people should not be blamed for engaging in certain kinds of conduct so long as they assume financial responsibility for harms they cause to others.

Modern critics have suggested, however, that there is an inconsistency between simple fairness and extended notions of financial responsibility. Suppose, for example, that *P* is injured in an accident and that *P* sues a local fraternal lodge seeking compensation for those injuries. *P* relies on the theory that similar accidents could happen to any of the lodge's members and, therefore, that the costs of this accident should be spread to the same group. The problem with *P*'s case from a corrective justice point of view is that the defendant did nothing that would give rise to a normative obligation to make good the injury. Thus, *P*'s cost-spreading rationale is inconsistent with the claims of justice, and a court that awards a recovery to *P* may be said to have *de facto* converted itself from administering corrective justice to implementing a cost-spreading scheme.[44] Those who assume that corrective justice is inconsistent with extended notions of financial responsibility seem to have something like *P*'s case in mind.

The difficulty with this argument is that it is very unlike the way in which cost-spreading rationales are taken into account in tort law. Products liability is a good example. In products liability, cost spreading is one of a number of rationales that supports the idea that a manufacturer should pay for injuries in connection with a defective product. Note that, unlike the fraternal order, the manufacturer does have some responsibility for the accident — not only did the manufac-

44. Stewart, for example, believes that a major cause of the current tort crisis is a shift from a corrective justice system to a cost-spreading scheme. Stewart, *supra* note 24, at 186-87. Fletcher similarly notes with disapproval that "the thrust of the academic literature is to convert the tort system into something other than a mechanism for determining the just distribution of accident losses." Fletcher, *supra* note 42, at 537.

turer's product cause the injury but the product itself was defective or unreasonably dangerous.[45] The plaintiff may not be able to prove that some particular negligent act of the defendant caused his injury, but it does not follow that the defendant cannot fairly be held responsible for the accident. Whether the defendant can be held responsible depends on how one understands the substantive requirements of corrective justice,[46] and in making this determination, it is not obvious that we should overlook the defendant's ability to absorb or spread costs.[47] Thus, cost spreading need not be viewed as displacing corrective justice concerns but can instead be seen as one of several relevant factors that help us determine what fairness requires in a specific context.[48]

I believe that the corrective justice aspect of tort law should be addressed by asking whether, all things considered, it is fair to require this defendant to pay for this plaintiff's injuries. Fairness is not an easy concept to define. Most of the theoretical examinations of this concept have relied extensively upon intuitive judgments about fairness in particular contexts.[49] Thus, it is not surprising that the tort law has failed to embrace one all-encompassing definition. Without a definition, courts confront the fairness issue on a case-by-case basis, relying heavily upon the intuitive judgments of judge and jury. These judgments reflect common sense understandings of community norms regarding financial responsibility.

Community norms are a part of a community's culture; they serve as the basis for collective action and discussion. Specifically, with respect to tort adjudication, they provide a basis for discussions about the nature of community life, the expected terms of interaction between individuals, and the requirements of reason and justice for the

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45. RESTATEMENT (SECOND) OF TORTS § 402A (1964); *see also infra* notes 136-38 and accompanying text.

46. But see Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 970-71 (1988), for an argument that the cost-spreading rationale is inconsistent with the structure of corrective justice because the former requires a system of compensating all injured victims (*i.e.*, a system of distributive justice) and the latter is wedded to decisionmaking in accordance with corrective justice principles. My view is directly opposed.

47. Aristotle's conception of corrective justice may be interpreted as requiring courts to ignore distributional considerations. *See, e.g.*, Weinrib, *supra* note 23, at 39. *But see* Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 190-91 (1981). Ames, on the other hand, clearly thought that distributional considerations could be relevant to a tort law based on morality. *See, e.g.*, Ames, *supra* note 38, at 100 (approving a German rule allowing recovery against insane defendants in cases where they have more than enough resources to meet their own needs); *see also* L. GREEN, JUDGE AND JURY 97-100 (1930) (arguing that judges consider distributional principles when moral factors are not dominating).

48. *See* Sharp, *Aristotle, Justice and Enterprise Liability in the Law of Torts*, 34 U. TORONTO FAC. L. REV. 84, 90-92 (1976).

49. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE (1971). Rawls' analysis makes extensive use of thought experiments to flesh out the concept of fairness.

investigation and adjudication of tort claims. It is a mistake to think that community norms exist apart from their expression in community activity. Community norms are not inscribed on a tablet; their substance cannot be independently identified and used as a test for decisionmaking practices. Instead, they are chiefly exhibited in current practices of tort adjudication and, for this reason, a corrective justice theory that relies upon community norms confronts distinctive problems with respect to justification.

B. *Pragmatic Justification: The Distinction Between Positive and Normative Analysis*

The requirement that tort law reflect community norms has a certain amount of appeal in a democratic system and, in addition, seems to be an accurate reflection of how we think about tort decisionmaking. Judges rarely are honored for their brilliant but idiosyncratic views of normative theory. Instead, they are praised for their deep understanding of the normative presuppositions that underlie community life[50] and their wide knowledge of contemporary social arrangements — what Llewellyn termed their "situation sense."[51] But the appeal to community standards runs counter to one of the major analytical premises of contemporary legal thought. Many modern theorists believe in a fundamental distinction between positive and normative analysis. This distinction bifurcates legal theory into two distinct projects: first, positive legal analysis determines what standards are actually employed in resolving legal controversies; and, second, normative legal theory considers whether these actual standards are in accordance with the standards that ought to be employed in the light of a larger normative metatheory. In this conception of the normative enterprise, existing legal practices are entitled to no weight in deciding what practices are desirable because the desirability of existing practices is the very issue to be judged.

A pragmatic approach rejects this bifurcation between what is and what ought to be. For the pragmatist, existing practices are the beginning of a normative inquiry. The basic insight that motivates the pragmatist is that every abstract conception is to be understood in relation

50. See, for example, Holmes' praise of Chief Justice Shaw for his "accurate appreciation of the requirements of the community whose officer he was:" O.W. HOLMES, *supra* note 25, at 106; *see also* Cardozo's description of the nature of judging in B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 107-08, 112 (1977) ("[A] judge . . . would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief.").

51. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 127 (1960). For a description of "situational appreciation," see also Wiggins, *Deliberation and Practical Reason*, in ESSAYS ON ARISTOTLE'S ETHICS 233-37 (A. Rorty ed. 1980).

to its consequences for human activity.[52] This means that a theory should be interpreted both as a theory about some particular existing practice and as a theory that generates implications for reform of that practice. For example, a pragmatist begins to construct a theory of bridge building by looking first to existing practices. The pragmatist's examination of these practices must be critical; it is aimed not simply at enumerating the types of bridges but at determining which methods produce the "best" bridges. The question — What is the "best" bridge? — cannot be answered in the abstract; it cannot be given the same kind of answer on the first day as it might receive after a thousand years of bridge building. Theory and practice evolve together within a context of human purpose and activity; the practice informs the theory while the theory, in turn, informs the practice. Thus, the hallmark of a pragmatic method is its continual reevaluation of practices in the light of the norms that govern them and of the norms in the light of the practices they generate.

A pragmatist begins an analysis of the tort system with the same kind of respect for existing practices. The adjudication of tort disputes is a normative practice that has evolved slowly over a period of centuries. It has been subjected to a great deal of pragmatic criticism. Reforms have been dictated both by common sense and theoretical study. Consequently, the resulting practices have something important to say about the community ideals of fairness they embody and create. In what follows, I will examine existing practices of tort adjudication in order to develop an account of justified adjudication. Pragmatic inquiries of this kind do not simply examine existing practices in order to better articulate the norms of justification that underlie the practices. Like the development of a theory of bridge building, the comparison of existing normative practices with norms of justification is a two-way street — the practices themselves enable an activity, the activity engenders a critical understanding of the practices, and this criticism in turn generates a process of reforming the practices. Specifically with respect to tort law, the practices that emerged in deciding private disputes in courts of law gave rise to a distinctly legal form of activity. As courts engaged in this activity, it became possible for theorists to develop an understanding of the norms of justification that underlie legal judgments and this in turn enabled a different kind

52. C.S. PEIRCE, *How to Make Our Ideas Clear*, in 5 COLLECTED PAPERS OF CHARLES SAUNDERS PEIRCE, paras. 5.394-.402 (C. Hartshorne & P. Weiss eds. 1963). It is important not to confuse this aspect of the pragmatist's philosophy with the ethical doctrine known as consequentialism. The pragmatist does not necessarily count up consequences to determine the better course of action. Rather the pragmatist claims that the significance of statements or activities is to be interpreted with reference to the concrete context in which they arise.

of normative practice — specifically, a critical practice that aims at evaluating existing adjudicatory practices from an internal point of view.

The pragmatic method, as I have described it, evaluates legal practices in terms of values already embedded either within those practices or in the legal culture. This seems at the outset to exclude the possibility of external criticism. Yet, many theorists would assert, to the contrary, that a fundamental rethinking of legal values is both possible and desirable. Disputing this assertion is beyond the scope of this article. I simply note that the controversy over fundamental criticism is an instance of the broader controversy over philosophical foundationalism. Traditional philosophy purports to assess the rationality of beliefs and values with reference to an abstractly conceived philosophical foundation. Pragmatic philosophers, on the other hand, make their assessments with reference to a contingent web of experience and location that inevitably locates their judgments within a particular point of view. Thus, pragmatic theorists reject foundationalism and, with it, the possibility of a fundamental revision of the values invoked by the tort system. As a substitute for grand theory, they find comfort in Wittgenstein's famous phrase: "I have reached bedrock and this is where my spade is turned."[53]

C. *Summary and Conclusion*

In this Part, I have argued that fault-based justifications for tort law improperly rely upon shifting definitions of the word "fault" and that their justificatory force is diminished.when we attempt to use the term more precisely. As an alternative to the fault based theory, I have suggested that the appropriate way to analyze the corrective justice function of tort law is to pose the question: Is it fair, all things considered, to make this defendant financially responsible for the plaintiff's loss?

I have also suggested that the issue of fairness raises questions that are contextual in the sense that they cannot be answered solely by appeals to abstractly stated rules of law. In Part II, I support this suggestion by considering several attempts to formulate corrective justice principles and arguing that none of these theories provide an adequate corrective justice justification for tort outcomes.[54] Thus, the

53. H. PUTNAM, THE MANY FACES OF REALISM 85 (1987) (quoting L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 217 (1953)).

54. In my view, this failure is inevitable since corrective justice demands a justification for the fairness of individual results and individual results can never be justified solely by general principles. *See infra* Part II.

contextual notion of fairness is partially supported by the failure of rule-based theories detailed in Part II. It is also supported, in Parts III and IV, by the development of a process-oriented, pragmatic theory of corrective justice.

II. Contemporary Theories of Corrective Justice

We can determine whether a corrective justice theory fulfills its justificatory function only if we have a clear sense of what it means for something to be justified in this context. Modern tort law raises many different kinds of demands for justification. Some of these relate to the tort system as a whole: How should it handle situations where several parties share responsibility for the plaintiff's wrongful loss? What should it do about a wrongful loss that is not the result of anyone's wrongful gain? What effect should it give to the availability of various forms of insurance? These questions are important but do not address the one essential function of a corrective justice theory. The fundamental claim on which such theories rest is that the tort system should be viewed in terms of its ability to provide individualized justice. This means that the system as a whole lacks justification if the decisions it reaches cannot themselves be individually justified. From the litigant's point of view, a theory of justification must answer one very specific question: Why is it fair that the outcome of my claim should depend upon a system of rules and practices that may ultimately deny me relief? Ideally a corrective justice theory answers this question by providing an explanation of why specific tort outcomes should be regarded as just.

Traditionally, corrective justice theories have overlooked the need for outcome justification and have concentrated instead on locating corrective justice concerns within the broader framework of political and moral theory. Aristotle, for example, was less concerned with the substantive requirements of corrective justice than he was with defining its role in the practice of virtue. Thus, in Aristotle's account, corrective justice is not an independently describable item for which he must offer a separate theory of justification. Instead, corrective justice is a part of the larger conceptions of justice and law that are, in turn, part of an even larger conception of virtue. A citizen who desires to be virtuous must avoid all unfair advantage; a state, to be just, must cancel unjust advantages whenever they occur. The result is a kind of justification for Athenian law: the adjustment of private disputes in accordance with law is justified because such adjustments are a part of the vision of the good life that Aristotle embraces.

Like Aristotle, contemporary corrective justice theorists do not fo-

cus on the problem of outcome justification. In this section, I will examine the work of Fletcher, Epstein, Coleman, Posner, and Weinrib. These five writers are major participants in the corrective justice debate and represent several different approaches to the problem of justifying tort law by appealing to its corrective justice function. Each of their theories can be divided into a descriptive component and a normative component. The descriptive component specifies the requirements of corrective justice, and the normative component provides justification for adjudicating controversies in accordance with the specified requirements. Each of these theories embraces a "rule-based" conception of legal adjudication.[55] This means that each theory centers on a set of substantive rules that are to be used in determining whether corrective justice claims are valid. Specifying the relevant criteria fulfills the descriptive function of the theory. The criteria are also central to the normative function because they serve as the basis for arguments relating to justification.

Unfortunately, none of these five theorists is very explicit about the kind of justification that their theories are meant to provide. Thus, it is necessary to analyze each of their theories carefully to see how each relates to the question of justification. This analysis is complicated by the fact that the various theories employ two markedly different justificatory strategies. Some theories employ a relational approach that assesses tort rules by relating them to generally acknowledged principles of justice. Fletcher's theory of reciprocal risk is an example of a relational theory.[56] Other theories employ a foundational approach. This approach formulates an ideal set of tort rules by reference to a preexisting foundational theory. The corrective justice theories of Coleman and Posner are examples of the foundational approach.[57] I will treat Weinrib and Epstein as advocating a mixed approach.

A. *Fletcher as a Relational Theorist*

Relational justification begins with a system of rules that reflects

55. A more precise description of my use of this term accompanies the account of practical reason, *infra* text following note 108.

56. Fletcher, *supra* note 42. Fletcher begins his discussion by noting that "tort law [is] a unique repository of intuitions of corrective justice" and proposes an analysis that is based on the existing categories of tort doctrine. *Id.* at 537-38.

