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# PROCESS CONSTRAINTS IN TORT\*

James A. Henderson, Jr.†

Fierce debates have raged in recent years over the objectives reflected in the tort-law system. A growing number of observers insist that tort law reflects efforts to achieve allocative efficiency and wealth maximization.<sup>1</sup> A somewhat smaller, but no less intensely committed, number insist that tort law primarily reflects fairness concerns.<sup>2</sup> To these may be added writers who maintain that liability rules are supported by a combination of efficiency and fairness considerations.<sup>3</sup> Understandably enough, these social policy debates tend to focus on the substantive content of tort law. What, various writers have asked, does the traditional refusal of courts to recognize a general duty to rescue tell us about the objectives of tort? Does such refusal suggest that fairness, rather than efficiency, is the underlying theme? Or does it constitute proof positive of precisely the opposite hypothesis?

Rather than engage in these debates, I would like to explore the possibility that some, at least, of the substantive tort doctrines that fairness and efficiency theorists seek to reconcile with their world views are more readily explainable in terms of the constraints imposed by the processes by which liability rules are implemented both in and out of court. Could it be, for example, that the refusal to impose a general duty to rescue has less to do with substantive objectives than with constraints of process? In this analysis, I will argue for exactly that conclusion. Whatever one's view of the underlying objectives of tort, to accomplish those objectives tort law must effectively guide behavior. I shall demonstrate that this necessity imposes constraints that very much

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<sup>1</sup> See, e.g., Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980). For recent criticism of these views, see Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

<sup>2</sup> See, e.g., Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

<sup>3</sup> See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980). Dworkin criticizes Calabresi's use of "fairness overrides." See Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980).

affect, and thus help to explain, the substantive content of tort doctrine. From time to time, courts and commentators have recognized the existence of these constraints. But never have they been drawn together systematically and advanced as analytical tools with which to explain substantive tort doctrine. Part I of this article develops a process perspective on tort and describes the conditions necessary for tort law to guide primary and adjudicative behavior. It then derives process constraints from these conditions and considers their relevance to the substantive objectives of tort law. Parts II and III bring these constraints to bear on traditional tort doctrine, including some areas for which neither fairness<sup>4</sup> nor efficiency<sup>5</sup> theorists have been able adequately to account, demonstrating both the descriptive and the prescriptive force of the process perspective.

## I

### DEVELOPING A PROCESS PERSPECTIVE ON TORT LAW

The phrase "process perspective on tort law" is likely to be understood to invite analysis of the various processes and procedures by which liability rules are applied both in and out of court. Such an implication would be consistent with Professor Summers's provocative *Process Values* article that appeared several years ago in this law review.<sup>6</sup> My focus, however, is narrower. The "process perspective" to which I refer focuses not on the processes themselves, but rather on the effects that these processes have on the substantive content of the tort law. My inquiry is not directed toward improving process; instead, it aims at increasing our understanding of the concessions that substantive tort law must make to the realities of process.

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<sup>4</sup> See, e.g., *Vaughan v. Menlove*, 3 Bing. (N.C.) 468, 475, 132 Eng. Rep. 490, 493 (C.P. 1837) (Tindal, C.J.) (recognizing need for objectively verifiable liability standards); see also *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969) (court lists seven reasons for denying negligence-based recovery for fright without effect, four of which are clearly process-oriented).

<sup>5</sup> Judge Richard Posner, a prominent efficiency theorist, has explored the economics of process in several essays. See, e.g., Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973). Lon Fuller, on the other hand, stressed the fairness elements of process. See L. FULLER, *THE MORALITY OF LAW* (1964). On the general subject of process concerns see H. HART & A. SACKS, *THE LEGAL PROCESS* (Tent. ed. 1958); Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

I attempted something of this sort several years ago, but limited my inquiry to the problems associated with judicial violations of but one of the process constraints, the fourth one of manageability. See Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467 (1976).

<sup>6</sup> Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

Tort law accomplishes social ends primarily by providing guides to two different types of behavior: the primary behavior of those persons whose activities generate the accident costs upon which liability issues focus,<sup>7</sup> and the adjudicative behavior of the lawyers, judges, and jurors who have responsibility for officially resolving liability disputes.<sup>8</sup> The first type might be called the "self application" feature of tort law, and the second type the "official application" feature. The prospective effects of tort law on primary behavior are of particular concern to efficiency theorists. For them, liability is future-oriented and is justified primarily because it deters actors from engaging in wastefully hazardous activities.<sup>9</sup> Fairness theorists, in contrast, emphasize the function of tort law in providing guides to adjudicative behavior. They believe that courts are justified in imposing liability on wrongdoers regardless of whether doing so would affect primary behavior in the future.<sup>10</sup> Notwithstanding these differences in emphasis, however, both substantive camps are concerned with the effects of tort law on both primary and adjudicative behavior.<sup>11</sup>

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<sup>7</sup> See, e.g., Ehrlich & Posner, *supra* note 5, at 261.

<sup>8</sup> Ehrlich and Posner refer to this behavior as "legal system behavior." Ehrlich & Posner, *supra* note 5, at 264. As used here, "adjudicative behavior" is limited to the in-court behavior of these actors. When lawyers settle cases out of court, they substitute contract negotiation for adjudication. This substitution is significant from the process perspective. See *infra* notes 30-32.

<sup>9</sup> See *supra* note 2. Professor Fletcher refers to this aspect of efficiency rationales as their "instrumentalist" feature. See Fletcher, *supra* note 2, at 538. Professor Calabresi has identified two instrumentalist effects of tort rules on individual behavior: (1) specific deterrence, achieved when the rules specifically describe how actors should or should not behave; and (2) general deterrence, achieved when market decisions are affected by the inclusion of liability and liability avoidance costs in the prices of various goods and services. See G. CALABRESI, *supra* note 3, at 27.

<sup>10</sup> See Fletcher, *supra* note 2, at 538-39 n.4.

<sup>11</sup> Efficiency theorists reflect concern for the effects of tort rules on adjudicative behavior when they treat those effects as part of the "transaction costs" associated with the tort system. See Ehrlich & Posner, *supra* note 5. Although fairness theorists purport to focus on the effects of tort law on adjudicative behavior, they recognize that liability decisions reflect our views of the behavior that can be expected from the individuals to whom tort rules apply. Professor Fletcher thus recognizes the fairness of excusing an actor from liability on the grounds of unavoidable ignorance:

[T]he question of rationally singling out a party to bear liability becomes a question of what we can fairly demand of an individual under unusual circumstances. Assessing the excusability of ignorance . . . can be an instrumentalist inquiry. As we increase or decrease our demands, we accordingly stimulate future behavior . . . Yet one can also think of excuses as expressions of compassion for human failings in times of stress—expressions that are thought proper regardless of the impact on other potential risk-creators.

Fletcher, *supra* note 2, at 553. In this passage, Fletcher translates the "what can we expect of actors in the future?" concerns of efficiency theorists into a "what can we expect this actor to have done in the past?" fairness concern. Although Fletcher looks backward rather than forward, he is concerned with what tort rules can (he would add "fairly") demand of primary behavior.

### A. *The Conditions Necessary for Tort Law to Guide Behavior*

The sections that follow first describe the conditions necessary for tort law to guide both primary and adjudicative behavior, and then derive process constraints to which tort law generally must conform if it is to perform these functions. Although the underlying assumption is that tort law guides behavior,<sup>12</sup> no claim is made that it does so inexorably. Indeed, I am comfortable with assuming significant limits on the efficacy of tort law in these regards.<sup>13</sup> But if tort law is to play any role in guiding either primary or adjudicative behavior, the characteristics about to be described are ones to which rules must generally conform.<sup>14</sup>

#### 1. *Liability Rules as Guides to Primary Behavior*

To the extent that tort law affects primary behavior, it does so by informing persons of the liabilities imposed for various activities. Some liability rules describe activities that may result in liability regardless of the level of care exercised. The rule of manufacturers' strict liability, for example, holds producers liable for harm caused by defective products regardless of how carefully they try to avoid defects;<sup>15</sup> similarly, a physician who fails to obtain his patient's consent to non-emergency treatment is liable as an insurer for resulting harm regardless of how skillfully he acts.<sup>16</sup> Liability rules also describe activities that will not expose actors to liability regardless of the level of care exercised. These are the

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<sup>12</sup> Professor Epstein has recently attacked this assumption, at least as it relates to primary behavior. See Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982). A careful reading of the article, however, reveals that he is primarily concerned with the social effects of marginal changes in common law liability rules rather than with the effects of the tort system in gross.

<sup>13</sup> To some extent, of course, individuals to whom rules are addressed are incapable of responding rationally. In those instances, the only kind of behavior that the rules will affect is adjudicative behavior. For a recent challenge to the assumption of primary rational behavior that underlies much of traditional tort commentary, see Rodgers, *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1 (1980). Even Professor Rodgers agrees that tort rules can and do affect what he calls "rational" behavior. On the effectiveness of law as a guide to primary behavior, see L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 45-136 (1975); H. JONES, *THE EFFICACY OF LAW* (1969).

<sup>14</sup> See *infra* text accompanying note 43.

<sup>15</sup> See RESTATEMENT (SECOND) OF TORTS § 402A (1964). In theory, a producer held strictly liable for defective products will invest in defect-avoidance measures up to the point of diminishing returns, and then insure against the liability that predictably will follow from the defects not worth trying to avoid. As long as the demand for his products is sufficiently great to allow him to earn a reasonable return on his investment, the producer will continue his activities and treat the costs of avoiding and insuring against defects as just another cost of doing business. It should be understood that we are referring here to strict liability for production defects. Design defects present very different problems. See generally Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979).

<sup>16</sup> See W. PROSSER, *THE LAW OF TORTS* 104 nn.59-63 (4th ed. 1971). The basis of liability in these cases is battery. For purposes of the present analysis, I include intentional torts in the first category of activities that bring liability regardless of the care exercised. See

rules conferring immunity on special categories of actors, such as governmental decisionmakers<sup>17</sup> and parents supervising their minor children.<sup>18</sup> Finally, liability rules describe the minimum levels of care with which all other activities must be undertaken to avoid liability for harm thereby caused. The best examples are those rules imposing general negligence standards of reasonable care.<sup>19</sup>

For tort law to guide effectively decisions on whether and how to engage in activities creating risks of harm to others, certain conditions must be met. Some of these conditions do not relate directly to the content of the liability rules and are of secondary importance in this analysis. Thus, liability rules must be communicated to those whose behavior is sought to be affected and must remain sufficiently constant through time to permit rational planning. And the persons to whom the liability rules are directed must be intelligent enough to understand the rules and motivated to follow them.

Attention in this article focuses on the conditions to which the liability rules themselves must conform if they are to affect behavior in the ways intended. For liability rules to guide primary behavior, they generally must conform to the following criteria. First, their clarity must be such as to enable persons to distinguish between modes of conduct that will bring liability and modes that will not. Second, they must refer to factual circumstances that can be objectively verified, so that persons can apply the rules with some measure of confidence. Finally, to the extent that the rules describe patterns of behavior to which individuals are expected to conform, they must avoid calling for behavioral patterns that are not achievable by those to whom the rules are directed.<sup>20</sup>

## 2. *Liability Rules as Guides to Adjudicative Behavior*

The need for clarity, verifiability, and conformability in liability rules is just as important here as it is in the primary-behavior context.<sup>21</sup>

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generally Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability By Way Of Informed Consent*, 56 NEB. L. REV. 51 (1977).

<sup>17</sup> See generally Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926), 28 COLUM. L. REV. 577, 734 (1928); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 221 (1924).

<sup>18</sup> See *infra* notes 108-12 and accompanying text.

<sup>19</sup> See generally W. PROSSER, *supra* note 16, at 139-204. It is important to observe that in theory the rules governing liability for negligent conduct are designed so that rational actors will avoid liability. See generally Posner, *supra* note 1.

<sup>20</sup> The first and third conditions closely parallel two of the conditions described by Lon Fuller as necessary for rules to govern conduct. See L. FULLER, *supra* note 5, at 38-39. Fuller's other conditions are not included here because they concern aspects of process other than the content of the rules. These include, for example, the requirements that rules be publicized and that they not be changed too frequently. *Id.* at 39. Fuller surprisingly does not address the concern reflected in the second condition described in the text, except as they may be reflected in his eighth condition that official conduct must be consistent with the rules. *Id.*

<sup>21</sup> In trying to predict their liability exposure, individual actors look for guidance to the

Judges and juries must be able to understand the rules, to verify the facts relevant to their application, and to conform to the relevant procedural requirements. But the shift in context introduces one significant, complicating factor—reliance upon the adjudicative process of decision. As it is used here, adjudication refers to the traditional process by which interested parties present proofs and arguments before an impartial judicial tribunal, urging that the applicable rules of decision, when applied to the proven facts, entitle them to a favorable result.<sup>22</sup> New adjudicative forms have evolved in recent years, most notably in areas of public law, that deviate significantly from this traditional model.<sup>23</sup> Consideration of these new forms of adjudication, however, is beyond the scope of this analysis. This article will focus on traditional adjudication because tort law is a body of law that has been generated by, and that still presupposes, a traditional adjudicatory model.

The key to understanding the traditional process of adjudication is to appreciate the significance of the litigants' right of participation in reaching a decision.<sup>24</sup> At the level of primary behavior, exposure to liability pressures an actor to weigh the interests of others more than he might otherwise do. He is not, however, ordinarily required to invite those who may be adversely affected to come in and plead their cases before him.<sup>25</sup> He may consult others before he acts, but he need not do so. Whether or not he consults those directly affected, the actor relies on his own judgment and intuition in attempting to reach an appropriate decision.<sup>26</sup> In contrast, traditional adjudication presupposes that per-

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patterns of liability that emerge from the applications of tort rules in court, rather than simply to the rules themselves.

<sup>22</sup> See Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 19.

<sup>23</sup> See generally D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Diver, *The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 98 HARV. L. REV. 465 (1980); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

<sup>24</sup> See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978). But see Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 39-44 (1979).