57. Coleman believes that corrective justice operates to preserve the values that are embodied in an underlying distributional scheme by freeing just distributions from distortions caused by unjust gains and losses. Thus, the normative theory that underlies both distributive and corrective justice functions, for Coleman, as a foundational theory. For a more complete discussion of Coleman's views, see *infra* text accompanying notes 71-83. Similarly, Posner argues that corrective justice should serve the same utilitarian or wealth-maximizing considerations that underlie distributive justice. Posner, *supra* note 47, at 201-06.

the substantive content of a particular set of adjudicatory practices. The theory then proceeds through a number of steps: (1) it describes the rules by means of an underlying analytical framework; (2) it characterizes the framework in terms of a more general purpose that the system of rules can be seen as promoting; (3) it describes this purpose in general terms; and (4) it articulates a relationship between this purpose and certain other purposes that are generally conceded to be desirable. Relational justification is justification in a weak sense. It furnishes the agent with a reason to behave in a certain way but it does not constitute a decisive argument in favor of the justified conduct.

Fletcher's theory of reciprocal risk is one example of a relational theory. Thus, his account begins with a conventional description of tort law as a collection of liability rules that are used to decide tort cases. Fletcher then identifies a general principle that underlies the rules: "[A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant — in short, for injuries resulting from nonreciprocal risks."[58] This principle interprets tort law in terms of a paradigm of reciprocity[59] and this paradigm, in turn, explains the use of various liability rules in certain contexts. The negligence rule, for example, applies "in the context of activities, like motoring and sporting ventures, in which the participants all normally create and expose themselves to the same order of risk."[60] In such circumstances, the plaintiff "must show that the harm derives from a specific risk negligently engendered" and not from common activities done in the customary way.[61] Similarly, intentional torts arise in cases where the defendant creates a risk that is greater than any risk that the plaintiff imposes. Thus, for example, the tort of battery "represents a rapid acceleration of risk, directed at a specific victim."[62] Finally, Fletcher explains the traditional categories of strict liability in terms of their application to activities that pose risks that are different in kind

58. Fletcher, *supra* note 42, at 542. It should be noted, however, that this principle merely defines the plaintiff's right to recover. The defendant still may avail herself of various excuses that are justified by utilitarian considerations or by compassion for the defendant in times of stress. *Id.* at 551-56.

59. *Id.* at 540-41. Fletcher distinguishes this paradigm from the paradigm of reasonableness. The latter provides a foundation for an economic or regulatory conception of tort law that, he argues, expresses a commitment to community welfare over fairness. The function of both paradigms is to distinguish between background risk and unlawful violations of individual interests. *Id.* at 542-43.

60. *Id.* at 548. There are a number of cases where negligence liability cannot be explained in this way. Fletcher dismisses these as "injuries in the course of consensual, bargaining relationships . . . [that] pose special problems." *Id.* at 548 n.43.

61. *Id.* at 548.

62. *Id.* at 550.

from those that result from common activities.[63]

The normative or justificatory component of Fletcher's account relates his paradigm of reciprocity to general concerns about equality and fairness. Thus, he explains the paradigm of reciprocity in terms of the principle that "all individuals in society have the right to roughly the same degree of security from risk"[64] and argues that this principle is analogous to Rawl's first principle of justice: "[E]ach person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all."[65] Thus, Fletcher views the rules of tort liability as fulfilling the general purpose of imposing financial responsibility for nonreciprocal risk, a purpose that is, in turn, related to the goals of equality and fairness. Since these goals are generally acknowledged to be legitimate, Fletcher's theory offers both a substantive principle of corrective justice — reciprocity — and a relational form of justification for the principle — reciprocity related to fairness and equality.

Fletcher's account illustrates an important limitation on the justificatory force of relational theories. The nature of relational justification requires that existing tort law be described in a very abstract way: tort cases must be abstractly described in terms of the rules that decide them; tort rules in terms of the type of liability they represent; and types of liability in terms of a general principle of recovery. Thus, the principle of reciprocity represents multiple layers of abstraction, and this fact ensures that the principle will be indeterminate with respect to individual cases.[66] Fletcher recognizes this problem and offers the following explanation:

> If one man owns a dog, and his neighbor a cat, the risks presumably offset each other. But if one man drives a car, and the other rides a bicycle? Or if one plays baseball in the street and the other hunts quail in the woods behind his house? No two people do exactly the same things. To classify risks as reciprocal risks, one must perceive their unifying features. . . . Determining the appropriate level of abstraction is patently a matter of judgment; yet the judgments require use of metaphors and images — a way of thinking that hardly commends itself as precise and scientific.[67]

63. *Id.* at 544-48.

64. *Id.* at 550.

65. *Id.* at 550 n.50 (quoting Rawls, *Justice as Fairness,* 67 PHIL. REV. 164, 165 (1958)).

66. Englard, for example, writes: "[W]hat actually constitutes a nonreciprocal risk? . . . This approach necessarily transforms the idea of reciprocity and fairness into a mere formal criterion devoid of any substance." Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory,* 9 J. LEGAL STUD. 27, 66 (1980); *see also* Coleman, *Justice and Reciprocity in Tort Theory,* 14 W. ONT. L. REV. 105 (1975); Sugarman, *supra* note 3, at 606.

67. Fletcher, *supra* note 42, at 572.

Fletcher goes on to urge that demands for precision in legal reasoning are misguided,[68] but he overlooks the consequences of this imprecision for the justificatory aspect of his theory. Justifying a principle of liability only serves to justify the outcome if the outcome is uniquely determined by the principle.[69] Thus, even though Fletcher's analysis is insightful and useful in other respects,[70] it does not resolve the problem of justifying tort outcomes.

B. *Coleman and Posner as Foundational Theorists*

Given the difficulties that relational theories confront in justifying tort outcomes, foundational justification might represent a more promising approach. Foundational justification begins with a foundational normative theory rather than with existing tort rules. This theory serves as a foundation for further analysis: (1) it serves as a basis for analyzing legal cases to determine the types of problems that a set of legal rules must address; (2) it helps to define alternative proposals for handling these problems; and (3) it is the measure by which these proposals are evaluated. With the help of a foundational theory, the corrective justice theorist formulates rules that are specific enough (at least when they are interpreted in the context of the foundational theory) to be determinate in individual cases. Foundational justification is justification in the strong sense; that is, the agent's belief in the foundational theory provides a decisive reason for him to follow the rules that the theory endorses. Coleman's analysis of corrective justice explores the use of a particular foundational theory to justify tort law. His conclusions are largely skeptical.

The chief purpose of Coleman's analysis is to identify those areas of tort law that are supported by corrective justice principles. To do this, he invokes a description of corrective justice that appeals to an underlying distributional scheme: "[C]orrective . . . justice is concerned with wrongful gains and losses. Rectification is, on this view, a matter of justice when it is necessary to protect a distribution of holdings (or entitlements) from distortions which arise from unjust enrich-

68. Fletcher suggests that "associating rationality with multistaged argumentation may be but a spectacular lawyerly fallacy" and argues that, in order to do justice, "courts and lawyers may well have to perceive the link between achieving their substantive goals and explicating their value choices in a simpler, sometimes metaphoric style of reasoning." *Id.* at 573.

69. Given that tort outcomes generally involve awarding damages in a specified amount, this states the requirement a little too strongly. It might be more accurate to say that the principle must specify either an outcome or a range of outcomes.

70. Coleman recognizes Fletcher's contribution: "[T]he difference between recoverable and nonrecoverable losses might best be understood in terms of the difference between background and nonbackground risks." Coleman, *supra* note 41, pt. 1, at 390. More than this, however, Fletcher's analysis of this distinction in terms of reciprocity represents a significant insight.

ments or wrongful losses."[71] The difficulty is to define what gains and losses are wrongful,[72] and it is in this connection that the decisionmaker must have recourse to a foundational theory that specifies a background pattern of entitlements and justifies their use in adjudicating private disputes.[73] In some cases, the plaintiff's corrective justice claim will be based directly on the wrongful nature of the loss that the defendant has caused the plaintiff.[74] In other cases, the claim is based specifically on a property right that secures the plaintiff's property against invasion by others. As an example, Coleman offers the hypothetical of a starving backpacker who is lost in a storm, breaks into a cabin, and helps himself to food, shelter and firewood.[75] Although the backpacker's conduct is justified by the doctrine of private necessity, the owner of the cabin can recover compensation under corrective justice principles.[76] The owner's right to the property under the foundational theory includes a right to compensation for justified as well as wrongful takings.

Coleman's theory of corrective justice is meant to provide a foundation for some, but not all, of the claims that are recognized by the tort system. A corrective justice claim is justified if the plaintiff's loss and the defendant's gain run contrary to the foundational theory of entitlements. This narrow conception of corrective justice, not surprisingly, justifies recoveries in only a small class of tort cases. It does not, for example, justify awarding recoveries in most cases that are

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71. Coleman, *supra* note 41, pt. 2, at 6.

72. "The central concern of the theory is to spell out in a nonquestion-begging way a criterion for determining which gains and losses are wrongful." *Id.* at 13.

73. Coleman generally requires that foundational theories of rights provide a normative basis for answering justificatory questions. *See* Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1340 (1986). In discussing corrective justice, however, Coleman argues that the background theory of distributive justice can operate to justify corrective justice claims whether or not the distributions that it mandates are themselves just. Coleman, *supra* note 41, at 6-7.

74. A loss is presumably wrongful if it violates the plaintiff's rights under the foundational theory. It is not clear, however, whether Coleman would accept this formulation. On the one hand, he adopts only the weakest version of the "infringement thesis" by arguing that rights infringement is a sufficient but not necessary criterion of corrective justice liability. *See id.* at 19-25. On the other hand, the arguments he makes in this connection suggest that he is talking about property rights that entail noninterference in all circumstances. *Id.* at 23. In a subsequent article, however, he defends a more flexible notion of rights that includes rights that are enforceable only in specified contexts. Coleman & Kraus, *supra* note 73, at 1352-56. In any case, one can formulate a definition of wrongful losses that avoids an appeal to rights by simply providing that wrongful losses are those that occur in violation of interests that are protected by the foundational theory.

75. Coleman, *supra* note 41, pt. 2, at 7 (citing Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 103 (1978)).

76. *Id.* at 8-9. This result agrees with the holding in Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910) (owner of damaged dock recovered from shipowner even though shipowner had acted prudently under the circumstances).

based on negligence or strict liability.[77] Negligence recoveries are not justified by Coleman's theory because the theory provides no justification for a recovery against a faulty defendant who has not registered a gain as a result of wrongful conduct.[78]

Coleman's theory is also limited in the kind of justification that it provides for the tort system as a whole. Coleman recognizes that the tort system involves a very specific form of legal redress and that the form of redress is as much in need of justification as the claim itself:

> The principle of corrective justice goes part of the way to justifying the claims to repair and liability recognized as valid in torts under the fault principle. The question is whether the principle of corrective justice requires and therefore justifies this additional, central feature of the tort system: namely the mode of rectification according to which claims to repair are satisfied by conferring a right to repair on the plaintiff and imposing the corresponding duty of compensation on the defendant.[79]

Thus, while Coleman's theory provides a foundation for some tort claims, it says nothing about the mode of rectification for those claims (the manner of eliminating unjust gains and losses), the character of rectification (form of compensation), or the extent of rectification ("how much of a person's gain or loss ought to be eliminated").[80] Coleman concludes with a realistic appraisal of this form of corrective justice theory: "While legal theorists have been attempting a global characterization of tort law as rooted in some overarching principle . . . the fact is that no single principle is capable of explaining the full extent of tort law."[81]

Although Coleman's approach provides a foundation for only small segments of tort law, it is nevertheless instructive to examine carefully the kind of foundation that it provides. His narrow conception of corrective justice provides redress (*i.e.*, a form of restitution) in cases where the defendant has wrongfully (*i.e.*, by violence, by fraud,

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77. Indeed, the only cases of strict liability that the principle justifies are those, like *Vincent*, where the plaintiff's loss is matched by a gain to the defendant.

78. Coleman, *supra* note 41, at 11. Typically, negligence cases involve some gain to the defendant because negligent defendants have often avoided the cost of precautions. Coleman argues, however, that this wrongful gain is not the result of the plaintiff's wrongful loss:

> Negligent motoring may or may not result in an accident. Whether it does or not, individuals who drive negligently often secure a wrongful gain in doing so . . . . This . . . wrongful gain is not, *ex hypothesi*, the result of anyone else's wrongful loss. On the other hand, if a negligent motorist causes another harm, he normally secures no *additional* gain in virtue of his doing so. In this respect faulty motoring differs from the usual case of fraud or theft.

Id. at 10. Thus, routine negligence cases lack an element that is essential to corrective justice recoveries under Coleman's theory.

79. *Id.* at 11.

80. *Id.* at 12-14.

81. *Id.* at 36.

or by violating existing rights) appropriated the property of another.[82] To return to the backpacker example, recoveries in such cases are justified as follows: the cabin owner can recover against the backpacker because (1) *ex hypothesi,* the backpacker has appropriated property that the foundational theory assigns to the cabin owner, and (2) the operative definition of corrective justice incorporates the foundational theory.[83] A tort outcome is justified under this skeletal account if and only if it follows from the noncontroversial application of a rule that is itself contained in the foundational theory. Coleman's justificatory strategy works by grounding certain corrective justice claims in notions of private property that are strongly embedded in the legal system; it therefore defers substantive consideration of the justification for these claims to the more general realm of political theory. Thus, Coleman's theory analyzes the logic and semantics of corrective justice claims rather than tackling the substantive issue of justification.

Posner's analysis of corrective justice[84] is similar to Coleman's. Like Coleman, Posner understands corrective justice as a method for vindicating claims that are meritorious with respect to an underlying distributional scheme. Posner, however, invokes a wealth maximization principle to justify both the distributional theory and the Aristotelian notion of corrective justice. Corrective justice, he argues, requires the rectification of wrongful gains and losses; economic analysis defines "wrongful gains and losses" in terms of their inefficiency.

> [L]aw is a means of bringing about an efficient (in the sense of wealth-maximizing) allocation of resources by correcting externalities and other distortions in the market's allocation of resources. The idea of rectification in the Aristotelian sense is implicit in this theory. If A fails to take precautions that would cost less than their expected benefits in accident avoidance, thus causing an accident in which B is injured, and nothing is done to rectify this wrong, the concept of justice as efficiency will be violated.[85]

The resulting theory of corrective justice is broader than Coleman's; it covers not only wrongful appropriations but also those cases where the corrective justice claim is based on negligence. The price of this increased coverage, however, is a foundational theory that is, itself, highly controversial and difficult to apply.[86]

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82. Sugarman agrees with this characterization of Coleman's theory. Sugarman, *supra* note 3, at 608-09.

83. *See supra* note 71 and accompanying text.

84. Posner, *supra* note 47.

85. *Id.* at 201 (footnote omitted).

86. There are many reasons to be skeptical of the claim that law should be judged by a foundational principle of wealth maximization. *See, e.g.,* Baker, *The Ideology of the Economic Analysis of Law,* 5 PHIL. & PUB. AFF. 3 (1975) (Posner's wealth-maximizing principle cannot

It is important to note that Posner's analysis of corrective justice substitutes a large normative issue — Should the law strive solely to maximize wealth? — for a smaller, local issue — Does justice require that this plaintiff recover from this defendant? It is also important to note that this substitution does not, by itself, place the answer to the local issue within the reach of economic calculation. When, how, and in what context should this calculation be made? Consider the following hypothetical. *A,* who is industrious and inventive, steals a tool from *B,* who is lazy and stupid. Should *B* be able to bring an action for damages? A wealth-maximizing theorist might proceed in one of two ways. On the one hand, he might confine his analysis to the local situation and conclude that *A* will make better use of the tool. On the other, he might consider more broadly the wealth-maximizing characteristics of a proposed rule for resolving the case.[87] If the latter, how should the proposed rule be formulated? Should he consider whether the institution of private property is wealth maximizing? Or, should he consider whether there should be special rules for tools because of their significance to wealth creation? Or, should he treat *A*'s use of the tool as an involuntary loan or as a constructive investment by *B* in *A*'s enterprise? The possible formulations are limitless and a foundational principle of maximizing wealth will not tell us which of these formulations should be chosen. Thus, even if we assume that economic calculation provides a unique and correct answer to a specific normative question, it does not help us to select the appropriate question from a number of equally plausible alternatives.

When tort law is conceived of as a regulatory enterprise, economic analysis is an essential part of formulating liability rules. This is because we want tort rules to regulate conduct in an efficient manner. From a corrective justice standpoint, however, we want liability rules that determine fair outcomes for individual litigants. Posner's suggestion — that a liability rule is fair if it generally maximizes wealth — is not implausible because even a losing litigant might agree that it is fair to invoke a principle that promotes social utility. The difficulty with

resolve crucial questions of distribution, welfare and human liberty); Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law,* 94 ETHICS 649 (1984) (wealth maximization not equivalent to utility maximization and may not be feasible for courts to apply); Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law,* 68 CALIF. L. REV. 221 (1980) (Posner's property assignment rule will not always produce preferable public policy because public policy depends on noneconomic questions of justice and rights); Michelman, *Norms and Normativity in the Economic Theory of Law,* 62 MINN. L. REV. 1015 (1978) (economic efficiency alone cannot encompass the complicated network of norms and values sought to be infused into law).

87. *But see* Rawls, *Two Concepts of Rules,* 64 PHIL. REV. 3 (1955) (attacking the distinction between act and rule utilitarianism).

Posner's analysis is not that utilitarian considerations are foreign to individualized justice,[88] but that, once we decree that utilitarian considerations are paramount, all of the existing rules and practices of tort adjudication must be reevaluated in the light of these considerations. Since these rules and practices frame the issues in tort cases, the economist has no framework within which to make calculations. Seeing corrective justice in terms of an overriding normative metatheory is a deeply radical proposal that invites two distinct levels of controversy. At the abstract level, there will be disagreements about fundamental values; at a more practical level, there will be real disputes about how a chosen set of values should be implemented in the context of reaching a just result in individual cases.

C. *"Mixed" Theories: Epstein and Weinrib*

A corrective justice theory may contain both relational and foundational elements. I read both Epstein and Weinrib as proposing "mixed" theories. Both theories are descriptive in the sense that they attempt to explain certain elements of modern tort law. They are both prescriptive in the sense that they propose changes in the current pattern of liability rules. Epstein proposes that tort law should discard the negligence principle in favor of his specific conception of strict liability. Weinrib, on the other hand, argues that strict liability has no basis in corrective justice and that, therefore, all cases should be judged by a negligence standard.

Epstein begins his argument by refuting the traditional justification for the negligence standard.[89] He then argues that existing rules of tort liability can be understood in terms of four specific paradigms of causation: force, fright, compulsion, and risk creation.[90] His account is descriptive in the sense that these four paradigms loosely describe the existing categories of tort liability. Epstein concludes from this analysis that defendants should be liable for injuries they "cause" because these paradigms reflect common sense notions of responsibility.[91] Thus, Epstein, like Fletcher, identifies existing patterns of tort liability with more abstract categories and then relates these categories to a generally recognized reason for shifting losses. Unlike Fletcher, Epstein argues in favor of a major doctrinal change, subsuming ex-

88. *But see* Weinrib, *supra* note 23, at 44-45.

89. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152-60 (1973).

90. *Id.* at 166-84.

91. As many commentators have noted, Epstein can be interpreted as offering at least two distinct accounts of corrective justice. The first relies upon notions of causation and responsibility; the second relies upon a particular theory of entitlements and property rights. My discussion of Epstein focuses on the first of these accounts.

isting patterns into a new system of liability rules. Epstein's approach to justification may be understood in two ways. On the one hand, he may be redescribing existing patterns of tort liability in terms of an underlying concept of causation. On the other, he may be formulating a foundational normative category of responsibility to be used in evaluating tort claims. If the former, then his position is vulnerable to the argument that existing case law defines a concept of causation that has no clear normative force. Thus, Epstein makes no justificatory gain by relating the cases to this concept.[92] If the latter, then Epstein is formulating a normative conception of "responsibility" that is both necessary and sufficient for corrective justice liability. However, when this normative conception is severed from existing case law, Epstein's paradigms are so skeletal that they could only be decisive in the simplest and most "paradigmatic" cases. Thus, Epstein's proposed principle, like Fletcher's, does not provide outcome justification because it fails to determine a uniquely correct outcome.

Weinrib's account of corrective justice[93] employs a similar method but reaches a diametrically opposite conclusion. He begins his account by noting that corrective justice is a form, and not a principle, of just adjudication.[94] He therefore believes that it is necessary to supplement Aristotle's account with a set of Kantian principles:

> Corrective justice in itself is devoid of a specific content, which, accordingly, must be sought elsewhere. . . . [I will argue] that the content which is to be infused into a corrective justice conception of tort law must be of Kantian inspiration. . . . [I]t must refer to some notion of equal membership in the kingdom of ends and the consequent impermissibility of arbitrary self-preference. It must also eschew reference to the aggregation of individual utilities which is the hallmark of utilitarian justification.[95]

Weinrib argues that negligence claims can be justified by these Kantian considerations. Thus, for example, negligent actions are wrong because they involve self-preference in action.[96] Utilization of a

92. Coleman notes that Epstein overlooks a fundamental ambiguity in the term "responsible." "Responsible" may narrowly denote authorship or it may assert the normative judgment that liability is appropriate. Coleman argues that the narrow sense lacks normative force — it denotes neither a necessary nor a sufficient condition of liability. Coleman, *supra* note 41, pt. 1, at 380-81.

93. *See* Weinrib, *supra* note 23.

94. Corrective justice provides a "justificatory structure" in the sense that it specifies "the types of *reasons* for an arrangement rather than an arrangement itself." *Id.* at 39.

95. *Id.* at 40.

96. *Id.* at 52-53. The argument runs as follows. By definition, negligent acts impose risks whose costs are greater than the cost of avoidance. A rational actor would not undertake such actions if she herself would have to bear the risk of loss. Thus, the rational actor cannot inflict these risks on others without violating the Kantian requirement that "[t]he rationality of his own purposive actions must mesh with the equality of persons generally." *Id.* at 50.

subjective standard in negligence cases would also be wrong because it would involve self-preference in conception.[97] Weinrib also argues that strict liability cannot be justified as a matter of corrective justice and that, therefore, it should be abolished in favor of the negligence standard.[98]

Weinrib falls short of providing a Kantian foundation for corrective justice adjudication. If we sever his "Kantian" principles from existing case law, it is difficult to know how they could be applied in individual cases. Thus Weinrib, when viewed as a foundationalist, encounters the problem of indeterminacy. If, on the other hand, his theory is understood as a relational justification for the negligence principle, then it does not provide the kind of outcome justification that corrective justice requires. In effect, Weinrib has related certain areas of existing negligence doctrine to a generally recognized normative value and, in so doing, he has provided some justification for regarding those areas as well settled. But justifying some aspects of negligence doctrine does not provide a justification for the outcome of any tort case that is decided consistently with the negligence standard. For this reason, his arguments fall far short of a corrective justice justification for the negligence standard.

D. *Summary and Conclusion*

I have argued that a corrective justice theory should provide justification for specific resolutions of corrective justice claims. In effect, it should answer the question: "Why is this outcome just?" None of the corrective justice theories discussed above provides an acceptable answer. Relational theories purport to justify legal outcomes by relating specific tort rules to values such as utility, generalizability, and equality that seem to have real justificatory power. The problem with these theories is that the values they invoke could be related in an equally plausible way to different patterns of rules that would entail different decisions in particular cases. Thus, relational theories do not provide the kind of outcome justification that corrective justice requires.

Foundational theories also fail to meet this requirement. On the one hand, they appear to be decisive because they invoke a powerful normative vision that encompasses rules specific enough to decide in-

97. *Id.* at 50-52. A subjective standard sets the boundary between the defendant's freedom and the plaintiff's right to security exclusively in terms of the defendant's subjective powers of evaluation. Thus, "the ambit of the plaintiff's right is confined to . . . the space remaining after the defendant's occupation." This does not set "fair terms of interpersonal impingement" because fairness "requires attention both to the actor and to the person affected." *Id.* at 51.

98. *Id.* at 57-62.

dividual cases. On the other hand, they can only achieve specificity by interpreting their vision in nonobvious ways. Thus, such theories fail to justify because they ultimately rely upon a normative structure that, as a whole, is far less powerful than its inspiring vision.

Relational and foundational theories are both rule-based because they seek justification by engaging in a two-step analysis: first, does the outcome result from a correct application of a correct legal rule?; and, second, is the legal rule justified by a larger normative theory? The difficulty with this approach is that it requires legal theory to aim at increasingly abstract statements of law and correspondingly abstract accounts of justification. Abstraction permits us to generalize rational considerations in such a way that we can articulate and debate large normative questions. Thus, abstractions help us to understand the values that lie within ourselves and our culture. But they perform this function in a way that renders them ineffective in justifying the outcomes of local normative disputes. Abstractions appear to support outcomes by focusing on a particular way of characterizing the case. Thus, the use of an abstract argument requires choices about what features of the case should be treated as central and about what level of generalization should be used in making the analysis. These choices raise significant normative questions that are not answered by the analysis. For this reason, appeals to abstract principles will never fully justify a particular outcome in a corrective justice dispute.

III. A Pragmatic Conception of Corrective Justice

An alternative to rule-based justification is a more pragmatic approach that focuses on the practices that are used in adjudicating tort claims. Under this approach, an outcome is justified if it is the result of decisionmaking practices that can themselves be justified as a way of resolving tort disputes. Properly understood, this approach is not committed to the position that legal rules are "shams" or that they are not important. A pragmatist need not deny that a case can be characterized by the rule that "decides" it[99] or that such reconstructions are useful in understanding the legal enterprise.[100] Many legal practices

99. We can reconstruct any decision in terms of selected facts and a rule that prescribes a conclusion for those facts. Section III.B.1 develops two models of practical reasoning; one rule-based, the other pragmatic. The pragmatic model describes the decisionmaker as choosing a major premise that best characterizes the case for purposes of decision. Thus, once she has made a decision, her reasoning can be "reconstructed" in terms of the major premise that she has chosen.

100. Reconstructions of cases in terms of decisional rules are useful "rules of thumb." They organize precedent and sometimes provide a convenient shortcut for resolving complex normative issues in recurring situations.

involve the invocation of legal rules. A pragmatist must explain this fact and also the fact that such invocations are not empty chants — where relevant, legal rules are binding on the decisionmaker.[101] Pragmatism entails realism about legal practices, and thus the role of rules in legal decisionmaking cannot be ignored. On the other hand, pragmatism rejects rule-based theories in one important context — the justification of legal outcomes. In this context, the pragmatist centers the analysis on justifying legal practices rather than on justifying the substance of legal rules.

In the remainder of this article, I will develop a pragmatic conception of corrective justice. The conception is pragmatic in three ways. First, it identifies corrective justice with a set of existing practices that govern adjudication rather than with a set of substantive principles that establish criteria for imposing liability. Second, while it acknowledges the importance of rules in normative decisionmaking, it denies that justifying a decision is primarily a matter of arguing for the substantive correctness of the rule that the decision invokes. And third, it rejects the possibility of an *a priori* or foundational theory that would endorse specific corrective justice outcomes, and relies instead upon contemporary community standards to guide normative decisionmaking. In this sense, Aristotle's approach can be understood as pragmatic. Aristotle develops the notion of corrective justice by looking to Athenian practices for adjudicating corrective justice claims. He notes that such claims are normally resolved by judges: "That is why, when disputes occur, people have recourse to a judge; and to do this is to have recourse to justice, because the object of the judge is to be a sort of personified Justice."[102] The judge personifies justice to the extent that she herself is just. This means that she must judge fairly the interests of others[103] and that she must resolve the controversy within a framework of rational principle: "[W]e do not allow a man to rule, but the principle of law; because a man does so for his own advantage, and becomes a despot, whereas the ruler is the upholder of justice, and if of justice, of equality."[104] Thus, according to Aristotle, a corrective justice claim is properly adjudicated when it is decided by a judge who

101. Schauer objects to the "rule of thumb" conception of legal rules because it seems to suggest that legal rules are not mandatory. Schauer, *Formalism,* 97 YALE L.J. 509, 534-35 (1988). To the contrary, understanding legal rules as "rules of thumb" helps us to understand the exact sense in which they are relevant to legal judgments. My analysis, *infra* note 200 and accompanying text, suggests that the conventions of tort decisionmaking forbid a decisionmaker from selecting a major premise that is at variance with a legal rule.

102. ARISTOTLE, *supra* note 5, at 1132a.

103. Justice is a complete virtue and one that must be exercised with regard to others. *Id.* at 1129b.

104. *Id.* at 1134a.

upholds justice by engaging in a process of deliberation that is structured by law and tempered by equity.[105] In this way, his account of corrective justice focuses not on rules but on an ideal decisionmaker who is principled, fair, and sensitive to the equities of an individual case. Since this decisionmaker is engaged in a process of deliberation, it is reasonable to think that Aristotle's views on corrective justice should be read in connection with his account of practical deliberation.

A. *The Difference Between Rule-Based and Pragmatic Accounts of Corrective Justice*

The cornerstone of Aristotle's account of practical deliberation is the practical syllogism. Practical syllogisms have three parts: first, a major premise or rule; second, a minor premise or case; and, third, a conclusion that applies the rule to the case and thereby indicates an appropriate action to take with respect to the case.[106] This syllogistic framework yields two possible models of practical deliberation, each of which provides a different analytical structure for thinking about tort law.