<sup>25</sup> Legislatures and administrative agencies are the only significant exceptions. For discussion of the extent to which administrative agencies are required to hold public hearings before they act nonadjudicatively, see Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). Whenever an individual actor's liability depends on obtaining the consent of those affected by his conduct, his exposure to liability compels the actor to involve them in the decision process. Thus, before a physician performs nonemergency surgery, he must obtain the informed consent of the patient. See *supra* note 16 and accompanying text. But even in this context the extent to which the patient actually participates in the decisions relevant to the treatment is limited. In the broader context of tort liability generally, when actors and victims have no opportunities to identify one another ahead of time, ex ante participation by those adversely affected is nonexistent.

<sup>26</sup> Thus, even if the actor is an administrative agency, so long as it is not acting through formal adjudication, it is free, both de facto and de jure, to exercise significant discretion in its

sons whose interests will be directly affected by a decision are guaranteed an opportunity to participate in the decisionmaking process, for the court must take into consideration their proofs and arguments.<sup>27</sup> It follows that for liability rules to support these adjudicatory endeavors, the rules must require that the relevant facts are likely to be verifiable by objective evidence, and that the issues for decision be arranged so that they may be addressed, considered, and decided in an orderly sequence.

The first of these requirements, verifiability, parallels the requirement in the context of primary behavior that liability rules refer to factual circumstances that are objectively verifiable. In contrast, the second requirement, orderly consideration of the issues, is unique and deserves further elaboration. The best way to understand the need for liability rules to clarify the issues to be argued and decided through adjudication is to examine the kinds of problems that only extrajudicial decisionmakers are capable of solving. Many of the day-to-day planning problems that confront individuals require the weighing and balancing of interrelated elements and considerations. In the absence of a rule making one or two factors determinative, a diverse range of factors must be considered. Moreover, these factors tend to be related to each other in ways that require most or all of them to be re-evaluated as each is considered in turn.<sup>28</sup> These problems, often called "polycentric,"<sup>29</sup> are capable of being solved by a person exercising managerial discretion—the decision process that individuals employ in planning their day-to-day activities.<sup>30</sup> Planning problems lend themselves to being "mulled over" and are usually solved by intuitional exercises of discretion. Relying on a combination of experience and intuition, skillful managers are able to reach sensible conclusions in a fairly high percentage of instances.<sup>31</sup>

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decisionmaking. See Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754-55 (1975).

<sup>27</sup> For discussion of the limited extent to which courts may exercise discretion in the context of traditional adjudication, see Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

<sup>28</sup> Selecting a living room rug is an example of such a task. Many factors are relevant to the decision: size, color, shape, design, texture, price, etc. And all are mutually interdependent—one's initial reaction to the texture, for example, may require adjustment as one focuses on the color and design, and subsequent adjustment when one balances the texture, color and design against the price. In the end, the best "rug pickers" are those with the best intuitions.

<sup>29</sup> See Fuller, *supra* note 24, at 394-404.

<sup>30</sup> *Id.* at 398. Another important process by which polycentric problems are solved is contract negotiation between interested parties. *Id.* at 399.

<sup>31</sup> Managers can and frequently do rely on rules. If the rules are "rules of thumb," the problems retain their polycentric character and the manager relies largely on intuition in applying them. If the rules are formal and specific, they will reduce the polycentricity of the problems facing the manager. See *infra* note 36 and accompanying text.



These polycentric planning problems, however, cannot be addressed effectively by the traditional adjudicatory process. Mutually interdependent factors can be assessed only by an ongoing process that permits tentative reactions to be reconsidered and altered in light of additional factors. Traditional forms of adjudication do not allow for such an approach to decisionmaking. Each litigant is promised the opportunity to rely on rules that, he can argue, not only support but *require* the result that he urges on the court. It follows that the rules of decision must reduce the mutual interdependency of the issues so that the affected parties can offer proofs and render arguments in an orderly sequence. Legal rules must, in effect, "depolycentrize" planning problems by addressing and resolving the major policy questions ahead of time at the rule making stage, leaving a manageable number of related but not highly interdependent facts and circumstances to be determined at the rule-application stage.<sup>32</sup> For rules to perform this function they must be somewhat specific and, if the underlying problems are complex, relatively complicated. By hypothesis, legal rules will not render complex planning problems adjudicable if they confront courts with open-ended questions such as "what solution would be reasonable under all the relevant circumstances?"<sup>33</sup>

It will help clarify this concept to consider what would happen if a court employing the traditional process of adjudication were to address a complex planning problem without the aid of adequately specific rules of decision. Suppose a court were to entertain a claim for damages based upon the argument that the defendant municipality had negligently failed to provide reasonable police protection, causing the crime rate to rise and the value of the plaintiff's home to fall. In the absence of some standard more definite than "reasonableness,"<sup>34</sup> the plaintiff would be asking the court to judge the city's police budget by hypothetically designing an alternative plan for the collection and disbursement of municipal revenues for police protection.<sup>35</sup> The size of a reasonable

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<sup>32</sup> When courts engage in rule making, they arguably exceed the limits of adjudication. Several considerations, however, make this judicial activity necessary and legitimate. First, courts engage only in incremental rule making. This helps to reduce the open-endedness of the issues. In rare instances when judges attempt to derive complex rules "out of wholecloth," they are rightly criticized. Second, judicial rule-making efforts are subject to review on appeal and in subsequent decisions. This does not reduce the polycentricity, but it does provide additional opportunities to address the policy issues in other judicial forums, thereby decreasing the likelihood of the rules being influenced by the decisionmakers' individual biases.

<sup>33</sup> Indeed, such a "rule" would not properly be described by that term, but would more properly be called a "standard." See Ehrlich & Posner, *supra* note 5, at 258-61.

<sup>34</sup> A more specific rule might be available. For example, the city charter might require certain expenditures, and the budget could be declared unlawful without them; or perhaps the court would adopt as a legal standard the average expenditure figure for cities of comparable size.

<sup>35</sup> The court in such a case would not be asked to design a new budget for the city, of course, but would merely be asked to decide whether the existing budget was reasonable.

police budget can only be determined in light of the city's needs and resources. Even assuming that the size of a "reasonable" budget could be determined, albeit tentatively, it next would be necessary to address the question: "How should a budget for police reasonably be allocated?" This polycentric question could, in turn, only be answered by weighing a number of considerations, including the comparative needs of various parts of the community, the available means of meeting those needs, and the relationships among the various needs and means.

As the parties in such a case progressed to questions of the sizes and numbers of police shifts, it would be necessary to consider not only more specific questions such as "patrol cars versus foot patrols," but also to return repeatedly to the fundamental question of a "reasonable budget." Without more specific rules of decision, no sooner would one side complete its proofs and arguments on the various issues involved than it would be required to replicate the entire process, with appropriate adjustments, in response to countervailing proofs and arguments by the other side.<sup>36</sup>

It should be emphasized that the sorts of problems presented in this hypothetical do not defy rational solution. To the contrary, planning techniques are available with which competent city managers are able to approximate, if not achieve, optimal allocations of municipal resources.<sup>37</sup> Likewise, the persons who become judges are not necessarily incompetent managers, and courts would not invariably make fools of themselves or self-destruct if they were to entertain actions of the sort just described. Indeed, as has already been observed, courts relying on new forms of adjudication are with increasing frequency entertaining

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Implicit in such a review, however, would be the necessity of deciding how a minimally reasonable budget would have been drawn up.

<sup>36</sup> Trials are not typically structured to accommodate such "back and forth" argumentation. Thus, in our hypothetical case the litigants would be forced into a two-step process in which the plaintiff, and then the defendant, would present his side. This would not solve the difficulties associated with polycentric problem solving; it would merely deny their existence by fiat. Each side could be expected to try to adjust his arguments to reflect alternatives likely to be presented by the other. For example, the plaintiff would argue: "Now, the defendant may answer my first point with this argument . . . . If he does, I reply as follows . . . . On the other hand, if he takes a different approach, I will counter by going back and adjusting my position on an earlier issue." Denied the opportunity to address the polycentric problem as it should be addressed, in the "back and forth" manner usually associated with negotiation, the parties would adjust as much as possible. To the extent that adjustment became impossible, the litigants would be denied the opportunity to participate meaningfully in the adjudicative process. Not surprisingly, the so-called "new" forms of adjudication developed in recent years, by means of which courts address extremely polycentric social planning problems, allow for the sort of "back and forth" negotiations described here. See Chayes, *supra* note 23, at 1298-1302.

<sup>37</sup> See generally PUBLIC EXPENDITURES AND POLICY ANALYSIS (R. Haveman & J. Margolis eds. (1970); E. QUADE, ANALYSIS FOR PUBLIC DECISIONS (1975); E. STOKEY & R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS (1978).

public-law claims somewhat analogous to the one just described.<sup>38</sup>

If a court were to entertain the hypothetical negligence claim described above,<sup>39</sup> however, it would be forced to depart from the traditional adjudicative model and would be compelled to substitute a management model in its place. The parties to such an action would be given their "day in court" in that they would be heard. Participation in the manner described earlier, however, would not be possible. The litigants would not be able to invoke rules that they could claim entitle them to a favorable decision as a matter of right. They would be forced instead to approach the court as supplicants, hoping to impress the judge or jury with elements in the matrix favorable to their side.<sup>40</sup> In the end, after the parties had rested on their proofs and arguments, the decisionmaker (judge or jury) would "mull over" the problem and resolve it by the intuitional exercise of discretion. The result reached in a given instance might be sensible enough, depending on the particular decisionmaker's managerial skills. But it would be a result reached by a management process and not by adjudication.<sup>41</sup>

If parties are to participate meaningfully in the adjudication of tort cases, rather than merely as supplicants before disinterested managers, liability must structure the issues so that each important aspect can be addressed and resolved without the necessity of continuous reconsideration and reevaluation in light of subsequent developments in the course

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<sup>38</sup> See *supra* note 23. The new forms of adjudication are concerned primarily with structural reforms in public institutions rather than recovery of money damages. Thus, a court might entertain a class action brought to reorganize a corrupt police department.

<sup>39</sup> The court probably would not entertain such a claim. First, the plaintiff probably would be barred by the doctrine of sovereign immunity because he is attacking discretionary, policy-level decisions. See *supra* note 17. Second, courts generally do not allow recovery in tort for economic harm. See, e.g., *In re Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968); *Stevenson v. East Ohio Gas Co.*, 47 Ohio L. Abs. 586, 73 N.E.2d 200 (1946). But see *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (commercial fishermen recover damages from oil companies for negligent diminution of aquatic life caused by oil spill). Both of these traditional limitations on exposure to liability reflect significant process concerns.

<sup>40</sup> Given these open-ended planning problems in the absence of a more specific standard than "reasonableness," all that a litigant could impress upon judge and jury would be slogans such as "police protection is a citizen's right" or "we shouldn't interfere with the city council's judgment."

<sup>41</sup> Several writers in recent years have argued that such judicially-implemented management decisions constitute legitimate new forms of adjudication. See *supra* note 23. I agree that these new processes might be legitimate when they are limited to suits seeking injunctive relief in the public law sector. Whether legitimate or not in the context of public law, judges act as managers in those cases; devising a new label such as "consultative process" does not alter the fact that the parties in such cases are appealing to the exercise of managerial discretion. See Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978). Moreover, such "judicial management" techniques are not legitimate in the private law setting of the hypothetical. The plaintiff in such a case should take his complaint to the city council, not the court, for council members are the managers who may legitimately exercise the political judgments he demands.

of proof and argument at trial.<sup>42</sup> For tort law to perform this function effectively, polycentric social planning problems must be addressed in advance at the rulemaking stage; such problems cannot be relegated to case-by-case resolution.

B. *Process Constraints Derivable From the Ways in Which Liability Rules Guide Primary and Adjudicative Behavior*

The preceding description of the conditions necessary for liability rules to guide both primary and adjudicative behavior suggests the process constraints to which tort law generally must conform. These constraints are not absolute; they must be balanced against each other and against the substantive objectives they are intended to complement.<sup>43</sup> But within their proper bounds, these constraints impose requirements to which tort law must conform if it is to provide meaningful guides to conduct.

1. *The First Process Constraint: Comprehensibility*

For liability rules to guide either primary or adjudicative behavior effectively, they must be comprehensible to the persons whose behavior they seek to affect. Regarding the effect of tort law on primary behavior, rules defining the activities to which strict liability or immunity attach should describe these activities specifically enough to permit actors to determine with some accuracy when to expect such special treatment.<sup>44</sup> Vagueness need not be avoided at all costs; some generality in liability rules is not only unavoidable but also desirable.<sup>45</sup> Liability rules that describe the levels of care governing various activities, such as

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<sup>42</sup> Each level of argument, of course, will be influenced by those preceding it. However, the parties can accommodate their arguments to the two-step structure imposed by procedural rules, as long as subsequent elements do not require reconsideration of prior elements.

<sup>43</sup> The manner in which this balancing is carried out will depend on the view taken toward the objectives of fairness and efficiency. An efficiency theorist would treat violations of the process constraints as generating costs to be considered in his equations leading to optimal resource allocations. A fairness proponent would treat such violations as introducing elements of unfairness and inequity, to be considered along with the fairness effects of the substantive content of tort rules. Because this analysis does not attempt to reconcile fairness and efficiency rationales, it will not attempt to work out the method for balancing process concerns against each other or against substantive concerns. On the subject of the relationship between the process norms and the substantive norms of fairness and efficiency, see *infra* text accompanying notes 69-74.

<sup>44</sup> For example, RESTATEMENT (SECOND) OF TORTS § 402A (1965) applies strict manufacturer's liability only to product sellers "engaged in the business of selling such a product [as that which harmed the plaintiff]." Although the boundaries of strict products liability have been extended in recent years, courts have tried to specify the new boundaries so that actors can determine their applications ahead of time. See generally Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1042-59 (1980).