1. *Two Models of Practical Deliberation*

In this section, I will outline two different models of practical deliberation and use them to distinguish between rule-based and pragmatic accounts of tort adjudication.

a. The impersonal decisionmaker. Under the first model, practical deliberation is simply a matter of recognizing the case, selecting the appropriate major premise, and mechanically performing the syllogistic act of judgment. This way of characterizing the process presupposes that reasoners start with a closed set of consistent major premises such that: (1) each major premise links a set of general criteria to a specific normative conclusion; (2) the criteria utilized by each major premise can be applied to particular fact situations in a noncontroversial way; and (3) there is one and only one major premise that

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105. Aristotle describes the function of equity as follows:

> Equality is just, but not what is legally just . . . all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms . . . . So when the law states a general right, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering the case to correct the omission by a ruling such as the legislator himself would have given if he had been present there.

Id. at 1137b.

106. Aristotle gives the following example: "[N]o man should walk, one is a man: straightway one remains at rest." ARISTOTLE, *De Motu Animalium,* at 701a, in 5 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 701a (J.A. Smith & W.D. Ross trans. 1912).

applies to each potential fact situation.[107] If these conditions are met, the resulting judgment is impersonal in the sense that rational decisionmakers who utilize the same set of major premises will decide like cases alike even if their personal ethical attitudes are markedly divergent.[108]

b. The intuitive decisionmaker. A different, more complicated way of understanding practical deliberation is suggested by David Wiggins.[109] For Wiggins, articulating the minor premise of a syllogism is no small job of categorization:

> A man usually asks himself "What shall I do?" not with a view to maximizing anything but only in response to a particular context. This will make particular and contingent demands on his moral or practical perception, but the relevant features of the situation may not all jump to the eye. To see what they are, to prompt the imagination to play upon the question and let it activate in reflection and thought-experiment whatever concerns and passions it should activate, may require a high order of situational appreciation . . . .[110]

This complex process of recognition "records what strikes such a man as the in the situation most salient feature of the context in which he has to act" and gives rise to a minor premise that describes the situation as an instance of a more general type. This, in turn, "activates a corresponding major premise that spells out the general import of the concern that makes this feature the salient feature in the situation." The resulting syllogism is not mechanical; it must be judged "dialectical[ly]" as "all of a piece with the perceptions and reasonings that gave rise to the syllogism in the first place."[111]

In the context of the intuitive model, major premises are not universal rules that link factual antecedents to normative conclusions; they are simply generalizations of normative attitudes toward a particular context. For example, a decisionmaker might say: "The important thing here is that the defendant was going too fast." Further, the decisionmaker is willing to generalize: "The defendant's excessive speed is a good reason for imposing liability." This generalization is

107. The impersonal account of legal decisionmaking can relax the second and third requirements by qualification. Thus, (2) would say "the criteria . . . *usually* can be applied . . . in a noncontroversial way and (3) would read "there is *usually* one and only one major premise . . . ." This leaves open the question of "hard" cases and makes room for theories like Hart's that distinguish between core and penumbral applications of legal concepts. *See* H.L.A. HART, THE CONCEPT OF LAW 121-50 (1961).

108. This is, in effect, an analytical truth that follows from the conception of rationality that is presupposed by the impersonal account.

109. Wiggins, *Deliberation and Practical Reason*, in ESSAYS ON ARISTOTLE'S ETHICS 221 (A. Rorty ed. 1980).

110. *Id.* at 232-33.

111. *Id.* at 234.

not universal[112] but it does have the effect of shifting the discussion from distinctly personal attitudes of praise or blame to the realm of reasons that can be described and evaluated.

This model seems to capture how we really think about practical problems.[113] It sees practical deliberation as a complex process of intuitive judgment and generalization. The decisionmaker appraises the situation by perceiving its morally salient features. These perceptions give rise to a rule as the reasoner attempts to generalize the salient features into an appropriate major premise. The need for generalization structures the resulting deliberation and focuses it on potential normative conclusions. Neither the initial appraisal nor the ongoing attempt at generalization are mechanical processes. They require intuitive normative judgments that cannot be made in a vacuum. These judgments are viewpoint dependent in the sense that they reflect the decisionmaker's own personal background of experience, opinion, and temperament. The pervasiveness of this background has been frequently recognized as an inherent part of normative decisionmaking. For example, Cardozo writes:

> There is in each of us a stream of tendency . . . which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[114]

Since this model of practical deliberation requires viewpoint-dependent judgments, it envisions that good faith, rational decisionmakers

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112. It is not universal in the sense that the decisionmaker does not endorse the proposition that all instances of excessive speed should result in liability.

113. Compare Wiggins' account with Dewey's explanation of how people think about ordinary practical problems:

> [We] begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. . . . The problem is to *find* statements, of general principle and of particular fact, which are worthy to serve as premises. . . . [We] generally begin with some vague anticipation of a conclusion . . . and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions.

Dewey, *Logical Method and Law,* 10 CORNELL L.Q. 17, 23 (1924).

114. Cardozo, *supra* note 50, at 12-13. For a contemporary feminist discussion of this issue, see Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges,* 61 S. CAL. L. REV. 1877 (1988), and Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging,* 61 S. CAL. L. REV. 1945 (1988); *see also* Minow, *Foreword: Justice Engendered,* 101 HARV. L. REV. 10 (1987).

may reach different conclusions with respect to the same set of factual circumstances.[115]

2. *Tort Cases and the Problem of Viewpoint*

A tort case presents real conflict and it is the role of the decisionmaker to resolve it by determining what happened and what should be done about it. This task is rendered more difficult by the fact that all the participants — the parties, the witnesses, and even the decisionmakers themselves — approach the case from their own distinctive viewpoint.

One obvious factor that determines viewpoint is the parties' own self-interest in the matter under dispute. The parties are biased in the sense that their perceptions about what happened are colored by the fact that they have a stake in the outcome. Perception and memory are malleable faculties that are easily influenced by an individual's own sense of behaving correctly. A party may not be telling a conscious lie when reporting that the other car was approaching too fast, even if other witnesses to the accident agree that the car was traveling at a safe speed. When there are no nonparty witnesses and no extrinsic evidence, determining what happened involves a far more complicated assessment of each party's character than simply weighing the veracity of each.

Beyond self-interest, judgments of what happened are colored through an entire network of beliefs, attitudes, and past experience. These may have nothing to do with the person's stake in the outcome of the case. Even the testimony of a seemingly disinterested third party may say more about that person's prior experience than it does about the circumstances of this particular case. For example, a witness may think that the defendant was belligerent merely because the defendant resembles someone that the witness considers a bully. Or, as another example, the witness to an auto accident may habitually drive too fast and therefore perceive that the accident was caused not by the defendant's excessive speed but by the plaintiff's failure to get out of the way. Indeed, the observer may have had an accident very much like this one, and the observer's perception of this accident may be filtered through the lens of that prior experience. In tort cases, the question — What happened? — can easily have as many answers as there are observers and, in the usual absence of decisive amounts of

115. This is an analytic statement based on the concept of rationality presupposed by the intuitive account. *See supra* note 109 and accompanying text.

extrinsic evidence, no one of these answers can be logically singled out as "the truth."

3. *Two Models of Tort Adjudication*

The two models of practical reason provide different analytical structures for thinking about tort law.

a. Tort law as rule-based adjudication. The impersonal decisionmaker conceptualizes corrective justice as a set of rules and principles (*i.e.*, potential major premises) that dictate outcomes for individual disputes. It is "rule-based" in the sense that it regards outcomes as being determined by the rule or principle that has been used to adjudicate the controversy. An individual case is correctly decided, in this view, if it is the result of employing an approved rule or principle. This analysis transfers normative debate from the merits of the individual case to the correctness of a general rule that is proposed for resolving cases of this kind.

Rule-based accounts of tort law divide decisional responsibilities between judge and jury. Normative issues are assigned to the judge; factual questions are left to the jury. Since the discrepancies in observer accounts belong to the "fact" side of the law/fact dichotomy, they are viewed as regrettable but not crucial. The jury does the best it can to resolve questions of credibility and that is the end of the story. Thus, rule-based accounts have a kind of double standard for justified decisionmaking: with respect to the facts, justification requires only jury adjudication; with respect to the law, justification requires the impersonal application of correct legal principles.

b. A pragmatic model of tort law. A pragmatic conception analyzes tort law as a collection of practices for adjudicating tort claims. Some of these practices require the invocation of rules;[116] others specify the procedures that must be followed in order to reach a legitimate decision. The pragmatic account is based upon the intuitive model of practical deliberation. Since this model acknowledges that normative decisionmaking is viewpoint dependent, it focuses on the latter by paying particular attention to the adjudicatory practices that define the personality of the decisionmaker and establish the context in which decisionmaking occurs. Thus, the problem of justification is a problem of rationalizing the use of these practices to decide corrective justice disputes.

On this model of intuitive decisionmaking, we can base a prag-

116. For example, the intuitive account version of practical deliberation includes a process of generalization that matches the circumstances of a particular case with a general major premise. *See supra* note 112 and accompanying text.

matic account of tort adjudication. The account begins with an examination of the procedures actually used to evaluate tort cases. This examination will yield the following observations: (1) tort adjudication is a complex process in which the jury exercises considerable discretion over normative matters; (2) jury decisionmaking does not conform to "the impersonal decisionmaker" description of practical reasoning; and (3) jury decisionmaking, like intuitive deliberation, is viewpoint dependent.

B. *Tort Law and Jury Adjudication*

Tort cases begin with events like these:

> In August, 1809, Butterfield left his local tavern, mounted his horse, and began to ride through the streets of Derby. It was eight o'clock in the evening, and the lamplighters were just beginning their rounds. Though there was no sign that he was intoxicated, he was riding very fast — some said violently. As Butterfield passed through town, he encountered a pole which had been placed across the street by a man named Forrester who was renovating his house. Butterfield failed to see the pole in time to stop, and as a result, he struck the pole and was thrown from his horse.[117]

> On November 21, 1968, Ms. Li was driving northbound on Alvarado Street in Los Angeles, California. Just before she reached the Third Street intersection, she stopped to make a left turn into a service station. As she was making this turn, her car was struck in the rear by a cab that was coming in the opposite direction. Mr. Phillips, the driver of the cab, was driving at about thirty miles per hour and was not able to stop in time to avoid the collision.[118]

The accidents that befell Mr. Butterfield and Ms. Li were of a relatively common type. Each of them was injured and each sought compensation for their injuries through the tort system. Mr. Butterfield filed suit against Mr. Forrester in a local Derby court; Ms. Li sued the Yellow Cab Company in the courts of California. Each was prosecuting a tort claim for negligent injury; each case was destined to become a milestone in the law of contributory negligence. In submitting their disputes to local courts, Mr. Butterfield and Ms. Li both became voluntary participants in a normative practice that has existed for over eight hundred years. Most legal analysts examine this practice through the filter of appellate court opinions. From this perspective, tort law truly appears as a body of substantive rules and principles

117. From the facts of Butterfield v. Forrester, 103 Eng. Rep. 926 (1809).

118. From the facts of Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

that dictate case outcomes.[119] From a pragmatic standpoint, the focus on appellate opinions is very limiting. If we are seeking justification for tort decisions or insights into a more effective way to operate the tort system, then it is necessary to proceed realistically by placing the very visible tort rules into the less visible context of tort practice.

1. *The Appearance of Rule-Based Adjudication*

Learning torts through a casebook or researching a torts problem through the leading opinions creates the impression that tort "law" consists of the doctrinal and policy-oriented categories that are routinely applied in appellate cases. An examination of the text of an appellate opinion makes it clear how this appearance is created. Butterfield's case is a good example. At the trial, an eyewitness stated that Butterfield might have seen and avoided the obstruction had he not been riding "very hard." The judge then instructed the jury that if Butterfield had not used ordinary care, Forrester should prevail. The jury found for Forrester. The case was appealed and prompted this response from Lord Ellenborough: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right."[120] Ellenborough followed this general requirement with an analogy — a case of wrongful conduct which also instantiates the proposed generalization: "In cases of persons riding upon what is considered to be the wrong side of the road, that would not authori[z]e another purposely to ride up against them."[121] And finally, Ellenborough found that the proposed general requirement led to a substantive rule regarding contributory negligence. According to Ellenborough, "Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."[122] Thus, as applied by Ellenborough, the rule of contributory negligence seems to address precisely the issue raised in *Butterfield v. Forrester.*

This way of reporting the case, however, emphasizes the rule while disguising the central normative question as it must have appeared to the parties, the witness, and the jury. An accident is caused by the avoidable and somewhat careless actions of two parties. An eyewitness volunteers the obvious fact that if Butterfield had gone somewhat

119. *But see* Green, *supra* note 47 (arguing that the substantive law of torts must be viewed within the context of tort procedures).

120. 103 Eng. Rep. at 927.

121. 103 Eng. Rep. at 927.

122. 103 Eng. Rep. at 927.

slower, the accident probably would not have occurred. The judge tells the jury that Butterfield must use ordinary care. The jury then faces the ultimate question — Who is responsible? — and this question raises many others. How fast was Butterfield riding? Given the time of day and the populous surroundings, what speed was reasonable? Was Forrester's obstruction really dangerous? Should there have been warning signs? Should the obstruction have been lit or removed at night when it could not be clearly seen? None of these questions has a precise or simple answer. No measurements were made; there are no exact definitions of reasonable or ordinary care. Thus, the jury cannot decide the case by systematically answering these questions. It has no choice but to apply its own rough intuitive sense of responsibility to a situation whose elements are so common as to be within the ready imagination of each individual juror. From the jury's point of view the case does not present the legal issue of contributory negligence; rather it presents a somewhat complex pattern of factual circumstances and the ultimate normative question: Butterfield is injured — who should pay?

Li v. Yellow Cab Co. presents a similar array of context-specific normative questions. There is a traffic accident of a relatively common type. Ms. Li is making a left turn and is hit by an oncoming car. She may not have had enough room to turn; the yellow cab may have been coming too fast. Again there are no precise answers. We can only be sure that each might have avoided the accident with the use of a little more care. Some of us have had accidents of this type; all of us have made left turns under similar conditions. As we learn more about what happened, we form our own intuitive sense of responsibility. Neither party, we think, is entirely blameless. It is hard on Ms. Li that she should have to bear all of the consequences. Most of us will feel when we examine the case concretely that Phillips and the Yellow Cab Company should bear some responsibility. Only the lawyers among us will think that this responsibility should depend on whether the law of California looks to contributory or comparative negligence. But, of course, Ms. Li's case is famous precisely because it served as the occasion for the California Supreme Court to announce its adoption of a standard of comparative negligence in an opinion discussing not the accident but the various policies which support a shift in substantive law.[123]

123. It is worth noting that one central justification for the shift is "practical experience with the application by juries of the doctrine of contributory negligence." Li v. Yellow Cab Co., 13 Cal. 3d 804, 811, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975). It seems that juries frequently disregard judicial instructions concerning contributory negligence and perform their

My point is not that it is illegitimate for appellate courts to treat the cases that appear before them in terms of substantive doctrinal categories. I only suggest that when we study tort law by reading appellate opinions, we should be careful not to be misled into thinking that the categories developed in these cases constitute the entire "law" of torts.

2. *The Reality of Jury Discretion*

At trial, most tort cases are decided by juries of untrained laypersons rather than by judges schooled in the intricacies of tort law.[124] The rule-based view takes this into account by bifurcating the task of deciding actual cases into two separate roles for judge and jury. For example, the *Restatement (Second) of Torts* provides: "In general, the court must decide questions of law, and the jury questions of fact."[125] Thus, it is the judge's job to determine the law that should be applied to the specific controversy, and the jury's task to determine the facts[126] and to apply the judge-given law.[127] In negligence cases, this means that the court must determine "legal" things such as "the standard of conduct required of the defendant by his legal duty,"[128] while ultimate questions such as "whether the defendant has conformed to the standard of conduct required by the law" are left to the jury.[129] One common way to describe the jury's function is to call it "law application,"[130] yet the procedures that surround jury adjudication suggest that this label is misleading. Jurors are ordinary citizens

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own rough justice by allowing a recovery in reduced amounts. *Id.* at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863 (quoting Prosser, *Comparative Negligence,* 41 CALIF. L. REV. 1, 4 (1953)).

124. If both parties consent, the case can be tried by the trial judge rather than by a jury. In such cases, the judge assumes the jury's role and exercises the same latitude of judgment over factual and normative questions.

125. This statement is found in § 328B comment b of the RESTATEMENT (SECOND) OF TORTS (1964) (dealing with the functions of the court).

126. The rule-based account places fact finding outside the province of tort law in that it is governed by nonlegal procedures of rational investigation.

127. For example, a typical federal court instruction provides:

> It is your duty as jurors to follow the law as I [the judge] shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. . . . [You are not] to be concerned with the wisdom of any rule of law stated by me.
>
> . . . .
>
> Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

E. DEVITT, C. BLACKMAR & M. WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS — CIVIL § 71.01, at 17 (4th ed. 1987).

128. RESTATEMENT (SECOND) OF TORTS § 328B(c) (1964).

129. *Id.* at § 328C(b).

130. *See, e.g.,* Weiner, *The Civil Jury Trial and the Law-Fact Distinction,* 54 CALIF. L. REV. 1867, 1919 (1966).

rather than legal experts.[131] At trial, most of the time is occupied with testimony and partisan argument; the instructions of the trial judge are a relatively small part of the process. Further, courts do not regulate the substantive aspects of jury deliberation nor is the jury required to provide justification for its verdict. These procedures all suggest that the jury's role is not limited to simple application of judge-given rules.

The "rule-application" description also presupposes that juries are impersonal decisionmakers. This assumes that their deliberations can be understood in terms of the impersonal model of practical deliberation: first, the jury determines the fact that defendant did *x;* second, the judge provides a rule such as "*x* gives rise to tort liability"; and third, the jury, possessing both a fact and a rule, mechanically draws the conclusion that the defendant is liable for damages.[132] To see that this description is inaccurate, we need only examine the kind of rule that the judge actually gives to the jury.[133]

The central question in many tort cases is whether the defendant's conduct was negligent. Therefore, the judge provides the jury with a negligence instruction that describes the conduct of reasonable persons using ordinary care:

> Ordinary [or reasonable] care is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury . . . . [It] is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence in the case.[134]

Thus, the judge tells the jury that the law requires the defendant to use ordinary care and leaves it to the jury to determine what ordinary care under "all the surrounding circumstances" might be.

The negligence instruction is not the kind of rule that impersonal decisionmaking requires. Rather, the instruction is nearly tautologous. It states a major premise comparable to: "The defendant is lia-

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131. Indeed, it is generally thought that jurors who possess legal expertise should be excused from the panel lest they have too strong an influence on the ultimate outcome.

132. *See supra* note 107 and accompanying text.

133. *See, e.g.,* E. DEVITT, C. BLACKMAR & M. WOLFF, *supra* note 127, § 80.03.

134. *Id.* at §§ 80.04, 80.05; *see also* 1 COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS No. 3.10 (7th ed. 1986):

> Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.
>
> It is the failure to use ordinary or reasonable care.
>
> Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

ble for wrongful conduct." Since the major premise is primarily definitional, more of the real normative work must be done in the minor or factual premise: "All things considered, this conduct is wrongful." Thus, in negligence cases, the line between the judge's sphere and the jury's does not separate an area of normative, law-like matters from one that is purely factual. It is a misconception to say that the jury simply applies the law. Its role is to decide the ultimate question of liability in the individual case that is before it.

It is frequently acknowledged that the jury has broad discretion in deciding negligence cases. Negligence cases are "mixed" in the sense that factual and legal questions are so intertwined that the roles of judge and jury cannot be separated cleanly.[135] While the "mixed" nature of the negligence issue is frequently acknowledged, less attention is paid to the "mixed" nature of many other questions that arise in tort cases. For example, the *Restatement* section on products liability requires a finding that a product is "defective" and "unreasonably dangerous."[136] The comments explain "defective" in terms of being not "safe for normal handling and consumption"[137] and "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . with the ordinary knowledge common to the community . . . ."[138] These standards are no more determinate than the instructions that are used in negligence cases. Thus, products liability cases, like negligence cases, present "mixed" questions that invest the jury with broad discretion to decide the ultimate normative questions under dispute.[139]

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135. See, for example, comments to RESTATEMENT (SECOND) OF TORTS, §§ 328B, 328C (1964), where the drafters give the following explanation of mixed questions:

> [S]ince a question of law may involve a ruling upon a question of fact, and a question of fact may involve the application of a rule of law, the two are often interwoven, and it becomes impossible to state the function of the court without reference to that of the jury, and vice versa.

Id. at § 328B comment b.

Holmes explained mixed questions by arguing that these are questions where the jury should supply a rule or standard from their own "daily experience." O.W. HOLMES, *supra* note 25, at 122-23. Holmes also suggested that experienced judges should take an active role in formulating such standards because their experience "enables [them] to represent the common sense of the community in ordinary instances far better than an average jury." *Id.* at 124.

136. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

137. *Id.* at comment h.

138. *Id.* at comment i.

139. While the *Restatement* is silent as to the respective roles of judge and jury in determining these issues, pattern jury instructions confirm that the normal practice is to leave application of these standards to the jury. *See, e.g.,* COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS Nos. 9.00.3, 9.00.5, 9.00.7 (7th ed. 1986). The jury is basically instructed on the elements of a manufacturing defect, a design defect, or a warning defect. Each instruction uses terms such as "reasonable," "foreseeable," and "ordinary" in explaining the concept of a defect. The manufacturing defect instruction is the most specific; it says that there is a defect if the product "differs from the manufacturer's in-

Even in the context of tort doctrines that are not of the "mixed" kind, the jury's discretion in deciding the ultimate normative question is increased by other aspects of tort doctrine. Take the example of negligence *per se.* The triggering circumstance for an instruction on negligence *per se* is a violation of a safety ordinance. Thus, if the law restricts highway speed to fifty-five miles per hour and the defendant exceeded that speed, the plaintiff may be entitled to an instruction that the defendant's violation of the statute, if not excused, is conclusive on the question of negligence.[140] In such cases, negligence is no longer a "mixed" question. The law requires a certain speed and violations of the law are negligent; it is not up to the jury to substitute its own judgment of what constitutes ordinary care. This kind of case seems to confirm the rule-based account by centering on a standard that the jury can apply in a more or less mechanical way. Nevertheless, even in such cases, the jury need not find for the plaintiff. It can only find for the plaintiff if it determines that the defendant's excessive speed was a substantial factor in causing the plaintiff's harm.[141]

Thus, it is the jury and not the substantive legal rules that determines the ultimate outcome in most trials of tort cases.[142] There is the rule and there is the jury's own common sense notion of responsibility, and there is little in the former that will force the jury to forgo the latter. In part, this is because many of the standards that the tort law invokes are, like negligence, simply appeals to the jury's own common sense judgment. But even when the standard itself is relatively specific, its application in the face of overlapping doctrinal categories such as negligence and causation still requires the case-specific intuitive judgment of the jury. There is nothing particularly surprising about this aspect of tort law. Legal principles that express general considerations of fairness are rarely specific enough to be decisive in individual cases. Such rules cannot be applied without intuitive judgments and these judgments are particularly important in an area such as torts, where disputes arise from a wide variety of accidental and unplanned occurrences. One important feature of pragmatic accounts

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tended result or if [it] differs from apparently identical products from the same manufacturer." *Id.* at § 9.00.3.

140. *See, e.g.,* Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

141. RESTATEMENT (SECOND) OF TORTS § 434(2)(a) (1964) assigns application of the "substantial factor" test of cause-in-fact to the jury.

142. Of course, some cases are decided by pretrial dismissals, directed verdicts, and judgments notwithstanding the verdict. Rule-based accounts interpret these judge determined outcomes as the application of substantive law standards to the evidence (or potential evidence) in the case. A different, more pragmatic way to understand these judgments is to view standards such as "no reasonable jury could . . ." or "there is no evidence to support a verdict of . . ." as means by which the trial judge frames an issue for appellate review.

of tort law is that they see this fact as an essential and central feature of tort adjudication.

3. *The Value of Jury Adjudication*

It is clear from the above discussion that current practices of tort adjudication confer considerable discretion on tort juries to determine a just outcome that is suited to the individual case. The latitude of the jury's discretion is frequently overlooked and, when it is not overlooked, it is frequently criticized. From a pragmatic perspective, however, these criticisms demand closer scrutiny. Jury adjudication may not be as arbitrary and as wasteful as its critics charge. It may instead perform a function that is central to achieving our corrective justice goals.

An argument in favor of jury adjudication may seem unrealistic amid the current talk of a torts crisis. Most analysts have started with the premise that we should aim for a tort system that is less generous and less expensive to administer. They then conclude that tort reform should focus on constraining tort verdicts and the juries that award them. Supporting this line of argument are statistics that purport to establish that ordinary citizens are too litigious,[143] that juries are too generous,[144] and that legal expenses are too high.[145] These statistics, however, present a somewhat equivocal case. First, there has been a certain amount of manipulation and overstatement.[146] Second, the significance of the data is limited by the fact that it comes entirely from litigated cases. Without reliable estimates of the number of tortious injuries,[147] it is reasonable to explain the increasing numbers of

143. *See, e.g.*, REPORT, *supra* note 24, at 45-47 (noting a 758% increase in product liability cases filed in federal court from 1974 through 1985 and a 123% increase in medical malpractice from 1979-1983).

144. *See, e.g.*, *id.* at 35-36 (noting a 363% increase in medical malpractice awards and a 370% increase in products liability awards in the years from 1975 through 1985).

145. Depending upon what factors are counted, the Rand Institute estimates the percentage of tort payments that is actually received by plaintiffs as compensation for their injuries (net of all legal fees and expenses) as between 46% and 56% for 1985. J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986). The task force reports a much lower 38% figure that is associated with the asbestos litigation. REPORT, *supra* note 24, at 42 (citing J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM & M. SHANLEY, VARIATIONS IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii (1984)).

146. Some writers suggest that the insurance industry is hiding excessive profits behind highly inflated statistics about the costs of the tort system. *See, e.g.*, Comment, *supra* note 1, at 404-05, 408 n.25. While the Justice Department Working Group, *see* REPORT, *supra* note 24, primarily relied upon the less controversial figures produced by the Rand Institute for Civil Justice, they made selective use of this data to dramatize and overstate the "crisis."

147. The limited research available on this point suggests that the percentage of injured parties who make claims is very low and this had led a number of commentators to wonder whether the real problem with the tort system is that too few legitimate claims are filed. *See, e.g.*, Abel, *The Real Tort Crisis — Too* Few *Claims*, 48 OHIO ST. L.J. 443, 448-52 (1987).

lawsuits by hypothesizing a similar increase in tortious injuries.[148] In short, for all the talk about a "litigation explosion," the case for retrenchment rests almost entirely upon the simple fact that costs are rising.[149]

Beyond the data, however, there is a deep seated notion that jury adjudication is an unnecessary extravagance. Ever since 1930, when Leon Green mounted a sustained attack on the use of juries,[150] analysts have assumed that there is no real advantage to jury adjudication beyond the dubious notion of citizen participation. Critics of the jury system emphasize its unpredictability and inconsistency.[151] They charge that it is decentralized and inefficient[152] and that it adds expense and delay to an otherwise overburdened tort system.[153]

The arguments against the jury system assume more than they prove. Green's argument is illustrative. In the last chapter of *Judge and Jury,*[154] he details the cumbersome procedures of jury selection, the emotionally charged atmosphere of the courtroom,[155] the exaggerated drama of the trial,[156] the elaborate efforts to keep prejudicial information from the jury, and the "ritualistic" delivery of

148. An alternative hypothesis might be that the insurance industry has simply adopted tougher settlement policies.

149. *See* Comment, *supra* note 1, at 402-03. The Working Group buttresses its argument by a discussion of recent expansions in tort law. REPORT, *supra* note 24, at 30-45. This analysis, however, begs the question by assuming that any departures from a strict interpretation of the fault and causation requirements are *prima facie* illegitimate.

150. *See, e.g.,* L. GREEN, *supra* note 47, at 395-417.

151. *See, e.g.,* Pierce, *supra* note 13, at 1322 (linking high transaction costs to uncertainty about jury verdicts and awards).

152. *See, e.g.,* Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases,* 99 HARV. L. REV. 1808, 1812 (1986); Sugarman, *supra* note 3, at 596.

153. *See, e.g.,* Landis, *Jury Trials and the Delay of Justice,* 56 A.B.A. J. 950 (1970); Sugarman, *supra* note 3, at 596.

154. L. GREEN, *supra* note 47, at 395-417.

155.

> The parties are nervous, the judge is impatient, the witnesses are jumpy, the members of the jury are eager to be about their business. Counsel are not so impatient. They know who must do the chief acting in this drama . . . . Whether serious and dignified, smiling and friendly, blustering and bullying, suave and clever, blunt and brutal, or quiet and cautious, they have chosen their rôles.

Id. at 397.

156.

> The litigants, knowing that they are down for leading rôles, dress for the occasion, and bring their retinues of relatives and neighbors, whom counsel must both encourage and censor. Even the audience enters into the spirit of the play, taking sides and applauding one way or the other. The court attendants do no less. The judge unconsciously exaggerates his conduct. Of all these, counsel alone . . . know that the rest are mere stage dressing for themselves, one of whom must be the villain and one the hero, but which, neither is yet certain.