<sup>45</sup> For an analysis by efficiency theorists of optimal levels of rule specificity, see Ehrlich & Posner, *supra* note 5.

the general negligence standard, need not be specific. Boundary clarification will be needed if significantly different levels of care are required for various categories of activities.<sup>46</sup> But within any given category, the level of care may and probably must be described in more open-ended terms.<sup>47</sup> As long as the language employed incorporates generally understood normative principles<sup>48</sup> and is accompanied by more specific elaborations that can function as benchmarks,<sup>49</sup> liability rules can adequately serve to guide primary behavior in most circumstances.<sup>50</sup>

Vague standards are not the only threat to comprehensibility in the context of primary behavior. Rules also lack sufficient clarity because of complexity or ambiguity. Complexity is the counterpart to vagueness; just as tort law can be too indefinite to serve as a guide to primary conduct, it can also be too complicatedly specific.<sup>51</sup> Ambiguity becomes a problem when a rule of decision reasonably can be interpreted by different actors to refer to different circumstances. This is likely to occur, for example, whenever a liability rule purports to take into account the subjective psychological predispositions of individual actors. Such a rule could be misinterpreted to invite actors to apply their own values as well as their own mental capacities.<sup>52</sup> Rules couched in "do your best"

<sup>46</sup> For example, courts generally hold infants to a lower standard of care. *See, e.g.,* Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931); W. PROSSER, *supra* note 16, at 154-57. However, children engaged in "adult activities" are often judged by an adult standard. *See, e.g.,* Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966); W. PROSSER, *supra* note 16, at 156-57. Similarly, common carriers often are held to a higher standard of care. *See, e.g.,* Mobile Cab & Baggage Co. v. Busby, 277 Ala. 292, 169 So. 2d 314 (1964) ("highest" care); Barrie v. Central R.R., 71 N.J. Super. 587, 177 A.2d 568 (1962) ("very high" standard of care). In these cases, as in the "adult activities" cases, the courts have defined as a matter of law what constitutes a "common carrier." *See* Burnett v. Riter, 276 S.W. 347 (Tex. Civ. App. 1925).

<sup>47</sup> One of the best-known expressions of the need for vagueness in general standards of conduct is Justice Cardozo's majority opinion in *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934).

<sup>48</sup> An example of a vague but comprehensible legal standard is the general negligence standard of reasonable care. *See infra* note 86 and accompanying text.

<sup>49</sup> Examples of court-made benchmarks include the common law rules governing the liability of possessors of land to various categories of entrants. Examples of legislated benchmarks include safety statutes, violations of which are treated as negligence per se. *See, e.g.,* Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); RESTATEMENT (SECOND) OF TORTS § 288B (1965).

<sup>50</sup> Again, I am not insisting that tort rules necessarily succeed in guiding primary behavior in all, or even most, instances. *See supra* note 13.

<sup>51</sup> The common law rules governing the liability of possessors of land have been criticized for being too complicated. The common law rules governing liability for defamation have been similarly criticized. *See* Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

More serious comprehensibility problems arise outside the torts field. In antitrust and securities litigation, for example, some cases have become so complex that judges have refused to allow the cases to be tried before a jury. *See, e.g.,* ILC Peripherals v. IBM, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd*, 636 F.2d 1188 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978). *But see In re United States Fin. Sec. Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

<sup>52</sup> As will be seen, this source of misunderstanding represents a common thread running

terms, which elsewhere have been labeled "aspirational," are especially likely to be misunderstood in this manner.<sup>53</sup>

Comprehensibility is also required in the adjudicative context. The negative effects of vagueness in this regard will be discussed later; consistent with the earlier analysis of the difficulties posed by polycentric problems, vagueness in rules of decision presents courts with difficulties that transcend incomprehensibility.<sup>54</sup> Of interest here are the negative effects caused by liability rules that are either too complicated or too ambiguous to be understood by participants in the adjudicative process. Although specificity is, within limits, desirable and necessary as a means of avoiding highly polycentric disputes, when taken too far liability rules can become incomprehensible even to competent lawyers, judges, and jurors.

## 2. *The Second Process Constraint: Verifiability*

If liability rules refer to facts and circumstances that cannot be objectively verified by the persons whose primary conduct is sought to be modified, accurate predictions of liability cannot be made and the rules will fail to guide behavior. Consider, for example, a liability rule that tells an actor that he is legally privileged to touch another person only if the other person actually desires to be touched. Regardless of what the other person says or does indicating such a desire, in many circumstances the actor cannot verify whether consent has been given and thus cannot predict the liability effects of intentionally touching others.<sup>55</sup>

Two sources of difficulty must be considered regarding the relevance of the verifiability constraint in the adjudicative context. First, if litigants are to have an opportunity to present proofs in support of their arguments, liability rules must refer to facts that can in most instances be verified objectively. Obviously, no set of liability rules can avoid evidentiary gaps in all cases; instances are bound to occur in which no witnesses are available to testify regarding events and circumstances crucial to the outcome.<sup>56</sup> But some factual circumstances, such as the subjective

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through this analysis. See, e.g., *infra* notes 89, 155 and accompanying text. Although the difficulties of trying to separate an actor's mental capacity from his value structure have received relatively little attention in connection with tort law, they have received a great deal of attention in connection with the insanity defense in criminal law. See *infra* note 205.

<sup>53</sup> See generally Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978).

<sup>54</sup> See *supra* notes 29-42 and accompanying text.

<sup>55</sup> Perhaps for this reason a plaintiff who manifests a willingness to be touched physically will be held to have consented to being touched. See *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891).

<sup>56</sup> Courts have dealt with the problem of gaps in proof in different ways. Often, circumstantial evidence is admitted from which the jury is allowed to infer certain facts. See, e.g., *Hoyt v. Jeffers*, 30 Mich. 181 (1874). In addition, the burdens of production and persuasion, set by the courts, often dispose of cases in which gaps exist. Perhaps the best known device for

mental events described above, are predictably nonverifiable in a high enough percentage of cases that, whenever possible, liability rules should avoid having outcomes depend on their occurrence.<sup>57</sup>

Second, courts must try to avoid hypothetical "what would have happened if . . . ?" questions in the course of resolving tort disputes. When such hypotheticals are addressed in adjudication, attention focuses on events that never occurred and circumstances that never existed. If liability rules require answers to such questions, proof gives way to speculation. Of course, to some extent these questions are unavoidable in connection with issues such as proximate cause<sup>58</sup> and damages.<sup>59</sup> But the verifiability constraint requires that liability rules avoid raising such questions whenever possible.

### 3. *The Third Process Constraint: Conformability*

Consistent with their function of guiding both primary and adjudicative behavior, liability rules should avoid calling for behavior patterns to which persons are incapable of conforming.<sup>60</sup> A clear violation of this constraint would be a rule mandating performance of certain acts and requiring levels of care and skill that most persons could not attain.<sup>61</sup> Rules leaving to the individual the decision whether or not to engage in activities are less likely to cause problems, even if they set high standards of care and skill. Of course, the choices open to actors must be meaningful. If actors who lack the requisite abilities can avoid liability only by becoming recluses or by leaving the jurisdiction, then even a rule that purports to give them the choice of whether or not to act will be open to legitimate criticism for violating the conformability constraint.

The discussion so far has focused on liability rules that describe the level of care and skill with which activities must be undertaken. Is the

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dealing with gaps in proof is the doctrine of *res ipsa loquitur*. The doctrine permits the jury to infer the defendant's negligence from the facts of the case, even when the negligent act cannot be clearly identified. *See, e.g., Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). *See generally* Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936). On the subject of circumstantial proof and judicial reliance on probabilities, *see generally* Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970); Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

<sup>57</sup> *See infra* note 84 and accompanying text.

<sup>58</sup> Or the use of hypothetical questions for the issue of proximate cause, *see infra* notes 92-96 and accompanying text.

<sup>59</sup> Regarding the use of hypothetical questions in connection with the damages issue, *see* Leubsdorf, *Remedies for Uncertainty*, 61 B.U.L. REV. 132 (1981).

<sup>60</sup> *See* L. FULLER, *supra* note 5, at 70-76.

<sup>61</sup> Professor Fuller describes strict criminal liability as "the most serious infringement of the principle that the law should not command the impossible." *Id.* at 77. Strict tort liability is different in this respect: Rules of strict criminal liability are aimed at modifying conduct directly; rules of strict tort liability usually reflect indifference regarding whether the actor acts, and can be viewed as "activity taxes." *See supra* note 15 and accompanying text; *infra* note 63 and accompanying text.

conformability constraint also relevant in connection with rules imposing strict liability? The answer here might appear to be in the negative in as much as strict liability rules neither require action nor specify the manner in which activities must be undertaken. Viewed in this way, strict liability operates in much the same way as an "activity tax," indifferent to whether one acts or refrains from acting. One conforms to a strict liability rule by paying the appropriate damages assessed after the event.<sup>62</sup> The legitimacy of strict liability as an indirect guide to primary behavior, however, is premised on an assumption that persons are free, in a meaningful sense of the word, to choose whether or not to engage in the activities to which such "taxes" attach.<sup>63</sup> It follows that whenever strict tort liability is imposed on persons who are not free to choose whether or not to engage in the relevant activities, the function of the strict liability rule as an indirect guide to primary behavior is impaired and the spirit of the conformability constraint is violated.<sup>64</sup>

Conformability also is relevant in the adjudicative context. Were a judge to require a jury to make specific findings based on a trial record that did not rationally support the findings requested, he would be calling for behavior to which the jurors would, as rational beings, be incapable of conforming. Courts traditionally have avoided such difficulties by resolving disputes against litigants who fail to carry their burden of production.<sup>65</sup> If, in the name of overriding policy considerations, jurors were required to make findings that were not rationally supported by the evidence, problems associated with this third process constraint would arise.<sup>66</sup>

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<sup>62</sup> Intentional torts, which I earlier grouped with strict liability rules, *see supra* note 16, do not reflect indifference to whether the actor conforms. The rules governing intentional torts are designed so that it is always in a rational actor's interest to avoid liability. *See supra* note 19.

<sup>63</sup> The theory underlying strict products liability is based on the assumption that producers are free to choose whether or not to produce and consumers are free to choose whether or not to consume. *See supra* notes 11, 16.

<sup>64</sup> Thus, courts have refused to hold producers strictly liable for harm caused by a product when the aspect causing the harm was mandated by a government contract. *See, e.g.,* *Hunt v. Blasius*, 55 Ill. App. 3d 14, 20, 370 N.E.2d 617, 621-22 (1977). In contrast to tort liability rules, rules imposing true taxes need not be so concerned with whether the persons being taxed are free to choose whether or not to engage in the taxed activities. Tax rules may be concerned with incentive effects, but they need not be.

<sup>65</sup> *See supra* note 56.

<sup>66</sup> An illustrative case is *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975), a products liability case in which the jury was instructed to render a verdict against one or more of the four defendants—the manufacturer, the distributor, the hospital or surgeon—despite knowledge that the harm might have arisen from other sources. Judge Mountain dissented, stating:

Note, first, the role the jury is being called upon to play. The judge will give to the jury two potentially contradictory instructions. First the jurors will be told to arrive at a verdict by a preponderance of the evidence, each defendant having the burden of exculpating himself. Then a further direction will be given that they *must* bring in a verdict against some one or more of the de-



#### 4. *The Fourth Process Constraint: Manageability*

The manageability constraint relates only to adjudicative behavior. As explained earlier, for tort disputes to be resolvable by traditional forms of adjudication, the rules of decision generally must avoid presenting courts with highly complex, polycentric problems. Complex disputes are those involving many points of decision; they become polycentric if the relevant points of decision not only increase in number but also become mutually interdependent in the manner described earlier.<sup>67</sup> If liability rules are to support litigants' reasoned arguments, they must not only limit the number of issues to be addressed but also separate the significant considerations and arrange them so that they can be addressed in an orderly sequence. The rules must be specific to some extent. Liability rules will violate the manageability constraint if they present courts with social planning problems to be solved on a case-by-case basis.<sup>68</sup>

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defendants. But suppose the members of the jury cannot agree that the evidence will sustain a verdict against *any* defendant. What then! Each juror has taken an oath—no small matter—to reach a verdict only 'according to the evidence.' What does he now do?

*Id.* at 311, 338 A.2d at 11 (emphasis in original) (footnote omitted).

<sup>67</sup> See *supra* notes 28-42 and accompanying text.

<sup>68</sup> One should observe that, in general, negligence cases involving multiple parties are more likely to present manageability problems than are bipolar cases with only one party on each side. See generally Chayes, *supra* note 23, at 1281-84, 1289-92. Increasing the number of parties tends to render negligence cases less manageable in two ways. First, it tends to increase the number of separate interests that must be accommodated and thus tends to render the dispute more complex and polycentric. The best descriptions of the complexities introduced by multiplicity of parties appear in recent treatments of the new forms of public law adjudication. Describing a typical school desegregation case, Professor Fiss observes: "In [cases arising within these new adjudicative models] the typical pattern is to find a great number of spokesmen, each perhaps representing different views as to what is in the interest of the victim group . . . . The multiplicity of spokesmen does not create these differences [in viewpoint]. They exist in the real world, and the court must hear from all before it can decide what the ideal of racial equality requires." Fiss, *supra* note 24, at 21. Second, even if the interests on each side are sufficiently identical to permit one spokesman to speak for all, the procedural device by which one spokesman is allowed to represent multiple parties is the class action. Rule 23 of the Federal Rules of Civil Procedure, which governs the use of class actions in the federal courts, requires "questions of law or fact common to the members of the class [that] predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). Rule 23 also suggests that courts consider the difficulties associated with managing the class action before certifying the class. FED. R. CIV. P. 23(b)(3)(D). These considerations reflect a recognition of the process difficulties inherent in multi-party litigation. See generally *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1351-52 (1976) and authorities cited therein. For an example of what can result when a class action becomes too large for the courts to manage, see *Gwathmey v. United States*, 215 F.2d 148, 154 (5th Cir. 1954) (denial of due process when jury permitted to decide value of 238 tracts of realty after reviewing "incredible volume of figures and general data"). That many people have a direct stake in the outcome tends to transform the dispute into the type of social planning problem that traditional forms of adjudication should try to avoid. Professor Chayes has observed: "I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication. The class suit is a reflection of our growing awareness that a host of important public and private interactions

C. *Relation Between Process Constraints and Objectives of Fairness and Efficiency*

Although this article will not attempt to reconcile the various fairness and efficiency rationales claimed to underlie our traditional tort liability system, it is useful to consider how the process constraints relate to these objectives. With relatively little effort, the preceding analysis could be translated into the terminology of efficiency theorists. For example, the problems associated with vagueness and complexity in tort rules could be dealt with in terms of the tort system trying to achieve optimal levels of rule specificity—levels at which more or less specificity would generate unnecessary social costs.<sup>69</sup> And the verifiability constraint could be treated in terms of the necessity for tort law to avoid imposing unnecessarily high information costs on those whose behavior it seeks to modify.<sup>70</sup>

The process constraints are also consistent with recognized fairness principles. As will be discussed below in connection with the traditional no-general-duty-to-rescue rule, the constraints of comprehensibility, verifiability, and conformability have a strong moral content in their application to primary behavior. Thus, it is not only inefficient to penalize an individual for failing to conform to an unclear rule, a rule referring to nonverifiable factual circumstances, or a rule that asks the impossible—it is also unfair.<sup>71</sup> In addition, the process constraints reflect fairness concerns in their application to adjudicative behavior. Liability rules should support meaningful litigant participation in tort disputes because it would be unfair to renege on the system's promise to litigants that they will be given this opportunity.