Id. at 399.

instructions.[157] He then contrasts these time-consuming and wasteful procedures with the more stately atmosphere of a bench trial:

> If the jury is taken out of the courthouse, the drama is gone. The court-room is not the same place. There is no tenseness. The lawyers are not the same; they no longer glare at one another. Even the parties are docile. The judge returns to himself. . . . The place is dead. . . .
>
> The argument on the issues is brief and pointed. There are no instructions to prepare, no verdict, no motion for a new trial except in the rarest instance. . . . The whole process is deflated until there is little left to do save get down to business.[158]

The resulting contrast is powerful — jury trials are wasteful, overly dramatic, and prone to error, while bench trials are efficient, businesslike, and result in verdicts that are less likely to be reversed. Green's judgment of the jury system is uncompromising and harsh:

> [W]hether we figure the cost of trial by jury in terms of time consumed, money expended, the quality or quantity of justice afforded, the waste of effort, the abuse of judicial process, or the loss in respect for the administration of law, we discover a deficit far greater than any imaginable satisfactions can overcome.[159]

What stands out in Green's argument is the unstated and unexamined assumption that there is nothing to be gained by jury adjudication. For example, Green writes:

> Judge and jury are generally in accord if the jury is not brought under some improper influence. If they disagree, it frequently results from some error or mistake which necessitates a new trial. The differences come in those close cases in which there can be no certain opinion, and in which two juries or two judges would as likely as not reach opposite conclusions.[160]

In this quotation we see Green's assumption stated and restated: (1) judges and juries reach the same results in most cases; (2) in most cases where they differ, the judge is correct; and (3) in the remaining cases, the outcome is so close that it does not matter who wins.[161] In what follows, I will try to render plausible an assumption that is contrary to Green's. I will argue that jury adjudication has important advantages in reaching a fair result in corrective justice cases.

157. *Id.* at 401.

158. *Id.* at 403-04.

159. *Id.* at 411.

160. *Id.* at 404.

161. *See* Kalven, *The Dignity of the Civil Jury,* 50 VA. L. REV. 1055, 1063-66 (1964) (evaluating jury effectiveness by comparing its judgments with those of trial judges); *see also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

C. *Summary and Conclusion*

In this Part, I have focused particulary on the procedures that are used in trial courts to submit cases to the jury. Obviously these procedures are only a part of a complex process that determines tort outcomes. Trial judges do not always send cases to juries and jury verdicts are not always accepted as rendered. Under some circumstances, judges will limit the jury's role by the use of interrogatories or special verdicts. In addition, trial judgments are subject to a process of review that requires appellate courts to relate the jury's verdict to a series of seemingly rule-based decisions by the trial judge. It would obviously be a major task to unravel all these different strands of decisional activity and to explain the process by which they are woven into a final decision. For now, I will simply note that the jury's case-specific, viewpoint-dependent judgment is an essential ingredient of this process and consider, in the next Part, how such judgments might be justified.

IV. A Pragmatic Justification for Jury Adjudication

In the last Part, I outlined a conception of corrective justice that rejects rule-based models of adjudication and argued in favor of an analysis of tort adjudication that assigns a central role to the jury in resolving tort cases. Specifically, I argued that the practices that govern jury decisionmaking are inconsistent with viewing jurors as "impersonal" decisionmakers. This does not mean that juries do not conscientiously apply the rules they are given.[162] Nor does it mean that appellate courts cannot review the trial outcome by relating it to a series of seemingly rule-based decisions made by the trial judge.[163] It simply means that the rules that govern these decisions do not, by themselves, determine tort outcomes and that, therefore, any account that purports to justify tort outcomes must deal realistically with the problem of viewpoint.

The viewpoint dependency of legal judgments is not a new idea. Indeed, several generations of theorists — realists, pragmatists, feminists, and critical legal scholars — have repeatedly argued that legal rules are not decisive in reaching legal outcomes. Despite this, rule-

162. H.L.A. Hart interprets the rejection of rule-based models as the denial of an internal perspective of rule following. This is not an adequate characterization of the realist arguments. *See, e.g.*, Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986). Nor is it a criticism of the argument that I made in the last section.

163. A person who takes an extreme position with respect to the indeterminacy of rules would argue that even judicial rulings are not rule-based. I prefer to think that there are varying degrees of rule-basedness and that jury judgments in tort cases tend toward the extreme of being viewpoint dependent.

based analysis continues to be an important part of legal theory. The reason for this is succinctly stated by Singer:

> Yet, if we are all realists, why are some of the insights of the realists so controversial? . . . The answer is that the realists were unable to produce an acceptable alternative to formalism that would enable judges and lawyers to engage in normative argument. . . . How can we engage in normative legal argument without either reverting to the formalism of the past or reducing all claims to the raw demands of political interest groups? This is a tough question to answer. It is so hard that judges and scholars often reassert central elements of formalist reasoning they had hoped to discard.[164]

Thus Singer highlights an issue that has created a serious dilemma for legal theorists: on the one hand, legal texts seem to support the thesis that rules do not decide cases; on the other, the disavowal of rule-based adjudication seems to silence discussions about justification. The attempt to justify jury judgments confronts a similar dilemma.

Unlike certain forms of rule skepticism, the intuitive conception of practical reason does not entirely silence normative debate. It sees practical deliberation as incorporating a process of generalization that moves from distinctly personal reactions to generalized statements of value that can be intersubjectively discussed.[165] Although rules in the intuitive model are not outcome decisive, they do structure normative discussions in such a way that there is something to talk about beyond simple feelings of blame and approval.

On the other hand, the claim that legal judgments are viewpoint dependent does entail the loss of a common framework for thinking about questions of justification. As we saw in Part II, most contemporary corrective justice theories are "rule-based" in the sense that they adopt a two-step process to justify legal outcomes: First, does the outcome result from a correct application of a correct legal rule? Second, is the legal rule justified by a larger normative theory? Thus, the result in *Butterfield v. Forrester*[166] is justified, on this view, only if it is the result of applying a correct legal rule and the change of legal rule announced in *Li v. Yellow Cab Co.*[167] is justified only if it is supported by policies that are generally acknowledged to provide an appropriate foundation for tort law. At the root of this enterprise lies a crucial assumption: a legal result is justified in this way or it is not justified at all. In Part II, I argued that rule-based theories are unable to justify

164. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 467-68 (1988).

165. *See supra* note 112 and accompanying text.

166. 103 Eng. Rep. 926 (1809); *see supra* notes 120-22 and accompanying text.

167. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *see supra* note 123 and accompanying text.

legal results and are therefore inadequate to provide a corrective justice justification for the tort system. In this Part, I argue that the pragmatic conception developed in Part III can provide such justification.

The rejection of a rule-based analysis does not necessarily mean that judge and jury are free to indulge whatever biases they possess; their decisionmaking need not be viewed as an unconstrained and arbitrary exercise. The pragmatist sees tort law as a collection of normative practices that produce authoritative legal judgments. At its simplest, this collection includes procedures that (1) allow each participant or observer to present his or her own viewpoint-dependent narrative, and (2) permit the judge or jury to develop an authoritative legal judgment from several conflicting narrative accounts. These practices produce judgments that are viewed as legitimate precisely because they are rendered in accordance with the appropriate legal practices. Thus, the pragmatic conception shifts the focus of justification from the outcome to the practices that produce the outcome. It requires, in short, that we be able to say why certain contexts for legal decisionmaking are better or more justified than others.

Adjudicatory practices might be justified in any number of ways. One might argue, for example, that certain practices embody traditional conceptions of democracy or fairness. I argued earlier, however, that the point of a corrective justice theory is not merely to give this kind of ad hoc justification but rather to answer the question: Why is this outcome just? This question suggests that the chosen practices must be justified in terms of their ability to reach an appropriate result, and this, in turn, requires that we give content to the idea of a just or legitimate outcome. Specifically, what is needed is a justification of tort procedures that relates them to a conception of objectivity that transcends the limitations of individual viewpoints.

A. *Hume's Moral Theory: The Problem of Diverse Viewpoints*

Legal theorists commonly distinguish two general types of moral theories. The first, sometimes called "deontic," is rationalist in method. It judges human activity by comparing it to the requirements of a rational set of moral first principles.[168] The second, usually termed "consequentialist," evaluates conduct in relation to its context: an act is good if it produces, on balance, beneficial consequences.[169]

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168. Kant is commonly understood as a typical deontic theorist.

169. Consequentialist theories include classical utilitarianism and the contemporary theory known as law and economics.

The two theories differ in their approaches to moral problems, but they nevertheless share an important similarity. Both theories presuppose that moral judgments can be made free from the distortions of perspective and bias. The deontic theorist believes that an action may be evaluated by means of objective, rational principles; the consequentialist believes that the utility of the action's consequences can be measured in an objective way. Legal theories that are based on deontic or consequentialist moral theories claim to assess the correctness of legal rules or legal results with similar objectivity. Legal judgments made in accordance with such theories purport to be viewpoint independent. In opposition to these theories, the pragmatic view asserts that viewpoint-dependent normative judgments are a central feature of legal adjudication. Inherent in this recognition is the rejection of both rationalist and consequentialist theories of morality in favor of a more naturalistic theory that traces the source of moral judgment to its roots in human experience. David Hume is perhaps the most notable expositor of such a theory and thus his views will be helpful in thinking about the problems raised by viewpoint-dependent judgments.

1. *Moral Sentiment*

In the first section of his *Enquiry,*[170] Hume argues that moral sentiment arises naturally from the "original fabric and formation of the human mind,"[171] and that the sentiments "which render[ ] morality an active principle and constitutes virtue our happiness, and vice our misery . . . depend[ ] on some internal sense or feeling, which nature has made universal in the whole species."[172] Similarly, in his *Treatise,*[173] he argues: "[S]ince vice and virtue are not discoverable merely by reason, or the comparison of ideas, it must be by means of some impression or sentiment they occasion, that we are able to mark the difference betwixt them. . . . Morality, therefore, is more properly felt than judg'd of . . . ."[174] These observations appear to be an accurate reflection of our moral lives. We know that cruelty is wrong because we feel it to be so and we are unlikely to accept an argument, no mat-

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170. D. HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (1953 reprint from 1777 ed.).

171. *Id.* at 4.

172. *Id.* at 5.

173. D. HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge ed. 1888) (1st ed. 1739).

174. *Id.* at 470. The previous section of Hume's treatise is an extended argument aimed at showing that moral qualities cannot be translated into relationships among ideas, thus showing in Humean terms that moral knowledge does not derive from reason alone.

ter how logical, that contradicts this basic judgment. But, despite its factual accuracy, Hume's account faces certain difficulties.

Individual moral responses are not uniform. Everyone can see that the clock on the tower reads four o'clock, but not everyone agrees that a particular action is cruel and deplorable. Some observers may feel strongly that it is; others may have equally strong feelings that it was justifiable under the circumstances. The difficulty for Hume, as well as for other philosophers who treat moral feeling as the origin of moral judgments, is that feelings of praise and blame are subject to individual variation and therefore seem to have little significance beyond the mere expression of attitude. In the absence of a theory that explains this variation, such accounts can be read as interpreting every moral judgment as an autobiographical statement by the speaker.[175] Thus, "That was a good action." says no more than "That action prompted my approval." And, if this is all that can be said, the conclusion must be skeptical — moral agents will be justified in doing whatever their feelings happen to approve.

Hume did not believe that moral judgments are mere autobiographical statements,[176] and, in fact, he proposes an experimental method for transcending the purely personal characteristics of moral sentiment. This method begins with the common experience of virtue and vice and aims "to reach the foundation of ethics, and find those universal principles, from which all censure or approbation is ultimately derived."[177] While the goal is universal principle, the foundation of his theory is fact and observation. He rejects a rationalist procedure in favor of a more Newtonian one:

> Men are now cured of their passion for hypotheses and systems in natural philosophy, and will hearken to no arguments but those which are derived from experience. It is full time they should attempt a like reformation in all moral disquisitions; and reject every system of ethics, however subtle or ingenious, which is not founded on fact and observation.[178]

Hume thus proposes a method for moral inquiry that builds from emotional judgments about particular cases to more general principles. Since emotional judgments are variable, his method will not work unless he is able to detect an order or pattern in them that permits him to

175. The recent interest in projectivist ethical theories has occasioned a reexamination of Hume's theory in projectivist terms. *See, e.g.*, S. BLACKBURN, SPREADING THE WORD 197-210 (1984).

176. Hume's discussion of morality occupies nearly a third of his *Treatise*, and, indeed, one author argues that moral questions were among his "earliest and most central interests." B. STROUD, HUME 171 (1977).

177. D. HUME, *supra* note 170, at 7.

178. *Id.*

endorse some feelings as right and condemn others as wrong. Without such a pattern, there can be no general moral principles and no alternative to moral skepticism.

Several aspects of Hume's account are clearly aimed at showing how individual variations in emotional response can be understood in an orderly fashion. For example, he makes a distinction between moral sentiments and feelings of self-interest. Hume argues that we can separate these by careful and calm reflection:

> The good qualities of an enemy are hurtful to us; but may still command our esteem and respect. 'Tis only when a character is considered in general, without reference to our particular interest, that it causes such a feeling or sentiment, as denominates it morally good or evil. . . . [T]hose sentiments, from interest and morals, are apt to be confounded . . . . It seldom happens, that we do not think an enemy vicious, and can distinguish betwixt his opposition to our interest and real villainy or baseness. But this hinders not, but that the sentiments are, in themselves, distinct; and a man of temper and judgment may preserve himself from these illusions.[179]

To make distinctions between self-interest and moral sentiment, it is necessary for the observer to cultivate a dispassionate temper — "a general calm determination of the passions, founded on some distant view or reflexion."[180] This "distant" view enables us to correct our moral judgments for limitations in our point of view. Hume writes:

> [E]very particular man has a peculiar position with regard to others; and 'tis impossible we cou'd ever converse together on any reasonable terms, were each of us to consider characters and persons, only as they appear from his peculiar point of view. In order, therefore, to prevent those continual *contradictions,* and arrive at a more *stable* judgment of things, we fix on some *steady* and *general* points of view; and always, in our thoughts, place ourselves in them, whatever may be our present situation.[181]

The result is that "[w]e blame equally a bad action, which we read of in history, with one perform'd in our neighbourhood t'other day."[182] Reason, not in the sense of abstract comparisons of ideas but in the sense of dispassionate feeling and a detached viewpoint,[183] thus ac-

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179. D. HUME, *supra* note 173, at 472.

180. *Id.* at 583.

181. *Id.* at 581-82.

182. *Id.* at 584.

183. Hume uses the term "reason" in two distinct ways. The first denotes a faculty for conceiving the abstract relations between ideas; the second denotes feelings that arise in a calm and dispassionate state of mind. The two are easily confused: "[The] tranquillity [of feelings arising in a dispassionate state] leads us into a mistake concerning them, and causes us to regard them as conclusions only of our intellectual faculties." *Id.* at 437.

counts for our ability to correct and stabilize the more passionate sentiments of moral life.

Moral feelings can be passionate and self-interested or they can be tempered by reflection and resolution. This variation of temperament and circumstance accounts for variation in moral response: "Upon the whole, this struggle of passion and of reason, as it is call'd, diversifies human life, and makes men so different not only from each other, but also from themselves in different times."[184] Thus variation is only a superficial feature of moral response. Analysis and calm appraisal permit the theorist to find a general pattern by sorting out true responses from those that are distorted by self-interest or passion.

2. *Sympathy and Justice*

Underneath the apparent variations in human sentiment, Hume believed, there is a synchronicity in human moral attitudes. He argues that

> [t]he minds of all men are similar in their feelings and operations, nor can any one be actuated by any affection, of which all others are not, in some degree, susceptible. As in strings equally wound up, the motion of one communicates itself to the rest; so all the affections readily pass from one person to another, and beget correspondent movements in every human creature.[185]

The sympathy of human responses plays a central role in Hume's theory. It accounts for our desire to win the praise of others[186] and interests us in the well-being of our fellows.[187] As such, it is the origin of our concern for social good and our approval of just action.[188] It is also the foundation of our ability to see ourselves as others see us and to disapprove our own actions even when they inure to our own benefit.[189] Thus, by allying moral feelings with sympathy and distinguishing them from mere feelings of self-interest, Hume's phenomenology of moral sentiment provides a basis for thinking about moral feeling as a communal property of human experience rather than a distinctly individual response to surrounding circumstances.

Hume's moral theory is a theory about human nature. It poses the questions: What is the origin of human satisfaction? What are the

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184. *Id.* at 438. He continues: "Philosophy can only account for a few of the greater and more sensible events of this war; but must leave all the smaller and more delicate revolutions, as dependent on principles too fine and minute for her comprehension." *Id.*

185. *Id.* at 575-76.

186. *Id.* at 322.

187. *Id.* at 577-78.

188. *Id.* at 499-500.

189. *Id.* at 589.

general types of things that excite human approval? Hume's answer is that we generally approve of qualities that fall into one or more of the following four categories: (1) those that are useful to ourselves;[190] (2) those that are useful to others;[191] (3) those that are immediately agreeable to others;[192] and (4) those that are agreeable to ourselves.[193] Considered in relation to these categories, just acts present special difficulties. While it is true that justice, in general, is useful to oneself and to society, it is not clear why we think that individual just acts are virtuous irrespective of their benefits. For example, it is unjust for *A* to steal food from *B* even if *A* is hungry and *B* is so rich that he will not miss what is stolen. The fact that *A*'s act benefits *A* does not make it virtuous. Nor is it virtuous even if it tends toward the benefit of society as a whole as, for example, when *A* steals food to feed the hungry masses. These kinds of considerations led Hume to see justice as an artificial virtue. It is artificial in the sense that our approval of particular just acts stems from reflection and reason rather than from direct feelings of approbation; it is a virtue in the sense that the general requirements of justice tend to promote the welfare of all.

3. *Hume's Theory and Viewpoint Dependency*

Hume's theory provides several important insights for thinking about the problem of justifying intuitive normative judgments. The first and most important of these insights derives from his conception of sympathy. This conception suggests that it might be fruitful to begin an analysis of moral response with the assumption that human beings have similar moral responses to similar circumstances when they view these circumstances under similar conditions. This suggestion organizes the inquiry and creates an agenda for thinking about moral response: if we assume that human beings have similar moral responses, then we must analyze differences in response as differences in the conditions of observation keeping in mind that these conditions include the temperament and prior experience of the observer. Thus, the central question is: What differences in conditions affect moral judgment and how are these to be analyzed? The answer to this ques-

190. These include: discretion, caution, enterprise, industry, frugality, economy, good sense, prudence, discernment, temperance, sobriety, patience, constancy, perseverance, forethought, order, presence of mind, quickness of conception, and facility of expression. D. HUME, *supra* note 170, at 78.

191. For example, we approve of those who are *"sociable, good-natured, humane, merciful, grateful, friendly, generous, [and] beneficent."* *Id.* at 8.

192. These include wit, ingenuity, good manners, eloquence, humor, good sense, and sound reasoning. *Id.* at 99-100.

193. These include cheerfulness, courage, tranquility, and aesthetic sense. *Id.* at 86-97.

tion is observational: We observe, for example, that we are more likely to make the same normative judgments when we are dispassionate; similarly, we observe that we confuse self-interest with moral feeling or that we approve just conduct even when it does not tend to our own benefit.

This way of analyzing the problem of moral response suggests a parallel strategy for thinking about the problems posed by intuitive, viewpoint-dependent legal judgments. If we assume that human beings generally possess similar dispositions with respect to such judgments, then it would be important for legal theorists to investigate the conditions under which such judgments are made. Following Hume's observations, we should analyze these conditions by paying particular attention to: (1) dispassion, *i.e.*, the level of intensity with which the decisionmaker is engaged with the dispute; (2) self-interest or bias, *i.e.*, the extent to which the decisionmaker believes that aspects of the dispute impinge on matters that are important to her own interests; (3) point of view, *i.e.*, the decisionmaker's experiential relation to the matters under dispute; and (4) the operative system of justice, *i.e.*, the decisionmaker's beliefs about the set of conventional rules that appropriately govern transactions and relationships.

The first two items on this list — dispassion and the elimination of bias — are frequently-noted requisites of rational decisionmaking. They are clearly served by a number of the procedures that govern jury adjudication. These procedures include the dignified nature of courtroom proceedings,[194] the use of jury oaths,[195] the disqualification of jurors who know the parties or have an interest in the outcome,[196] and instructions about bias or prejudice.[197] The last two items are more problematic and I will examine them at length in the following section.

194. *See* Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969); *see also* Justice Black's statement in *Illinois v. Allen:* "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." 397 U.S. 337, 343 (1970).

195. The CALIFORNIA CENTER FOR JUDICIAL EDUCATION AND RESEARCH, CALIFORNIA JUDGES BENCHBOOK—CIVIL TRIALS § 4.32 (1981) provides the following sample oath: "You, and each of you, do solemnly — [*swear/affirm*] — that you will well and truly try the cause now pending before this court and render a true verdict according to the evidence and the court's instructions — [*so help you God*] —." (brackets in original).

196. CAL. CIV. PROC. CODE § 229 (West Supp. 1990).

197. *See infra* note 199 and accompanying text.

B. *The Justification of Jury Adjudication: Diverse Viewpoints and Shared Realities*

The pragmatic account of tort adjudication centers on the fact that juries decide cases by making intuitive normative judgments concerning the financial responsibility of the defendant. One problem with such judgments is that they seem to lack the kind of interpersonal confirmation that reinforces factual judgments. Observers who view the same set of circumstances may agree on the facts but disagree about what, if anything, should be done to correct the situation. This has led many theorists to view intuitive normative judgments as inherently unreliable. Hence, if we are to incorporate intuitive normative judgments into a theory of justified decisionmaking, we must develop a theory about the circumstances under which such judgments may be justified.

In developing an understanding of justification in this context, we might make use of an analogy. The problem of justifying normative judgments in the face of conflicting normative viewpoints resembles the problem of describing a publicly perceived external reality on the basis of reports from differing observational viewpoints. Suppose there is one object and several observers. On a phenomenological level, each observer may describe a different set of characteristics. Each account is as true as any other; no one viewpoint is entitled to dominate. On a more abstract level, each account is limited; we are able to compare each person's story to the facts as we know them. In appealing to the facts, we appeal not only to facts about the object but also to facts about the relative positions of the various observers. These facts help us to construct a more comprehensive story that accounts for the differences in perception. My purpose in thinking about physical objects is not to give an account of how these individual perceptions give way to a shared conception of an external object but rather to describe two ideas that might be useful in analyzing the viewpoint dependency of intuitive normative judgments.

One of the ways in which we think about experiential differences is to analyze them in terms of the viewpoint of the observer. Each observer has a unique viewpoint from which he gains a partial perspective on the object. If there were an ideal post of observation, then we could compare the observer's partial perspective with the full perspective available from the ideal post. Lacking such a post, the various viewpoints of several observers must be compared with one another in order to analyze the limitations in observational opportunity that affect individual perceptions. Every observational position gives rise to a partial perspective. Analyzing the limitations of this perspective and

comparing it to other perspectives are essential steps in developing a shared interpretation of an external reality that is perceived differently by individual observers.

A second tool used to develop a shared account from several conflicting viewpoint-dependent accounts is the construction of a nonphenomenological shared vocabulary. An observer does not usually say: "I see a spot of red." He says: "There is a red object." The latter statement commits him to a comparison of his observations with those of other observers. The observer who uses a vocabulary of external physical objects should be troubled by inconsistent observations in a way that he need not be troubled by contradictions in phenomenological statements. Using the language of physical objects leads to a discourse of shared interpretation, and the point of such a discourse is that it commits good faith users of the discourse to search for agreement with other observers. In searching for these agreements, good faith participants readily acknowledge the limitations of their own viewpoint and use the vocabulary of physical objects as a way of putting together information from a number of different partial perspectives.

In this section, I use the notions of partial perspectives and intersubjective vocabularies to analyze the jury's function in reaching a justified decision in a tort case.

1. *The Partial Perspectives of Witnesses*

The jury constructs its own understanding of a case from the testimony of witnesses. Every observer has a limited point of view. Each side has a bias; the perceptions of each witness have been filtered through a unique web of apperception. The jury's job is to formulate an intuitive normative response to "the" situation taken as a whole. But viewpoint dependency means that "the" situation is really several different situations depending upon the viewpoint adopted. The jury cannot, therefore, simply choose sides; its role is to form an understanding of the circumstances from its own shared and intermediate perspective. This intermediate perspective is obtained through a complex process of analyzing and comparing a number of different descriptions.

To create an intermediate perspective, the jury must recognize the partial perspective of each observer. The analogy of physical observation suggests that no observer has an ideal position from which to offer a perspective-free account of the underlying controversy. Instead, a final account can be reached only by receiving multiple reports and interpreting those reports within a framework that includes the exact

position of each observer. Following this analogy, we can think about the problem of viewpoint in legal cases by thinking about the information that is necessary to permit the jury to make a common-sense judgment not only about what has been observed but also about the normative perspective that colors each observer's perception of the "facts" of the case. Thus, one way to look at the various procedures that surround jury adjudication is to look at the extent to which they are aimed at correcting ordinary limitations of observation and judgment. A number of tort trial practices can be understood in this way. For example:

- There is no limit to the number of witnesses that parties may call. This represents a concern that the jury shall receive all possible points of view.
- All testimony is subject to wide-ranging cross examination. This is intended to help the jury make reasonable judgments about the perspective of each witness.
- The jury hears each side's story within a framework that includes rules of evidence and formalized courtroom procedures. This is intended to exclude prejudicial or inherently unreliable information and to aid the jury in putting each piece of evidence in the proper perspective.
- The jury may not discuss the case with outsiders nor prematurely among themselves. Again, this guards against the receipt of prejudicial information. It also has the effect of preventing jurors from committing themselves to a point of view while their understanding of the case is still relatively partial.

These procedural devices are aimed at protecting the jury's own emerging point of view from "illegitimate" influences. The concept of an "illegitimate" influence is not straightforward. Information is not necessarily excluded merely because of its probable falsity — questions of credibility are for the jury. Nor is testimony barred simply because it may play upon the emotions of the jury. The dominant consideration is that all relevant information should be admitted so long as it is possible through the technique of cross examination or otherwise to place the information in its proper perspective.[198] This is because the jury, in coming to a shared interpretation of the relevant evidence, is not simply weighing the credibility of witness accounts; it is instead performing the more complicated task of piecing together a fabric of observations and partial perspectives that begins to tell a coherent story about "what happened."

198. Rule 403 of the Federal and Revised Uniform Evidence Rules states that evidence may be excluded by a judge "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The need to define what evidence is "probative" and nonprejudicial is one important reason to explore the effect of bias and viewpoint on normative decisionmaking.

2. *The Role of Rules in the Creation of a Discourse of Shared Interpretation*

In order for jurors to piece together a shared interpretation of an underlying incident, they must construct a discourse of shared interpretation and a shared vocabulary for dealing with the normative claims of the parties. In this endeavor, they are aided by the legal instructions given to them by the trial judge. Thus, the jury's decisional context is defined not only by the procedural devices described in section IV.B.1 but also by the instructional practices of trial courts. We have seen that these instructions, properly understood, are not rules of decision that determine the ultimate judgment. They nevertheless play an important role in defining the discourse in which the jury proceeds to judgment. For example, one common instruction is the following:

> This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.[199]

In effect, jurors are told to disregard, to the extent that they can, whatever prejudice they may have concerning the parties. Jurors may not be able to do this; jurors may not even admit to themselves that they have any such prejudice. Nevertheless the court's instruction points out the need for caution and provides jurors with a clear statement of principle that can be used as an argument should such prejudice surface in the jury's deliberations. The need for fairness becomes, in effect, a group "norm" for the jury.

In a similar fashion, we can understand the real purpose of the negligence instruction. This instruction, while not outcome determinative, nevertheless plays an important role in the presentation and decision of tort cases. In most cases, the governing legal theory is established prior to trial. This theory is the basis of the parties' presentations as well as the touchstone for evidentiary rulings. Its importance, however, is not limited to this organizing function. The theory becomes an instruction and, as such, plays an important role in the deliberative process of the jury. For example, the judge tells the jury that the defending party's conduct must be reasonable. Among the jury, there may be widely divergent views as to what constitutes reasonable conduct. The point of the instruction, however, is to create the basis for discussion; individual jurors are not allowed to forgo this way of analyzing the case. They cannot say: "Why quibble over what

199. FEDERAL JURY PRACTICE AND INSTRUCTIONS, *supra* note 127, § 71.03, at 20.

is reasonable? The defendant didn't need to be out so late and that is the end of the matter." The term "reasonable" is an item in the shared vocabulary of the jury. Within the framework of the jury deliberation, its relevance is beyond dispute and disagreements over the application of the term require resolution. When we understand substantive tort rules in this way, we can see that while they do not "decide" cases, they play an important role in creating a shared interpretive vocabulary.