Even though the process constraints are consistent with fairness and efficiency principles, I would resist attempts to reduce them entirely to these substantive theories. Instead, drawing upon the work of Professors Lon Fuller<sup>72</sup> and Robert Summers,<sup>73</sup> I suggest that the process constraints rest on an independent base. Regarding the effects of liability rules on primary behavior, the process constraints are rooted in notions of the dignity and responsibility of human individuals. Reliance on self-

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... can no longer be visualized as bilateral transactions between private individuals." Chayes, *supra*, at 1291.

<sup>69</sup> See generally Ehrlich & Posner, *supra* note 5.

<sup>70</sup> See generally Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972), in which the authors propose that tort liability be imposed on the "cheapest cost avoider"—that is, the person who can most cheaply acquire information upon which to make a cost-benefit analysis and can most efficiently act on that analysis. Clearly, rules that refer to factual circumstances that cannot be verified by the addressees threaten to impose liability on persons who are not effective cost-avoiders.

<sup>71</sup> Lon Fuller's work reflects the fairness content of the first three process constraints. See L. FULLER, *supra* note 5. Professor Fletcher's writing does as well. See *supra* note 11.

<sup>72</sup> See L. FULLER, *supra* note 5; Fuller, *supra* notes 22, 24.

<sup>73</sup> See Summers, *supra* note 6. See generally L. FULLER, *supra* note 5, at 162-67.

applying rules of conduct presupposes that the persons to whom the rules are addressed are intelligent enough to understand the rules and responsible enough to conform their conduct to them. Any system purporting to rely on self-applying rules of behavior that came to be characterized by widespread violations of these constraints would not simply be inefficient and unfair—it could no longer claim to be governed by the rule of law.<sup>74</sup>

In the adjudicative context, the process constraints reflect the significance traditionally attached to the right of those affected by the rules to participate meaningfully in their official application. This commitment to a participatory mode of rule application reinforces the view of individual responsibility in the context of primary behavior. Whether one implication of this analysis is that traditional forms of adjudication should continue to dominate the tort system is not clear. But as long as the commitment to adjudication remains in force, widespread violations of the process constraints represent an erosion of the integrity of the legal process.

## II

### EXAMINING TRADITIONAL TORT DOCTRINE FROM A PROCESS PERSPECTIVE: A HISTORICAL OVERVIEW

Obviously the early common law rules conformed to the process constraints. These early liability rules, which were the underpinnings of modern tort law, not only reflected but also were derived from the formal processes of adjudication in the King's courts.<sup>75</sup> These processes were based upon a strict bipolar mode in which the issues for decision were limited to those of the nonpolycentric, "what happened?" variety.<sup>76</sup> This sharp narrowing of focus was accomplished by limiting rights of access to the King's courts to those claims for relief specifically described in formal writs issued for the purpose of summoning defendants to court.<sup>77</sup> Two of the limited number of King's writs related to what today would be considered tortious conduct: the writs of trespass

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<sup>74</sup> This point is central to the analysis in this article. The process constraints are the conditions that rules generally must satisfy if they are to govern conduct. They do not assure that the tort system will achieve fairness or efficiency; substantive norms must help to determine the content of the rules to achieve those objectives. But even if rule makers are sincerely bent on achieving a fair and efficient tort system they will fail, as Fuller's hypothetical monarch failed, unless they conform generally to the process constraints. See L. FULLER, *supra* note 5, at 33-38.

<sup>75</sup> See generally J. KOFFLER & A. REPPY, *COMMON LAW PLEADING* 32-35 (1969); R. POUND, *THE HISTORY AND SYSTEM OF THE COMMON LAW* 129 (1939).

<sup>76</sup> See generally H. STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* 149-57, 340 (1882); Chayes, *supra* note 23, at 1282.

<sup>77</sup> See generally J. KOFFLER & A. REPPY, *supra* note 75, at 34-35; R. POUND, *supra* note 75, at 131, 133.

and trespass on the case.<sup>78</sup> Although the former was of more ancient origin and imposed comparatively stricter liability,<sup>79</sup> both writs closely conformed to the process constraints.<sup>80</sup>

The liability rules governing intentional wrongs, which evolved from the earlier writs of trespass,<sup>81</sup> illustrate the manner in which rules of substance traditionally have accommodated the necessary constraints of process. The elements of the plaintiff's prima facie case in battery—intent, contact, and causation—present essentially “what happened?” issues that lend themselves to resolution through adjudication.<sup>82</sup> The element of intent threatened to pose nonverifiable issues of fact,<sup>83</sup> but intent, along with the element of consent, avoided process difficulties by relying on an objective rather than a subjective standard.<sup>84</sup> The “reasonableness” issues that presented some of the affirmative defenses to intentional torts, which are more open-ended and hence more likely to present process difficulties, have been recognized only recently and reflect the lowered sensitivity toward process concerns that is characteristic of the modern, negligence-dominated tort era.<sup>85</sup>

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<sup>78</sup> See generally J. KOFFLER & A. REPPY, *supra* note 75, at 152-53, 174; 3 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 223 (1906).

<sup>79</sup> See generally J. KOFFLER & A. REPPY, *supra* note 75, at 175; Peck, *Negligence and Liability Without Fault in Tort Law*, in DEPARTMENT OF TRANSPORTATION, AUTOMOBILE INSURANCE AND COMPENSATION STUDY 51-55 (1970).

<sup>80</sup> The writs were specific and were confined to statements of what actually happened. For examples, see C. CLARK & H. STEPHEN, *supra* note 60, at 48-50; J. KOFFLER & A. REPPY, *supra* note 59, at 154-55, 182.

<sup>81</sup> A list of the actions encompassed by trespass *vi et armis* (“with force and arms”) includes menaces, assault, battery, mayhem, false imprisonment, and rape. See generally H. FINCH, A SUMMARY OF THE COMMON LAW OF ENGLAND, Table 14 (1654). These writs correspond to currently-recognized intentional torts.

<sup>82</sup> See RESTATEMENT (SECOND) OF TORTS § 13 (1965).

<sup>83</sup> Certainly, if intent were equated with a subjective desire that a result be achieved by one's conduct, problems of proof would arise frequently. In many cases it is clear from an actor's behavior what he desires to accomplish. In a significant number of cases, however, behavior is sufficiently ambiguous to prevent inferences regarding the actor's subjective desires.

<sup>84</sup> “Intent” thus is equated not only with results subjectively desired, but also with results believed with substantial certainty to follow from his actions. See, e.g., Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955); RESTATEMENT (SECOND) OF TORTS § 8A (1965). Although “believe” connotes a measure of subjectivity, this extension of the concept of intent encourages a more objective approach. See also *infra* notes 204, 205 and accompanying text. On the element of consent, see *supra* note 55 and accompanying text. It should be observed that intent raises nonverifiability problems only at the adjudicative level, because actors can determine their own intent; in contrast, consent raises problems at both the adjudicative and the primary behavior levels, because actors frequently cannot determine the states of mind of others.

<sup>85</sup> The necessity defense to trespass actions, with its focus on the reasonableness of the defendant's actions, is a good example. See W. PROSSER, *supra* note 16, at 124-26. A recent English case, in which a London borough sued squatters who sought shelter in unoccupied public buildings during London's housing shortage, reveals the problems one can expect to encounter. The defendants raised the necessity defense. In denying its application, the Lord Justice focused on the process problems that the court would face in determining which de-

By far the most significant tort law development from a process perspective has been the rise to dominance of the negligence concept over the last 150 years. With its heavy reliance on the vague principle of "reasonableness under all the circumstances," the negligence concept was destined to cause difficulties. The effects of negligence rules on primary behavior suggest that even superficially vague rules can guide behavior effectively if they invoke widely understood and recognized moral principles. To the extent that the negligence system's admonition to avoid creating unreasonable risks has served to guide primary conduct, it can be attributed to the success with which it captures the time-honored maxim that one should consider the interests of others when one acts.<sup>86</sup>

A troublesome question that the courts addressed early was whether negligence should be judged on the basis of an objective or subjective test. If an objective test were used, it would violate the conformability constraint because it would ask more of mentally incompetent persons than they could deliver.<sup>87</sup> But if a subjective test were used, it would present nonverifiable questions of whether particular individuals had done the best that reasonably could be expected of them.<sup>88</sup> Moreover, a subjective standard might ambiguously convey the mistaken impression that actors are free to impose on others not only their mental limitations but also their values.<sup>89</sup> On balance, this article's analysis supports the decision to rely on an objective standard.<sup>90</sup> The negative

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fendants were entitled to occupancy. *See* London Borough of Southwark v. Williams, 2 All E.R. 175 (C.A. 1971) (opinion of Megaw, L.J.). *See generally* Henderson, *supra* note 5, at 495-500.

<sup>86</sup> *See generally* Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 65 (1980); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

<sup>87</sup> Professor Rodgers is critical of the tendency to apply objective standards to what he calls nonrational behavior: "What has happened is that a social conception of negligence, understandably evolving in the context of rational decisionmaking, came to be applied indiscriminately to nonrational actors who were held to standards they could not meet." Rodgers, *supra* note 13, at 18.

<sup>88</sup> *See, e.g.*, Vaughan v. Menlove, 3 Bing. (N.C.) 468, 474-75, 132 Eng. Rep. 490, 493 (C.P. 1837) (opinion of Tindal, C.J.) ("It is contended . . . that the question ought to have been whether the Defendant had acted honestly and bona fide to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various . . ."). *See generally* W. PROSSER, *supra* note 16, at 152-54.

<sup>89</sup> The problem stems from the inherent difficulties in attempting to separate psychological predispositions that are value-neutral—forgetfulness and incomprehension, for example—from those that are not—for example, indifference to the interests of others. *See also infra* notes 155, 205 and accompanying text.

<sup>90</sup> *See, e.g.*, Brown v. Kendall, 60 Mass. 292 (1850); Vaughan v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837); RESTATEMENT (SECOND) OF TORTS § 283B(b)(1), (2) (1965). *See generally* Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927). Regarding the standard of care required of children, the courts have adopted a somewhat more subjective test. Juries have sometimes been instructed to take into account not only a

effects of asking more than subnormal individuals can deliver are mitigated to the extent that they can choose to avoid particularly risky activities.<sup>91</sup> A subjective approach would almost certainly have been unworkable as a guide to either primary or adjudicative behavior.

Another source of process difficulties has been the tendency for negligence cases to present "what would have happened if . . . ?" questions in connection with the issues of causation and damages.<sup>92</sup> Given the generally recognized objectives of tort law, these hypothetical questions cannot be avoided altogether. But they do threaten plaintiffs with inherently intractable problems of proof. Courts have largely avoided these problems in connection with the issue of causation by allowing plaintiffs to rely on unsupported assertions of common sense expectation rather than proof. In so doing, they tacitly shift to the defendant the burden of coming forward with evidence that the plaintiff would have been injured anyway.<sup>93</sup> Of course, proximate causation remains part of the plaintiff's prima facie case.<sup>94</sup> As a practical matter, however, that issue is one that the defendant raises in the relatively few cases in which it is presented. If courts insisted that the plaintiff prove that his harm would have been avoided had the defendant exercised due care, the proximate cause issue would present substantial process difficulties.<sup>95</sup>

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child's age, but also his experience and intelligence. *See generally* W. PROSSER, *supra* note 16, at 155; Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1928). To the extent that children are held to the standard of a reasonably prudent child of similar age, the judge and jury presumably have had sufficient contact with children of different ages to formulate an objective standard. However, to the extent that courts have instructed juries to account for an individual child's intelligence or experience, more difficult process problems may be raised.

<sup>91</sup> Mentally incompetent persons thus can plan their activities or have their activities planned for them so as to avoid being in control of dangerous instrumentalities such as motor vehicles and other heavy equipment.

<sup>92</sup> For analyses of the use of hypothetical questions in connection with the causation issue, see generally Henderson, *A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue—The Need for An Expanded, Rather Than A Contracted, Analysis*, 47 TEX. L. REV. 183 (1969); Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968); Thode, *A Reply to the Defense of the Use of the Hypothetical Case to Resolve the Causation Issue*, 47 TEX. L. REV. 1344 (1969). Although I defended the use of "what would have happened if?" questions, I did so on grounds that are compatible with the present analysis. *See infra* notes 93-96 and accompanying text. For an analysis of the use of hypothetical questions in connection with the damages issues, see generally Leubsdorf, *supra* note 59.

<sup>93</sup> *See generally* Henderson, *supra* note 92, at 197. The talk of "tacitly shifting the burden" admittedly is mine; yet Prosser agrees with my statement that courts allow plaintiffs to rely on common sense assertions rather than on proof. *See* W. PROSSER, *supra* note 16, at 242-43 nn.50-53.

<sup>94</sup> *See* RESTATEMENT (SECOND) OF TORTS § 328A(c) (1965).

<sup>95</sup> In some cases, it would be clear whether the plaintiff would or would not have been injured. But in many cases it would not be clear, and the plaintiff would be hard pressed to "prove" something that never happened. More often than not, the best that the plaintiff would be able to offer would be an expert's statistical proof. Given the inherent difficulties of proof in these cases, courts tend to be lenient with plaintiffs. *See, e.g.*, *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978).

By tacitly shifting to the defendant the burden of coming forward in most cases, however, these difficulties have been largely avoided.<sup>96</sup>

Even if it is assumed that an objective negligence standard avoids difficulties with the first three process constraints, it is more doubtful that it does so with respect to the fourth, the manageability constraint. As in the earlier-discussed hypothetical case involving judicial review of the reasonableness of the municipal budget for police protection, the question of whether a person has acted reasonably frequently presents complex, polycentric issues.<sup>97</sup> Even if it is assumed that actors intuitively can reach sensible planning decisions *ex ante* while exercising managerial discretion, it is unclear whether principles of reasonableness will support judicial review and evaluation of those decisions *ex post*. Given the inherent limitations on negligence as a guide to adjudicative behavior, one might have expected that by now the process difficulties associated with such a vague standard as "reasonableness under the circumstances" would have caused its replacement by some more manageable combination of strict liabilities and strict immunities.<sup>98</sup>

That negligence has survived to this point can be attributed to a combination of factors, not the least of which is its attractiveness from a substantive policy perspective. The two most important factors from a process perspective are reliance on a hypothetical "reasonable person" to cover basic situations involving the general reasonableness standard,<sup>99</sup> and the development of specific rules to cover special situations.<sup>100</sup> Reliance on the reasonable person supports an empathetic approach in which the tribunal places itself hypothetically in the position of the defendant and recreates the largely intuitive process of exer-

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<sup>96</sup> They are avoided at least in the sense that in most cases the plaintiff reaches the trier of fact when he proves that the defendant's negligent conduct in fact caused him to suffer injury. If the defendant does not raise the proximate cause issue, it disappears from the case as a practical matter. And in the relatively rare case in which the defendant succeeds in presenting a strong proximate cause argument, either proof on that is available or the plaintiff's rhetorical assertions are weak. The tacit shifting to the defendant of the burden of going forward thus assures that proximate cause will become an issue only in those cases in which the verifiability problems are not great. Process problems associated with the damages issues are reduced by reliance on standardized measurements such as life-expectancy tables. But difficulties remain. *See generally* Leubsdorf, *supra* note 59.

<sup>97</sup> *See supra* text accompanying notes 34-41.

<sup>98</sup> Strict liability and immunity rules do not present complex, polycentric planning problems so long as the activities to which the liabilities and immunities attach are defined specifically. *See supra* note 44 and accompanying text. To some extent, of course, the expectation alluded to in the text has been fulfilled. Strict products liability is a rapidly expanding field of tort law. No-fault and worker compensation systems also have been fairly widely implemented. But the fact remains that a significant portion of the traditional negligence system is not only intact, but expanding. *See generally* Henderson, *supra* note 5; Schwartz, *supra* note 86.

<sup>99</sup> *See generally* James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951).

<sup>100</sup> *See, e.g., infra* notes 106-12 and accompanying text.

cising managerial discretion.<sup>101</sup> Litigants advance arguments which, although explicitly couched in terms of what a reasonable person would have done, implicitly invite the tribunal to empathize with them.<sup>102</sup> This approach does not reduce the polycentricity in these cases, but rather provides a way for decisionmakers to cope. To this extent, it represents a tacit departure from the adjudicative mode. But litigants can participate meaningfully when the tribunal is called upon to review individual conduct not involving complex or sophisticated technology.<sup>103</sup> It is more difficult for judges and juries to empathize with institutional actors.<sup>104</sup> Because many of the earlier cases decided under the general negligence standard involved conduct with which tribunals could empathize, reliance on the reasonable person helped them to cope with polycentric issues in negligence cases.<sup>105</sup>

The second type of judicial response to the potential process difficulties in negligence cases has been the development of rules of decision that reduce the polycentricity in particularly troublesome areas. An example of such an adjustment occurred in cases involving negligence claims against physicians. For the courts to review independently the reasonableness of standardized medical procedures clearly would exceed

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<sup>101</sup> An early Michigan decision recognized the empathetic approach: "Thus the problem . . . is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that stand-point judging whether he was guilty of negligence or not." *Detroit & Milwaukee R.R. v. Van Steinburg*, 17 Mich. 99, 119 (1868).

<sup>102</sup> Because of the risks of inducing bias and prejudice through direct appeals by lawyers to jurors to identify with their clients, courts have placed restrictions on the directness with which these calls for empathy may be made. Thus, courts have held "put yourself in my client's place" arguments improper and grounds for reversible error, particularly when the damages issue is involved. *See, e.g., Fisher v. Williams*, 327 S.W.2d 257, 264 (Mo. 1959); *Annot.*, 70 A.L.R.2d 935 (1960).

<sup>103</sup> This is the important element that distinguishes much of traditional negligence litigation from the new forms of public law adjudication. In neither context are the rules of decision sufficiently specific to support claims logically derived from them. But when the parties in a negligence case present their arguments to a jury comprised of a cross-section of the community who are able to appreciate the implications of what occurred and whose instincts can be trusted, they are able to participate meaningfully by invoking the shared expectations of the community. In the public law litigation described earlier, however, this type of participation is less possible. Instead, the large number of interested parties typically participate in an unruly process of negotiation ruled over by a combination judge/manager/power broker. *See* authorities cited *supra* note 23.

<sup>104</sup> When a finder of fact is asked to assess the reasonableness of a complicated product design, for example, it is more difficult for him to put himself in the appropriate corporate shoes and answer the question "how would I have acted if I had been General Motors?" I do not have empirical proof to support this assertion, but I submit that it is intuitively correct.

<sup>105</sup> *See, e.g., Brown v. Kendall*, 60 Mass. 292 (1850), in which the plaintiff sought to recover for injuries sustained when the defendant inadvertently struck him in the face with a stick while trying to separate fighting dogs. Admittedly, a significant percentage of negligence cases since the late nineteenth and early twentieth centuries have involved industrial defendants, especially railroads. *See generally* 1 F. HILLIARD, *THE LAW OF TORTS* 339 (3d ed. 1866). However, in many of those cases more specific extrajudicial standards were available with which to reduce or eliminate the need to rely on the general reasonableness standard.



the limits of adjudication.<sup>106</sup> The judicial response in medical malpractice cases has been to limit inquiry to the more manageable question of whether the conduct of the individual physician conformed to the established standards of his profession.<sup>107</sup> In effect, courts have delegated to the medical profession responsibility for developing appropriate medical procedures.

A more stark example of this "avoidance by delegation" technique occurred in response to negligence actions brought by children against their parents. Perceiving a need to adjust the duty of care to reflect the special relationship between parents and their children<sup>108</sup> and reluctant as a substantive matter to impose objective "off the rack" standards of parental obligation,<sup>109</sup> courts would have faced significant problems of verifiability and manageability in working out "tailor-made" duties owing from individual parents to their children.<sup>110</sup> It thus is consistent with the present analysis that courts avoided these difficulties by granting parents immunity from negligence-based liability.<sup>111</sup>

Developments in recent years support this analysis. Many courts now allow negligence actions by children against their parents, but only

<sup>106</sup> Several commentators have recognized the process difficulties inherent in reviewing the professional conduct of physicians. See McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 607-08 (1959); Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1164 (1942); Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 IND. L.J. 528, 534-35 (1976).

<sup>107</sup> See *Loudon v. Scott*, 58 Mont. 645, 654, 194 P. 488, 491 (1920); *McCandless v. McWha*, 22 Pa. 261, 267-68 (1853). See generally W. PROSSER, *supra* note 16, at 161-66; McCoid, *supra* note 106, at 558-59.

<sup>108</sup> Courts and commentators have recognized the need to tread carefully in litigating tort disputes between parent and child. The two most frequently cited concerns are the possible disruption of the family unit, and interference with parental discretion. See, e.g., *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905). See generally McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1060, 1074-77 (1930). The long-recognized privilege of a parent to inflict disciplinary punishment on a child reflects the law's willingness to adjust to the parent-child relationship. See RESTATEMENT (SECOND) OF TORTS §§ 147-155 (1965).

<sup>109</sup> Judicial reluctance to impose objective standards is clearly reflected in *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974):

In the family relation between parent and child, . . . we do not believe that application of this standardized norm is the wisest course . . . . Each child is different, as is each parent . . . . [T]here are so many combinations and permutations of parent-child relationships that may result that the search for a standard would necessarily be in vain—and properly so.

See also *Schneider v. Coe*, 405 A.2d 682 (Del. 1979); RESTATEMENT (SECOND) OF TORTS § 895G, Comment k (1965). But see *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (applying a "reasonable and prudent parent" standard).

<sup>110</sup> Adoption of a subjective approach in parent-child cases presents problems of nonverifiability. In addition, the question "what should this parent have done to best look after the interests of this child, under these circumstances?" is polycentric.

<sup>111</sup> This immunity originated at common law with the landmark case of *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891). See also *Reingold v. Reingold*, 115 N.J.L. 532, 181 A. 153 (1935); *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928). See *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974).

in connection with activities (such as the operation of motor vehicles) that are not unique to the parent-child relationship and therefore do not require courts to address the difficult question of what a reasonable parent with the attitudes and values of the individual defendant would have maintained in the way of levels of care toward his children.<sup>112</sup>

I have examined two common law techniques for reducing the process difficulties of negligence cases, both of which involve delegating responsibility to nonadjudicative decisionmakers. A third technique, not involving such delegation, remains: the development of matrices of rules and subrules defining the duties owed between and among various special categories of actors. The common law rules governing the liabilities of possessors of land epitomize this technique. In essence, the courts developed relatively specific exceptions to the general duty of care,<sup>113</sup> together with exceptions to these exceptions.<sup>114</sup> These rules would not have been necessary, or at least necessary to the same degree, if courts had been willing as a substantive matter to treat landowners' responsibilities to various categories of entrants the same as the duty of care generally owed in the society. Courts felt, however, that the responsibilities owed by landowners should vary depending on the status of the entrants, and so the need for specific rules arose. Instead of delegating to landowners the responsibility for defining their own duties to others, courts undertook to define these duties by exercising their rule making function.

Interestingly, in recent years some courts have discarded the common law rules governing possessors' liability to entrants, relying instead on the general negligence standard.<sup>115</sup> This move has been motivated in part by substantive considerations, but courts also have cited the increasing complexity of the traditional rules that they insist has led to

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<sup>112</sup> See, e.g., *Schenk v. Schenk*, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Goller v. White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963).

<sup>113</sup> Entrants on land are separated into three distinct classes. The business invitee, whose presence benefits the owner, is owed the general standard of reasonable care. See generally RESTATEMENT (SECOND) OF TORTS §§ 332, 341A, 343, 343A, 343B, 344 (1965); W. PROSSER, *supra* note 16, at 385-98. The licensee, whose presence is merely permitted and is of no benefit to the owner, is entitled only to be warned of known dangers. See generally RESTATEMENT (SECOND) OF TORTS §§ 341, 342, 330 (1965); W. PROSSER, *supra* note 16, at 376-85. The trespassing adult, who enters another's land without permission, generally is only protected from intentional injury. See generally RESTATEMENT (SECOND) OF TORTS §§ 329, 333, 342 (1965); W. PROSSER, *supra* note 16, at 357-64.

<sup>114</sup> The most common exceptions to these exceptions are for child trespassers, see RESTATEMENT (SECOND) OF TORTS § 339 (1965), discovered trespassers, see RESTATEMENT (SECOND) OF TORTS §§ 336-338 (1965), and trespassers consistently using a limited area, such as a footpath, see RESTATEMENT (SECOND) OF TORTS §§ 334, 335 (1965).

<sup>115</sup> See *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). See generally *Hawkins, Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH. L. REV. 15.

"confusion and conflict."<sup>116</sup> These decisions, of course, may have substituted one source of process difficulty for another—if the status of a particular entrant continues to be a relevant (even if not controlling) consideration, reliance on a vague reasonableness standard will lead to increased levels of polycentricity.

In describing the extent to which the content of tort law has been influenced by the process constraints, I must be careful not to overstate the force of my thesis. Substantive considerations obviously have played a dominant role in shaping the common law of torts. An important reason for allowing the medical profession to set its own standards is that courts can assume that these standards are adequate to protect the interests of patients;<sup>117</sup> courts have granted parents immunity from negligence-based liability in large part because courts can assume that parents will, as a general rule, act in the best interests of their children;<sup>118</sup> and landowners owe little in the way of duties to trespassers because it is believed to be neither fair nor efficient to require them to invest resources to protect unforeseeable wrongdoers.<sup>119</sup> The foregoing analysis, however, strongly suggests that behind the substantive logic is a process logic that also helps to shape the contours of tort doctrine.

Although the examples of common law tort doctrine considered thus far have avoided process difficulties by cutting back on actors' potential tort liability, process difficulties also can be reduced by expanding liability. An example of such a development was the enactment of worker compensation statutes in most states early in this century.<sup>120</sup> Although a commonly accepted explanation for the adoption of worker compensation systems suggests that they were the product of substantive policy choices,<sup>121</sup> a more accurate view recognizes the sig-

<sup>116</sup> *Rowland v. Christian*, 69 Cal. 2d 108, 116, 443 P.2d 561, 566, 70 Cal. Rptr. 97, 102 (1968) (quoting *Kermarec v. Compagnie Generale*, 358 U.S. 625, 630-31 (1959)). See generally Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 272 (1929).