3. *Collective Decisionmaking as a Way of Compensating for Partial Perspectives*

The construction of a shared interpretive vocabulary is but one step in a larger process of collective decisionmaking. Jury consensus is made difficult by the fact that it is not only the parties and witnesses who bring their own individual normative bias to the "facts" of the case. Individual jurors also receive evidence and testimony through a filtering web of prior experience and normative attitudes. Juror *A* sees the plaintiff as a bully; juror *B* sees the very same man as a reasonable person. The problem of partial perspectives affects each juror's receipt of evidence in the same way that it colors observer accounts.[200] Thus, there are two distinct levels of viewpoint-dependency. There is a first-order bias among those who witnessed the incident and a second-order bias among those who hear the various witness accounts. The first level requires that the variation in witness accounts be resolved in favor of a shared interpretive framework that identifies the perspective of each witness and locates that witness' viewpoint within the framework. The second level requires that the jury reconcile its own diversity of normative viewpoints by engaging in a process of collective decisionmaking.

A jury decision is meant to be collective in a real sense. If all that the tort system required was an aggregation of the individual opinions of individual jurors, then a public vote could be taken at the close of evidence. Instead, a number of procedures facilitate group deliberation. Throughout the trial, the jurors sit together enclosed in a box. To deliberate, they retire to the privacy of a jury room. Nonjurors are excluded and the jury is isolated physically. What happens in the jury room is both secret and privileged and no time limit is imposed on the process. In short, the experience of serving on a jury is marked in

200. *See supra* section III.A.2. It is generally recognized that juror "bias" is not limited to cases where the juror knows one of the parties or is a party in similar litigation. This is the reason why lawyers are given wide latitude in questioning prospective jurors and a comparatively generous number of peremptory challenges.

numerous ways — both subtle and explicit — as an experience of group participation.

While the jury is not required to justify its decision either to the parties or to the court, the process of group deliberation requires individual jurors to explain their reactions to their fellow jurors. Opinions about the appropriate outcome and the reasons that support those opinions are subject to scrutiny and group discussion. In a process that has elements of open-ended exploration, negotiation, and debate, the jury moves toward its own formulation of the event in dispute.[201] In the course of this process, individual jurors may identify and disclose their own biases and perspectives; they may refine their own initial appraisal of the case. But, more importantly, certain kinds of arguments and certain kinds of considerations become relevant to the group's decision regardless of whether any individual juror actually finds them personally persuasive. The emergence of this collective framework for discussing the case eventually results in a decision collectively taken. This decision may not reflect the initial views of some of the jurors; it may not even represent the outcome they would select if the case were up to them in their individual capacities. Nevertheless, it is a group verdict in the sense that it emerged from a process in which group norms dominated over individual viewpoints.

It is not my contention that group opinions are always more reliable or inevitably superior to judgments made from an individual perspective. This is clearly not the case. My claim is limited to a particular kind of normative problem and to a particular conception of legitimate judgment. Group decisionmaking may be disastrous when utilized to make plans or to consider questions of moral theory. My suggestion is that it may be the best we can do in confronting the kind of local normative problem that tort cases represent. The reason for this suggestion is that, under certain circumstances, group deliberation has the effect of limiting the impact of individual normative perspectives on the outcome of the case. The process of jury deliberation is not unlike the old story about the blindfolded men and the elephant. Each man tells a remarkably different story about the nature of the beast he has touched. If there are enough blindfolded men and if they are given enough time to compare notes, it is reasonable to suppose that they will piece together a collective story that both accounts for and rests on the experience of each member of the group. Similarly, jurors, by abstracting their impressions away from an emerging sense

201. For a discussion of the relationship between studies of small group behavior and empirical studies of jury decisionmaking, see R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 233-36 (1983).

of their own particular vantage point, arrive at a collective understanding of the nature of the decision that the case requires.

C. *Local Objectivity*

In the last section, we saw that jury decisions are based on shared experience and the development of group norms of judgment. To justify the jury's decision, however, there must be some way to characterize it as the correct resolution of the underlying dispute. It is necessary therefore to articulate a conception of "objectivity" that is appropriate for assessing jury decisionmaking.

The concept of objectivity is troublesome for pragmatic theorists because they deny the primacy of any particular viewpoint and also the possibility of an ideal post of observation. Traditionally, pragmatists have tried to reconstruct a notion of objectivity by focusing on rational method and intersubjective agreement.[202] This conception of objectivity is subject to a number of difficulties, and, indeed, these difficulties are even more severe in the area of normative dispute. What, after all, is a rational method for investigating normative questions? What should theorists do about the fact that tentative agreements on normative questions are so hard to obtain? Fortunately, our present inquiry does not require universal answers to these questions but only that they be addressed in one specific decisional context.

Tort cases arise from a particular kind of dispute. Such disputes are local in the sense that they focus on a specific transaction. Agreement on the proper resolution of such questions does not necessarily entail broader agreements on ultimate values or moral systems. If *A* steals a loaf of bread from *B*, jurors can agree that *A* ought to return the loaf whether or not they all subscribe to the same moral theory about stealing. Juries have no need to formulate a principle of general application, no need to agree on exceptions, and no need for a general theory of property rights. They need only reach an agreement about the proper resolution of this one specific case.

In attempting to reach such an agreement, the jury may find that its differing conclusions are the result of its differing perspectives on the controversy. One juror may not be sure that it was *B*'s loaf to begin with, or she may think that *B* is the kind of person who is constantly overreaching. Another juror may not believe that people who talk with the kind of accent that *A* has are truthful or may worry that

202. *See* 5 COLLECTED PAPERS OF CHARLES SAUNDERS PEIRCE paras. 376.2, 407, 408 (C. Hartshorne & P. Weiss eds. 1963); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

B was not able to make her point forcefully enough. In everyday life, viewpoint disputes concerning normative questions are frequently unresolvable within the limits of normal discussion, and it therefore seems a remarkable feature of the jury system that it operates, at least theoretically, on a principle of consensus.[203]

Jury consensus suggests a justificatory norm that I call local objectivity. The idea behind local objectivity is that, under certain circumstances, any number of observers will come to the same conclusion about a local normative problem. We can define local objectivity as follows: a judgment is locally objective if made by consensus after a process of investigation and deliberation that, as a matter of practical experience, produces agreements in local normative judgments among persons with varying normative viewpoints. Under this definition, most tort verdicts are locally objective because (1) they are based on a consensus jury verdict, (2) the process that is used in tort cases does, in fact, generally produce agreement,[204] and (3) tort juries normally include a cross section of normative viewpoints.[205]

This conception of local objectivity leaves open a number of problems. Certainly not every procedure that utilizes consensus results in justifiable judgments. For example, one could imagine a procedure that produced consensus by allowing plaintiffs but not defendants to present their side of the case. In order to determine which judgments are justified, the concept of local objectivity must be supplemented with a set of requirements that specify rational and fair methods for adjudicating cases. Thus, a complete pragmatic account of justification requires not only that a given judgment be locally objective but also that the process that produces that judgment be subject to wider and longer term agreements about fair procedures. Despite this limitation, the concept of local objectivity is useful in thinking about corrective justice issues. Tort rules operate in a wide diversity of actual circumstances and in contexts where factual disputes are difficult to separate from their normative counterparts. Differing view-

203. Jury unanimity has proved to be an elusive goal, and most jurisdictions now allow recoveries on something less than a unanimous verdict. Most jurisdictions, however, require a consensus in the form of a super majority. For a discussion of the effects of the decision rule on jury deliberation, see R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 201, at 29-32.

204. Kalven and Zeisel report a 5.5% figure for deadlocked juries in criminal cases. H. KALVEN, *supra* note 183, at 57 & n.2; *see also* R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 201, at 27 (reporting a 5.69% figure when a unanimous verdict is required and a 3.19% figure when only a majority verdict is needed).

205. It is obvious that most juries are homogeneous with respect to some areas of normative dispute and heterogeneous with respect to other areas. "Homogeneous" like "sameness" and "difference" is a relative term. My point here is that the diversity of civil juries is, in some sense, representative of the diversity in the wider society.

points are a pervasive aspect of such cases. The jury's role in mediating these differences is essential, and the consensus it represents is a significant part of the reason why tort adjudication is an acceptable and justifiable normative practice.

D. *Summary and Conclusion*

A pragmatic philosophy recognizes that bias is a pervasive feature of human experience and that it constitutes a large portion of our individuality and personhood. In most circumstances, we need not be overly concerned that normative judgments are situated within a context of personal history and temperament. But legal disputes raise special problems because we believe that it is not legitimate to resolve them on the basis of situated interpretations and values. In response to this dilemma, the legal system strives to achieve judgments that can be endorsed by relatively impersonal forms of justification.

The tort system uses two methods for reducing the effects of bias. One method is to utilize rules that are abstractly formulated and therefore seem less vulnerable to charges of partiality. A second method is to acknowledge the problem of viewpoint and to adopt procedures that will minimize its effect on real world judgments. The first method is found in rule-based practices;[206] the second in jury adjudication. Since jury adjudication is only loosely constrained by rule-based practices,[207] it relies heavily upon viewpoint-dependent normative judgments. Thus, justification of tort outcomes requires justification of both the rule invoked and the nonrule-based practices that define the personality and viewpoint of the decisionmaker. In short, we must have some reason to believe that the jury's viewpoint deserves respect as a legitimate and authoritative place from which to render judgment.

In this Part, I have argued that the judgments of tort juries are worthy of this kind of respect. Jury judgments are locally objective because they result from procedures that produce consensus judgments while allowing each side considerable latitude in presenting its own view of the case. As a result of these procedures, juries are able to reach a collective decision that transcends individual viewpoints.

CONCLUSION: CONSEQUENCES FOR TORT LAW

This paper began by recognizing that modern tort law cannot be fully justified by its regulatory and compensatory functions. As an alternative, it explores the possibility of a corrective justice rationale.

206. *See supra* note 21.

207. *See supra* Part III.

The conception of corrective justice that it develops differs radically from other contemporary accounts in that it is pragmatic rather than rule based. The trouble with rule based accounts, I have argued, stems from the indeterminacy of the rules and principles on which they are based. A principle cannot provide justification for an individual decision if it is indeterminate with respect to that decision. And, since the essence of a corrective justice justification is an appeal to the fairness of individual decisions, I have concluded that rule based theories do not provide adequate justification for the tort system.

In contrast, the pragmatic conception of corrective justice is based upon the idea that tort law enforces community standards of financial responsibility and just compensation. The difficulty with this approach is that the application of these standards requires *ad hoc,* intuitive judgments that are heavily influenced by the viewpoint of the decisionmaker. The tort system compensates for the subjectivity of individual viewpoints, I have suggested, by allowing the jury to evaluate a wide range of issues and by requiring that it operate in a decisional context that produces locally objective judgments. Thus, I conclude, jury adjudication is an essential element of reaching a fair resolution of corrective justice disputes.

The forgoing analysis is not intended to be decisive with respect to current questions of tort policy. It does not, for example, provide entirely persuasive reasons for adopting corrective justice as the dominate goal of the tort system. Nor does it consider how the corrective justice goal interacts with the other tort goals. Rather this article is meant to be tentative and exploratory. It attempts, as I noted at the outset, to clarify fundamental questions about the nature of tort liability and the basis for corrective justice claims.

Nevertheless, the analysis developed above raises some concerns about a number of contemporary practices. These practices include the tendency of some trial courts to pressure juries into reaching consensus,[208] the use of peremptory challenges to exclude jurors from minority cultures,[209] and the growing trend toward permitting juries to reach a decision by a simple majority vote.[210] Each of these practices undermines the conception of local objectivity as a justification for case-specific jury judgment.

208. *See* Leaphart, *Eighteenth Annual Review of Criminal Procedure: Trial,* 77 GEO. L.J. 1009 (1989).

209. *See* Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenger,* 63 S. CAL. L. REV. 1015 (1990).

210. *See* Feikeus, *The Civil Jury - An Endangered Species,* 20 U. MICH. J.L. REF. 789, 795-96 (1987).

Also of concern is the recent round of suggestions that judges should exercise greater control over tort outcomes. Tort law has always displayed a tension between "bright line" rules and jury discretion. Many traditional common law doctrines operated to place certain issues under judicial control.[211] In modern times, however, the use of technical rules to control juries has eroded substantially.[212] The trend toward liberalizing the rules that allow plaintiffs to get to the jury has been noted with dismay by many commentators and is frequently blamed for exacerbating the tort crisis. Epstein, for example, decries the "incurable judicial fondness for replacing fixed rules of tort liability with open-ended balancing tests" as "one central methodological weakness of modern tort law."[213] The problem, however, with rule-based alternatives should be clear from the foregoing discussion. Tort law could become truly rule-based only if judges could fashion legal rules that are comprehensive enough to provide guidance in every case, specific enough to decide each individual case, and, at the same time, appropriately linked to general considerations of fairness. Since all these goals cannot be achieved simultaneously, those who advocate rigid adherence to technical legal rules are generally willing to sacrifice individual fairness to the supposed utility of a "bright line" system.[214] If I am correct that the value of the tort sys-

211. As of 1930, Green's list included: "[t]he doctrines of trespass, licensee, invitee, affirmative conduct, fault, act of God, assumed risk, contributory negligence, gross negligence, discovered peril, last clear chance, independent contractor, non-delegable duties, dangerous instrumentalities, scope of employment, joint enterprise, nuisance, proximate cause, and others." L. GREEN, *supra* note 47, at 386.

212. For example, in most states, contributory negligence has been replaced by comparative negligence. *See, e.g.,* N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982); WIS. STAT. ANN. § 895.045 (West 1983); *see also* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). Similarly, assumption of the risk has been eliminated or merged with comparative negligence, *see, e.g.,* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 48-56, 155 A.2d 90, 93-97 (1959); the rules governing the duties of occupiers have been liberalized, *see, e.g.,* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); and the rejection of affirmative duties has been blurred and riddled with exceptions, *see, e.g.,* RESTATEMENT (SECOND) OF TORTS §§ 322, 395 (1964). In addition, courts have created new torts such as wrongful employment termination, *see, e.g.,* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *but see* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), and bad faith failure to settle an insurance claim, *see, e.g.,* Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); *see also* Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), *overruled by,* Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), that require juries to consider, under all the circumstances, what reason and justice require.

213. Epstein, *The Risks of Risk/Utility,* 48 OHIO ST. L.J. 469, 469 (1987).

214. Epstein, for example, recognizes that rigid rules may reach nonoptimal results in specific cases, but argues that this result is justified by utility: "The narrower proposition that a good consequentialist works with is that social utility will be advanced, as a first approximation, by specific rules that curb the use of force, lying, and misrepresentation, and insure that persons

tem is in its quest for individual justice, then this tradeoff must be regarded as unacceptable: fairness is an important aspiration for tort law and case-specific consensus decisionmaking is essential to achieving fair outcomes.

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keep their promises." *Id.* at 471 (footnote omitted). Epstein's sacrifice of individual result to the collective good is consistent with his generally utilitarian views on tort law. *Id.* at 470.