<sup>117</sup> See generally *McCoid*, *supra* note 106, at 688.

<sup>118</sup> See, e.g., *Lander v. Seaver*, 32 Vt. 114, 122 (1859) ("This parental power is little liable to abuse, for it is continually restrained by natural affection. . . ."); see also *McCurdy*, *supra* note 108, at 1076.

<sup>119</sup> See generally *W. PROSSER*, *supra* note 16, at 357-58. Of course when the trespass is foreseeable, both fairness and efficiency concerns support the imposition of duties. See exceptions discussed *supra* note 114.

<sup>120</sup> See generally 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 4.00-5.30, at 23-40 (1964 & Supp. 1982).

<sup>121</sup> For an example of the substantive rhetoric that preceded enactment, see the opinion of Chief Justice Winslow in *Driscoll v. Allis-Chalmers Co.*, 144 Wis. 451, 469, 129 N.W. 401, 408-09 (1911):

When [the laborer] has yielded up life, or limb, or health in the service of that marvelous industrialism which is our boast, shall not the great public . . . be charged with the duty of securing from want the laborer himself, if he survive, as well as his helpless and dependent ones? . . .

These are burning and difficult questions . . . [that] are well within the province of the legislative arm of the government.

nificant role played by process considerations.<sup>122</sup>

Popular impressions notwithstanding, worker compensation statutes were not so much a reflection of dissatisfaction at the substantive level with perceived inadequacies in the benefits available in tort to injured workers as they were the product of dissatisfaction at the process level with the unworkability of the common law system. Until the middle of the nineteenth century, employers generally enjoyed immunity from tort liability for workplace injuries.<sup>123</sup> As long as this immunity persisted, process problems in workplace-injury cases were by and large avoided. As pressures for change mounted and found expression in court-made exceptions to the traditional immunity rules, the rules of decision became so complex as to render the process difficulties intolerable.<sup>124</sup> At the substantive level, by the time the worker compensation statutes were enacted, workers were well on their way to victory. The statutes were aimed primarily at eliminating the process problems left in the wake of judicially-implemented substantive reforms.<sup>125</sup> With their enactment, the circle was complete. A workable (from a process perspective) strict-immunity rule had been replaced with a negligence system that proved unworkable; therefore, the negligence system itself was replaced with a more workable statutory system of strict liability.<sup>126</sup> Viewed substantively, the movement from strict immunity to strict liability is a dramatic expansion of workers' rights; viewed from the process perspective, the tort system has returned full circle to its point of origin.

Another example of this cyclical pattern is the development of privity-free strict liability for defectively manufactured products. At the beginning of this century, the general rule was one of strict manufacturers' immunity from negligence-based liability to injured consumers.<sup>127</sup> This

<sup>122</sup> I am indebted to Professors Friedman and Ladinsky for their sociological analysis of the implementation of worker compensation statutes in this country. Much of the analysis that follows is based on their work. See Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

<sup>123</sup> See *id.* at 54-59.

<sup>124</sup> See generally *id.* at 59-69 (discussing both policy and process considerations that led to pressures for change).

<sup>125</sup> The point is not that injured workers were necessarily recovering inadequately in tort actions, but rather that the piecemeal judicial reforms escalated the administrative costs so dramatically that it came to be in everyone's interest (except perhaps that of trial lawyers) to replace the common law with a legislated compensation system. See *id.* at 65-69.

<sup>126</sup> "Workable" undoubtedly overstates the case supporting adoption of the workmen's compensation statutes. For criticism of worker compensation systems, see generally H. SOMERS & A. SOMERS, *WORKMEN'S COMPENSATION* 268-89 (1954); Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 57, 63-91. Professors Friedman and Ladinsky suggest that worker compensation law may be developing in the same "stability-instability-replacement" cycle as did the earlier fellow-servant immunity rule. See Friedman & Ladinsky, *supra* note 122, at 81.

<sup>127</sup> See W. PROSSER, *supra* note 16, at 641-42. The decision generally recognized as the source of this immunity is *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

general rule gradually became subject to a number of exceptions.<sup>128</sup> Once the immunity rule fell<sup>129</sup> and courts began to decide "how much quality control is reasonable?" on a case-by-case basis, it was inevitable that the combined pressures of substance and process would lead to the adoption of strict liability.<sup>130</sup> As in the case of worker compensation laws, the adoption of strict manufacturers' liability traditionally is viewed as a triumph of substantive policy concerns favoring injured consumers.<sup>131</sup> From the process perspective, however, it is also seen as a necessary and largely inevitable return to a rule of decision that avoids, as had the earlier rule of strict manufacturers' immunity, the types of process difficulties described in this article.

### III

#### THE CLEAREST EXAMPLE OF THE PROCESS CONSTRAINTS AT WORK: THE NO-GENERAL-DUTY-TO-RESCUE RULE

From any view, the absence at common law of a general duty to rescue<sup>132</sup> is of small practical consequence. The many exceptions to the general rule have all but consumed it.<sup>133</sup> More important, one comfortably can assume that even without a legal duty most persons will help others in distress whenever they can do so at little cost to themselves.<sup>134</sup> And yet, perhaps because it strikes most persons as counterintuitive, the general rule of no-duty-to-rescue always has been a favorite with tort commentators, providing a window through which a succession of writers have peered into the substantive foundations of our tort law system.<sup>135</sup>

<sup>128</sup> The exceptions to the "privity rule" began with *Thomas v. Winchester*, 6 N.Y. 397 (1852). They are reviewed and analyzed in then-Judge Cardozo's opinion in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>129</sup> See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>130</sup> See generally Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

<sup>131</sup> See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Kessler, *Products Liability*, 76 YALE L.J. 887, 925 (1967); Prosser, *The Fall of the Citadel*, *supra* note 130, at 799-800.

<sup>132</sup> See, e.g., *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1898); *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959). See generally W. PROSSER, *supra* note 16, at 338-48. As the phrase is used here and elsewhere in the literature, a "general duty to rescue" would be a duty imposed by law in the absence of any preexisting relationship or causal connection between parties.

<sup>133</sup> See *infra* notes 186, 191-92 and accompanying text.

<sup>134</sup> If "cost to themselves" includes psychological costs, this appears definitional. Most people perceive that they derive benefits from helping others; if the corresponding costs are low, they will presumably engage in rescue.

<sup>135</sup> See, e.g., Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111-13 (1908); Bohlen, *The Moral Duty to Aid Others As a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Gregory, *The Good Samaritan & The Bad: The Anglo-American Law*, in *THE GOOD SAMARITAN & THE LAW* 23

Defenders of the general rule have been comparatively few and largely unconvincing. In an early essay, Ames used this no-duty rule to emphasize the distinction between law and morals,<sup>136</sup> but he did not explain why the legal and moral positions should differ so sharply.<sup>137</sup> Contemporary writers have added relatively little to our understanding of why the no-duty rule persists. Professor Epstein has argued that, absent some cause-in-fact connection between the defendant's conduct and the plaintiff's plight, there is no moral basis on which to premise a legal duty to act.<sup>138</sup> But his view that the basis of all duties in tort law is the cause-in-fact connection between the actor's conduct and the victim's harm has yet to convince many other tort commentators.<sup>139</sup>

Writers who view tort law as a means of enhancing allocative efficiency also confront difficulties in rationalizing the no-duty-to-rescue rule. Whenever one person, at relatively small cost, can act to prevent a significantly greater loss to another, efficiency will be enhanced if the would-be rescuer is induced to act.<sup>140</sup> Attempting to defend the no-duty rule, Professors Landes and Posner argue that it may help to avoid discouraging the wealth-maximizing efforts of those who would be likely to rescue others voluntarily in the absence of a liability rule.<sup>141</sup> But the most helpful conclusion they are able to reach is that the rule may not be quite so inefficient as it seems.<sup>142</sup>

Given these difficulties in explaining the no-duty-to-rescue rule, it is not surprising that numerous commentators have urged that it be over-

(J. Ratcliffe ed. 1966); Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

<sup>136</sup> See Ames, *supra* note 135.

<sup>137</sup> Ames, along with Holmes and others, embraced the view that the law was a science capable of being understood from a relatively limited set of legal principles by applying scientific legal reasoning. See generally G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 26-29 (1980). Thus, although Ames suggested that legal rules were evolving toward notions of morality, he makes little attempt to explain the original divergence other than to suggest that an early belief that the law could never discern the true thought or intent of a man led to "formal and immoral" punitive law. See Ames, *supra* note 135, at 97.

<sup>138</sup> See Epstein, *supra* note 2, 2 J. LEGAL STUD. at 200-01.

<sup>139</sup> For criticism of Epstein's analysis, see England, *supra* note 86, at 57-63; Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

<sup>140</sup> If both rescuer and rescuee were free to bargain their way out of the situation (as they are not, given the exigencies of the circumstances) they would find it mutually advantageous to arrange to spend some resources in order to save substantially more. Such a move would be "Pareto superior," because at least one of the parties would be made better off without making the other worse off. See Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512-13 (1980). When tort law imposes a duty to rescue, the rescuer may be required to expend his own resources to save the resources of the rescuee. Even if the rescuer is not reimbursed, the move will be "Kaldor Hicks superior" as long as the rescuee saves more than the rescuer expends. See generally *id.* at 513-14.

<sup>141</sup> See Landes & Posner, *supra* note 135, at 121-24.

<sup>142</sup> *Id.* at 124, 126.

turned.<sup>143</sup> One such argument has been advanced only recently. Stressing fairness reasons, Professor Weinrib has argued that courts should recognize a general "easy-rescue" rule.<sup>144</sup> He would impose liability whenever an actor who refused to assist another in an emergency could have prevented, at small cost to himself, greater loss to the other.<sup>145</sup> Weinrib recognizes the administrative difficulties of a general duty to rescue<sup>146</sup> and affirmatively answers the question of "whether the indeterminacy in a rescue principle will be legally manageable."<sup>147</sup> Although he recognizes the general relevance of administrative concerns, Weinrib does not address adequately the range of process problems raised; his easy-rescue rule would not be nearly so manageable as he makes it out to be.

The analysis that follows will test the proposed easy rescue rule against the process constraints developed earlier. The question to be answered is this: Would a general duty to engage in a relatively low cost rescue violate the process constraints? As the following analysis makes clear, the imposition of such a duty would, in varying degrees, violate them all.

Whether a general duty to undertake easy rescue would present significant problems of incomprehensibility would depend on whether a subjective or an objective test were used—that is, on whether courts did or did not purport to take into account an individual defendant's psychological predisposition in imposing a duty to act. As will be explained shortly, a subjective test is more likely than an objective test to be misunderstood by those to whom it is directed. The traditional negligence standard avoids problems in this regard by employing an objective test.<sup>148</sup> A general duty to rescue presumably could accomplish the same goal by adopting a similarly objective test: "Would a reasonable, psychologically normal person in the defendant's position have been able to effect a rescue at relatively little cost?" A subjective test, by contrast, would excuse a defendant who could show that he was psychologically incapable of responding to the plaintiff's need for help.

A major problem with an objective test in the rescue context is that fairness-based arguments favoring a subjective approach are much stronger here than in the general negligence context. This point will be

<sup>143</sup> See, e.g., M. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER & PUBLIC POLICY* xii, 64-73 (1977); Ames, *supra* note 135, at 112-13; Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972); Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 509 (1965); Weinrib, *supra* note 135.

<sup>144</sup> See Weinrib, *supra* note 135.

<sup>145</sup> The author circumscribes his duty with two limits: there must be an "emergency," and the rescue must not "inconvenience" the rescuer. See Weinrib, *supra* note 135, at 285.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 275.

<sup>148</sup> See *supra* notes 82-85 and accompanying text.

developed in connection with the conformability constraint, but its essence is not difficult to grasp. In both the negligence and the rescue contexts, whenever the defendant is psychologically incapable of acting reasonably, the tort claim is brought by one innocent person against another innocent person. But in the negligence context, the defendant has *caused* the plaintiff's harm. Between two innocent parties it is arguable on fairness grounds that the person who caused the harm should bear the loss.<sup>149</sup> In the rescue context, in contrast, the defendant who is psychologically incapable of acting reasonably is not only innocent of wrongdoing, but also is not responsible for causing the plaintiff's harm.<sup>150</sup> In the rescue context no moral basis exists for shifting the loss of an innocent plaintiff to an equally innocent defendant who is psychologically incapable of acting to prevent the loss.<sup>151</sup>

Professor Weinrib never explicitly addresses the issue of whether an objective or a subjective test should be used in connection with his easy rescue rule. At one point he refers to measuring the inconvenience to the defendant "objectively in terms of market values."<sup>152</sup> But it is clear that he is thinking only in terms of objectively evaluating the "time and effort directed at aiding the victim,"<sup>153</sup> elements that I agree should be objectively measured regardless of whether the defendant's psychological predispositions are taken into account. On balance, Weinrib would probably adopt what is here described as a subjective test, allowing the defendant's psychological predispositions to be taken into account. Because his reasons for imposing a duty to rescue are fairness reasons, his concept of "inconvenience" to the defendant is consistent with a subjec-

<sup>149</sup> Many of the commentators who have supported an objective negligence standard have taken this position. *See, e.g.,* Edgerton, *Negligence, Inadvertence, and Indifference; the Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 867-68 (1926). More recently, Professor Epstein has advanced the thesis that the defendant's causing the plaintiff to suffer harm is sufficient by itself to require the defendant to offer a good reason why he should not be liable to the plaintiff. Epstein also argues that in the absence of a cause-in-fact connection, the defendant owes no duty to the plaintiff. *See generally* Epstein, *supra* note 2, 3 J. LEGAL STUD. 165; Epstein, *supra* note 2, 2 J. LEGAL STUD. 151.

<sup>150</sup> We are considering here the absence of a general duty to rescue; thus it is assumed that no cause-in-fact connection exists between the defendant's conduct and the plaintiff's predicament. *See supra* note 132. Although I do not agree with Professor Epstein's general thesis that the absence of a causal connection prevents the would-be rescuer from owing any duty to the would-be rescuee, I agree that in the special case being considered here—a would-be rescuer who was psychologically incapable of rescue—the combination of an absence of personal culpability and a lack of actual causation argue strongly for no liability.

<sup>151</sup> Viewed in this way, the special case here being considered comes down to this: *P*, an unlucky victim of circumstance, found himself in need of rescue; *D*, also an unlucky victim of circumstance, witnessed *P*'s plight. *P* and *D* were total strangers. Neither party was in any way responsible for putting *P* in his predicament. *D* was psychologically incapable of helping *P*. *P* suffered harm. Is there any moral reason why *D* should be obligated to make *P* whole? I submit that there is not.

<sup>152</sup> *See* Weinrib, *supra* note 135, at 275.

<sup>153</sup> *Id.* at 272.



tive approach.<sup>154</sup> Insisting on an objective test would undermine the moral basis on which he deems the duty to rest.

A subjective test, however, presents significant process problems. From the standpoint of comprehensibility, a subjective test is likely to be misunderstood at both the primary and adjudicative levels to condone consideration of not only the actor's psychological predisposition but also his values. In the familiar classroom hypothetical in which the defendant could have saved a drowning child by wading ankle-deep into a tranquil pond, it would not only be difficult but also arguably inappropriate to distinguish between the relevance of a deep-seated, pathological aversion to pond water and the relevance of a deep-seated, pathological aversion to children.<sup>155</sup> Yet, adjusting for the latter type of psychological predisposition would be tantamount to excusing the defendant's failure to act on the ground that "he hates kids." That this possibility is far from academic is indicated by the difficulties that courts have encountered in struggling with analogous concepts in substantive criminal law under the headings of "diminished responsibility" and "diminished capacity."<sup>156</sup>

Moreover, a general duty to undertake a relatively low cost rescue would create problems in connection with the process constraint that liability rules should avoid referring to nonverifiable factual events and circumstances. In the adjudicative context, a subjective test based on the individual defendant's psychological predispositions would present plaintiffs with significant problems of proof.<sup>157</sup> Moreover, regardless of whether a subjective or an objective approach were used, imposition of a general duty to rescue would present "what would have happened if . . . ?" questions on a much more regular basis than in traditional negligence cases.

Under traditional negligence rules, such questions arise primarily

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<sup>154</sup> Weinrib speaks of inconvenience in terms of "the pleasure that [the actor] must forego in adhering to [the duty to rescue]." *Id.* at 285. This is a seemingly subjective approach. Weinrib appears to consider only the outrageous cases of nonrescue—cases in which defendants refuse to help others out of malevolence and spite. Clearly, our "frozen with fear" hypothetical cases are not of this variety.

<sup>155</sup> The first defendant appears innocent of wrongdoing, assuming that he is telling the truth. For a discussion of verifiability problems, see *infra* note 157 and accompanying text. The second defendant is more difficult to judge. At one extreme, he might come into court and admit that he recognized the victim as his neighbor's child, for whom he has an abiding dislike. Although he would be unlikely to admit to such motives, if he did they would constitute an "outrageous" case. At the other extreme, the defendant's psychoanalyst might testify that his patient's predisposition regarding children paralyzed him just as completely as the first defendant's phobia regarding pond water. What, then, should be the result under a subjective standard? For a discussion of an analogous problem in the criminal law context, see also *infra* note 205.

<sup>156</sup> See *infra* notes 204 & 205.

<sup>157</sup> See *supra* notes 83, 84 and accompanying text.

in connection with the issues of proximate causation and damages.<sup>158</sup> Proximate causation is the more problematic of these two issues, but even in this context such questions are relatively manageable. For a general duty to rescue, however, process problems associated with such questions would not be so easily avoided. The reason for this is the absence of an underlying cause-in-fact connection between the defendant's behavior and the plaintiff's harm. In the context of traditional negligence, the tacit assumption favoring the plaintiff in connection with the issue of proximate cause is appropriate because the defendant's behavior is not only unreasonable but also is the cause-in-fact of the plaintiff's harm.<sup>159</sup> In the general rescue context, the cause-in-fact connection is missing; the only possible causal link between the defendant and the plaintiff is proximate causation. It thus would be less appropriate in the context of a general duty to rescue to supply the plaintiff with a presumption regarding the only issue of causation in the case. It follows that hypothetical "what would have happened if?" questions would arise more frequently in the rescue context than in the traditional negligence context, and would present difficult problems of verification.<sup>160</sup>

Even if nonverifiability in the adjudicative context were somehow avoided, perhaps by relying on an objective test and a presumption of proximate causation, a general duty to rescue would present problems of nonverifiability at the level of primary behavior. These problems may be seen clearly by comparing situations under traditional negligence with those under the proposed general duty to rescue. Although an actor acting under traditional negligence principles may confront ambiguity regarding the balance of risks and benefits flowing from his conduct, at least he can assume that his putative victims would prefer that he choose a course of conduct that is less likely to cause harm, and he usually can determine which course of action will produce this result.<sup>161</sup> If risk-averse actors in the negligence context err on the side of excessive caution, their would-be victims will have no legitimate grounds for complaint.<sup>162</sup>

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<sup>158</sup> See *supra* notes 92-96 and accompanying text.

<sup>159</sup> The cause-in-fact connection, coupled with the defendant's negligent conduct, arguably supplies sufficient grounds for liability in and of itself. See, e.g., *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560. In effect, by allowing defendants to raise the proximate cause issue, the negligence system gives them "one last chance" to demonstrate why liability would not further the objectives of the system.

<sup>160</sup> In the earlier drowning-child hypothetical, for example, it might be difficult to determine whether the child was beyond saving before the defendant came along.

<sup>161</sup> This is not to say that actors can easily determine which course of conduct is less costly, but rather that they can usually determine which course is safer. Because accident avoidance costs also are costs, the safer course may be the more costly approach.

<sup>162</sup> Tort law is concerned with the unreasonable creation of risks rather than the unreasonable elimination of risks. Even if it is recognized that from a social welfare standpoint there is such a thing as "too much safety," see *supra* note 161, conduct that is too safe is

In contrast, the ambiguities confronting would-be rescuers are not so easily resolved in favor of safety. More frequently than in the traditional negligence context, would-be rescuers cannot determine whether acting or refraining from acting is more likely to expose others to risks of harm. Unlike the situation in the traditional negligence context, an actor responding to a general duty to rescue cannot assume that his would-be rescuees would prefer to have him respond one way or the other. The earlier hypothetical of the drowning child was easy, for the presence of a child lying face down in the water calls for rescue most unambiguously. But many cases are not this clear.<sup>163</sup>

Advocates of a general duty to rescue have tended to ignore these problems of nonverifiability in their treatments of the subject. Professor Weinrib, for example, addresses the "need for rescue" element with his requirement that an emergency must exist before rescue is required.<sup>164</sup> But he assumes, without discussion, that actors will know real emergencies when they see them. His process concerns are limited to the manageability of his easy-rescue rule as a guide to decision at trial; thus, he focuses primarily on the ability of courts to draw lines of demarcation after the fact.<sup>165</sup> Nowhere does he address the problems of ambiguity and nonverifiability at the level of primary behavior. Weinrib's failure to address these process problems undermines his argument that a gen-

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generally not tortious. Our legal system tacitly relies on self-interest, rather than exposure to liability, to guard against actors behaving too cautiously toward others.

<sup>163</sup> For example, a potential rescuer observing a young man and woman struggling in the back seat of an automobile may not be sure whether he is watching a rough-and-tumble courtship or imminent rape. A call to the police will be either helpful or traumatic in its effects, depending on the circumstances. Professor Gregory presents the following example of the sorts of ambiguities facing potential rescuers:

Recently I read a letter to the editor in our local newspaper. It excoriated an unnamed storekeeper for inexcusably accusing a small Negro child of intending to shoplift and threatening him with jail. But the writer of the letter really seemed to be flaying herself for not having lashed out at the storekeeper. She felt that she should have alleviated the child's horrible embarrassment and the wound to his psyche. Indeed, she equated her failure with the betrayal of Kitty Genovese by her neighbors. On the other hand, if she had spoken up, she might have provoked even greater harm to the child.

Gregory, *supra* note 135, at 37 (footnote omitted).

To make matters worse, if the would-be rescuer guesses wrong, he may be liable in a retaliatory tort action. *See, e.g., Sloan v. Pierce*, 74 Kan. 65, 85 P. 812 (1906) (defendant shot plaintiff under the mistaken impression that such action was necessary to prevent plaintiff from injuring defendant's father). *See generally* W. PROSSER, *supra* note 16, at 113.

The rescuer runs the additional risk that he may conduct the rescue negligently. Although this risk does not raise process concerns, it is related to the problem of a potential rescuer's deciding, often under intense pressure of time, whether or not to intervene. The so-called "Good Samaritan" statutes, enacted in a number of states, which relieve good faith rescuers from liability for negligence, suggest that these concerns are shared generally. *See, e.g., KAN. STAT. ANN. § 65-2891(a)* (1972).

<sup>164</sup> *See* Weinrib, *supra* note 135, at 285, 293.

<sup>165</sup> *See id.* at 276-77.

eral duty of easy rescue is morally justified.<sup>166</sup> I am fairly certain that he would recognize nonverifiability in the adjudicative context as part of the "administrative difficulties" of such a rule. But he fails to realize that nonverifiability also presents problems in the context of primary behavior; therefore, he fails to perceive the full extent to which this consideration detracts from the efficacy of a general duty to rescue.

Regarding the requirement that liability rules avoid calling for patterns of behavior to which actors cannot conform, a general duty to rescue based on an objective reasonableness standard clearly would require more than abnormally timid persons would be able to deliver.<sup>167</sup> It could be argued, of course, that the conformability constraint does not prevent an objective standard from being imposed in the traditional negligence context.<sup>168</sup> In the traditional negligence context, however, actors possessing subnormal capacities are presumably able to avoid the excessive burdens of the objective negligence standard by avoiding activities that are especially risky to others and in which the actors' incapacities are likely to contribute significantly to the risks. Given the propensity of such persons to cause harm to others, it does not seem unfair to expect them to curtail their activities in this manner.<sup>169</sup>

In contrast to the traditional negligence context, it not only would be more difficult for psychologically handicapped persons to predict those activities in which the need for them to engage in rescue might arise, but it would also be unfair to expect them to restrict their activities so as to avoid the possibility of being called on to act. To some extent, of course, it would be possible to predict those activities in which someone is likely to be injured and to require assistance.<sup>170</sup> However, under an objectively administered general duty to rescue, the abnormally timid individual would be required to predict those occasions requiring assistance *from him*. This would be a more difficult task, requiring predictions of the likelihood not only of encountering persons who need help, but also of the availability of other would-be rescuers.<sup>171</sup>

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<sup>166</sup> Would Weinrib, for example, excuse a defendant in the "struggle-in-the-backseat" hypothetical, *see supra* note 163, who honestly and reasonably misinterprets the struggle to be innocent courtship? If not, how does he answer the honest-but-mistaken defendant's argument that the law of torts unfairly puts him on the horns of a dilemma?

<sup>167</sup> By "abnormally timid persons" I mean those whose psychological predispositions render them less capable of acting to help others. *See generally* ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES (J. Macaulay & L. Berkowitz eds. 1970); B. LATANE & J. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP? (1970) (both works cited in Rodgers, *supra* note 13, at 20 n.102). Professor Rodgers supports the general no-duty-to-rescue rule on grounds similar to my third process constraint.

<sup>168</sup> *See supra* note 90 and accompanying text.

<sup>169</sup> *See supra* note 91 and accompanying text.

<sup>170</sup> Landes and Posner assumed that one could compile a list of activities that are likely to present rescue opportunities. *See* Landes & Posner, *supra* note 135, at 120.

<sup>171</sup> For example, it is easy to see that a public beach is a place where persons will require

Under a general duty to rescue accompanied by an objective liability standard, abnormally timid persons would have relatively little opportunity to plan their activities so as to avoid the burdens of an objective standard.<sup>172</sup> Their only choice would be either to take their chances and proceed as if no duty to rescue existed or to stay home, preferably alone—hardly a meaningful or fair choice. Of course, reliance on a subjective standard would reduce the burdens on abnormally timid persons. But even if a subjective approach would satisfy the conformability constraint, it would do so only by creating substantial problems in connection with the constraints of comprehensibility and verifiability.

The most telling effects of recognizing a general duty to rescue would be felt in connection with the process constraint of manageability. In contrast to the traditional approach to negligence-based liability in which the requirement of cause-in-fact serves, as a practical matter, to limit the number of persons who can be joined as defendants,<sup>173</sup> a general duty to rescue would more frequently present situations in which an injured plaintiff would have several persons—occasionally even a large number—against whom to bring suit.<sup>174</sup> Not every instance in which more than one person could have rescued would result in litigation involving many defendants. Some plaintiffs would be unable to identify everyone who had refused to render assistance, and others might choose not to join all potential defendants. Although this might serve to simplify some rescue cases, it would do so in ways that would give rise to substantial unfairness objections by defendants who could legitimately ask “why me?” Moreover, there is no guarantee that plaintiffs in these “group failure to rescue” cases would be forced or would choose to pres-

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rescue fairly frequently. However, a timid person could go to many public beaches every day with confidence that he would not be exposed to liability because of the assured presence of other potential rescuers, including professional lifeguards.

<sup>172</sup> The sorts of emergencies that Weinrib envisions providing opportunities for easy rescue are freaks of chance that do not lend themselves to planning ahead of time: “[E]mergency aid does not unfairly single out one of a class of routinely advantaged persons; the rescuer just happens to find himself for a short period in a position, which few if any others share, to render a service . . . .” Weinrib, *supra* note 135, at 292.

<sup>173</sup> It is unusual for a large number of persons to act in concert negligently so as to injure the same plaintiff. Cases such as *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), in which the California court allowed the plaintiff to join a number of medical personnel because he was unable to prove which one of them injured him while he was unconscious and in their care, are unusual.

<sup>174</sup> The absence of a cause-in-fact requirement accompanying a general duty to rescue leads to this multiplicity of potential defendants. See *supra* note 150 and accompanying text. Thus, it is physically possible for a crowd of persons to watch idly while the plaintiff suffers harm from lack of rescue. The episode in New York City involving Kitty Genovese is a well-known example of this phenomenon. Thirty-eight people witnessed one or more of four separate attacks on the young woman over a half-hour period and failed to call for help. One witness finally called the police after it was too late to save the victim’s life. See generally A. ROSENTHAL, THIRTY-EIGHT WITNESSES (1964).

ent courts with bipolar tort actions. To the contrary, it could be expected that plaintiffs in a significant percentage of these cases would join a number of defendants in order to increase their chances of recovery. Thus, it may reasonably be assumed that judicial recognition of a general duty to rescue frequently would present courts with cases involving a large and relatively unmanageable number of defendants and issues.<sup>175</sup>

In addition, not only would the number of defendants tend to complicate failure-to-rescue cases, but the interrelationships among the defendants regarding the duties that they allegedly owed to the plaintiff would present potentially high levels of polycentricity. Consider a hypothetical case in which a plaintiff joins as defendants a number of onlookers for failing to come to his aid following an accident in a public place. Each defendant would point to the presence of the other would-be rescuers as a relevant datum in deciding whether he should have stepped forward.<sup>176</sup> Not only would each defendant present a different set of considerations regarding relevant circumstances such as physical capacity to act, timidity, and the like, but also the considerations would tend to be mutually interdependent, causing the question "which person or persons should have rescued?" to become highly polycentric. These problems would be exacerbated were the plaintiff to argue that the onlookers should have organized a cooperative rescue effort, to which each defendant was obligated to contribute according to his physical abilities, psychological predispositions, and the like.<sup>177</sup>

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<sup>175</sup> Courts have recognized these potential difficulties. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5 (1976) ("[The absence of a general duty to rescue] owes its survival to 'the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue . . . .' (Prosser, *Torts* (4th ed. 1971) § 56, p. 341).")

<sup>176</sup> If we posit the unrealistically simple situation in which five equally able-bodied and psychologically adequate people stand and watch a child drown in six inches of pond water, see *supra* note 155 and accompanying text, then the assertion of high polycentricity is inaccurate because the presence of the others would not be relevant to the liability of any one of them—they are all liable for failing to act. Yet "real life" situations would never be so simple. Instead of floating face down in a shallow pond, the child would more likely get into difficulties at a public beach unattended by a lifeguard. A number of onlookers would swear that they believed that a lifeguard was providing help. Others would swear that they are not good swimmers or had just eaten lunch, and assumed other, more capable, onlookers would take action. In response to the plaintiff's argument that someone could have, at least, called for professional assistance, all the onlookers will argue that they were "sure" that because so many people were standing around someone had already gone for help. Given the inherent ambiguities in such a real life situation, the tort case in which the child's family joins 50 or so onlookers as defendants would become complicated and unmanageable.

<sup>177</sup> Although these situations would arise infrequently, Weinrib's proposed "easy rescue" rule, with its emphasis on low cost, would encourage plaintiffs to adopt a "group rescue" approach because it would enable a number of onlookers to contribute modestly to effect a rescue which in the aggregate involved a more substantial expenditure of resources. Something close to the mood of this suggestion was struck by Professor Rudolph when he addressed

Professor Weinrib raises the question of multiple defendants only by way of answering the earlier-described objection to his rescue rule based on the unfairness of allowing the plaintiff to single out one or a few from many possible defendants. His reply to the objection is interesting and reflects the inadequacy of his treatment of the process implications of his proposal. He argues that the potential unfairness of singling out one defendant could be avoided by allowing that defendant to join others by way of seeking contribution—a solution that ignores the negative effects of joinder on the manageability of such claims.<sup>178</sup> In support of his position he observes that multiple-tortfeasor cases arise under traditional negligence principles, erroneously asserting that the difficulties would be no greater in the rescue context.<sup>179</sup>

Viewed more generally, it is a fair assessment of Weinrib's treatment of rescue to conclude that he nowhere addresses the difficulties I have herein described in connection with the manageability constraint. The closest he comes is his recognition that the "low cost" concept will require courts to engage in line-drawing. But the examples he uses to show that courts can cope with what he calls "vague but manageable concepts"—the concepts of duress and necessity from contract law—reveal that he is not anticipating the sorts of problems raised here.<sup>180</sup>

Such difficulties would not be limited to cases involving multiple defendants. Even in cases in which recovery was sought from a single defendant, the question of whether a general duty to rescue was breached would present polycentric issues. In effect, the plaintiff would be asking the court to design an alternative, more reasonable course of

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the question of the difficulty of sorting out the liabilities after the fact: "We realize that in some situations it will be difficult to know all of the persons who might have the duty [to rescue], but in such cases the group will be large, and the hardship of contributing will be small." Rudolph, *supra* note 143, at 533.

<sup>178</sup> Weinrib, *supra* note 135, at 262. Although contribution may mitigate unfairness problems, it is likely to exacerbate process problems. Conversely, holding onlookers liable on a pro rata basis despite their culpability alleviates process problems, but causes fairness problems to reemerge. *See supra* note 177.

<sup>179</sup> Weinrib, *supra* note 135, at 262. Weinrib overlooks the greater likelihood of multiparty cases in the rescue context, *see supra* note 173 and accompanying text, as well as the fact that the rules governing joint and several liability in traditional negligence cases render it unnecessary to engage in the "sorting out" process described *supra* note 177.

<sup>180</sup> *See* Weinrib, *supra* note 135, at 276. My process concerns extend beyond Weinrib's concern for the judicial task of line-drawing. Weinrib's contract concepts require courts to determine the amount of duress or necessity sufficient to obviate assent. The only real problem this question presents relates to verifiability. Duress, for example, is a comprehensible concept. The proscription on the use of duress by contracting parties is one to which persons are capable of conforming. Moreover, the question of "how much duress is too much?" is not very polycentric—it calls for judgments along an essentially linear "free will/coercion" axis. Finally, the potential verifiability problems are not as difficult in practice as they may appear in theory; although most jurisdictions employ a subjective test, courts rely on a combination of circumstantial evidence and presumptions to adopt a basically objective approach to the questions of duress. *See generally* Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis*, 53 IOWA L. REV. 892, 893-96 (1968).

conduct than that undertaken by the defendant. Frequently a range of possible responses would have been available to the defendant, each varying as to probable costs and benefits. Moreover, assuming that a subjective standard were employed, judges and juries would have a more difficult task in attempting to rely on empathy. In many cases, it would be clear enough what the defendant should have done; but in many cases it would not, rendering difficult the task of adjudicating a "reasonable rescue."<sup>181</sup>

It remains to be considered whether limiting the duty to situations in which rescue could be effected at low cost would render these cases manageable. Whether it would depends on the meaning given the phrase "low cost." To impose liability whenever action could have been taken at "relatively" low cost would not reduce the difficulties significantly.<sup>182</sup> However, to impose liability only when rescue could have been effected at practically no cost whatever to the rescuer would make the determination easier. As the cost of rescue approaches zero, the "rescuer's cost" consideration moots a sufficiently large percentage of the other considerations so as to reduce the associated polycentricity to manageable levels.<sup>183</sup>

This conclusion does not threaten the foregoing process analysis of the traditional no-duty-to-rescue rule. A "practically no-cost rescue" rule still would present difficulties in connection with the other process constraints. More important, such a rule would be of minimal social utility. The overwhelming percentage of individuals presented with the opportunity to effect life- or limb-saving rescue at practically no cost to themselves will choose, almost by hypothesis, to act irrespective of any incentives provided by tort law.<sup>184</sup> Exposing would-be rescuers to liabil-

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<sup>181</sup> The clear case is the "child in the pond" hypothetical. The difficult case is one in which several alternative courses of action were available to the defendant, each with a different set of costs and benefits. The most unmanageable cases involve situations in which several persons were simultaneously in need of help, and in which the different forms of assistance to each affected the costs and benefits to the others. In such circumstances the rescuer, and later the court, would confront a highly polycentric problem of deciding on a reasonable course of action. *See supra* notes 34-36 and accompanying text.

<sup>182</sup> "Relatively" in this context connotes the cost-benefit balancing involved in traditional negligence cases and can be highly polycentric.

<sup>183</sup> Once a court determines that there was one possible means of no-cost rescue, it is clear that liability would result. If there were a number of no-cost means of rescue, the court's initial determination of whether there were *any* no-cost means would be simpler.

<sup>184</sup> I believe Weinrib favors a narrow definition of "easy," and thus is advancing what might be called an "outrageous failure to rescue" doctrine. *See supra* note 154. It is interesting to observe that courts employ a somewhat analogous concept to outrageous behavior to allow recovery for the intentional infliction of mental upset. *See generally* RESTATEMENT (SECOND) OF TORTS § 46 (1965). But the social utility of the latter rule is significantly greater than that of a rule imposing liability for "outrageous non-rescue." In the intentional infliction of mental upset context, those held liable can control whom they will harm and when they will harm them. In contrast, the defendant who commits "outrageous non-rescue" is *not* in control of the circumstances surrounding the opportunity to effect easy rescue. *See supra* note 132



ity for refusing to act under these unusual circumstances probably would fail to reach the few truly sociopathic individuals who would refuse to effect no-cost rescues, and might have negative effects on some of the majority who would rescue voluntarily.<sup>185</sup> Thus, a general duty to rescue limited to "no cost" situations would yield little if any benefits. Imposition of such a duty, therefore, would not justify the process problems that it would generate.

The traditionally recognized exceptions to the no-duty-to-rescue rule support the foregoing analysis. For example, duties to act are imposed on persons who have special relationships with persons requiring rescue.<sup>186</sup> Such limited duties can serve as guides to primary behavior because they tend to suggest specific courses of conduct based on the underlying relationship.<sup>187</sup> Moreover, timid individuals can reduce their exposure by avoiding the special relationships generating such duties.<sup>188</sup> At the adjudicative level, nonverifiability problems are reduced

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and accompanying text. If he was in control—if he "set things up"—he falls within an exception to the no-duty rule and is liable under traditional law. Thus, even if we assume that sociopathic individuals do exist who would stand idly by and watch other persons suffer easily preventable injuries, in order to commit torts these sociopaths must be "lucky" enough to be given the chance to do so. Unlike the tortfeasors who intentionally inflict mental suffering, they cannot run next door to their neighbor's house and not rescue him.

It follows that society's need for a tort rule aimed at discouraging outrageous nonrescue is much less compelling than is its need for a rule discouraging outrageous aggression. Society arguably needs a rule proscribing the intentional infliction of mental suffering in order to curb the tendencies of some persons to seek out victims upon whom to inflict emotional trauma, and will therefore tolerate the process difficulties associated with implementing such a rule. Because the opportunities to engage in "outrageous nonrescue" arise randomly, the small minority of persons willing to take advantage of such opportunities receive them so seldom that the process problems of a duty to rescue rule outweigh the minimal deterrent value of such a rule.

<sup>185</sup> See generally Landes & Posner, *supra* note 135. Even if their conclusions are weak, they count for something here because the benefits likely to be derived from a no-cost rescue rule are so small.

<sup>186</sup> See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 438, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976) (psychiatrist-patient); *Farmer v. State ex rel. Russell*, 224 Miss. 96, 105, 79 So. 2d 528, 531 (1955) (jailor-prisoner); *Kambour v. Boston & Me. R.R.*, 77 N.H. 33, 43, 86 A. 624, 629 (1913) (common carrier-passenger). See generally RESTATEMENT (SECOND) OF TORTS § 314A (1965).

<sup>187</sup> Courts can create guidelines based on the customary patterns of behavior associated with each relationship. For example, in *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), the court imposed a duty on a psychiatrist either to warn the intended victim of his potentially violent patient or to have the patient confined. Such a duty is not imposed unless the psychiatrist knows or objectively should know of the danger his patient presents. Once the danger is known, warning or confinement are courses of action suggested by the psychiatrist's professional relationship with his patient. Often the duty based on a special relationship is less demanding. Common carriers or jailors, who have people under their control for periods of time, have a duty to see that passengers and prisoners receive adequate medical attention. See, e.g., *Conolly v. Crescent City R.R.*, 41 La. Ann. 57, 61, 5 So. 259, 260 (1888).

<sup>188</sup> Most of the activities charged with special duties are those entered into voluntarily (e.g., doctor, jailor, common carrier). See *supra* note 186. The most troublesome relationships from this perspective are familial relationships that are not voluntary—for example, the rela-

by the application of an objective standard that is easier to defend on fairness grounds if the basis for the duty is a special relationship voluntarily entered into.<sup>189</sup> The difficulties associated with "what would have happened if . . . ?" inquiries are mitigated by the understandable willingness of courts to rely on the types of tacit assumptions that render manageable the issue of proximate causation under traditional negligence principles.<sup>190</sup>

The most dramatic effects of the special-relationship exception are the ways in which it helps to render rescue cases judicially manageable. By hypothesis, the special-relationship requirement limits the number of potential tortfeasors and returns the relevant litigation closer to the bipolar mode. This reduces polycentricity to the extent that the tribunal is called upon to determine the reasonableness of the failure of an individual defendant or a small group of defendants to undertake a specific course of rescue derived from the nature of the underlying relationship.

This analysis applies to the other exceptions, including those based on the defendant's abandoning a rescue attempt<sup>191</sup> and the defendant's knowingly having caused the plaintiff's predicament.<sup>192</sup> In each instance, the special features upon which the exception is based provide a sufficiently narrowed focus for the duty-to-rescue rule to serve as a guide to both primary and adjudicative behavior.<sup>193</sup>

tionship between brothers. Consistent with this analysis, it is not clear whether duties to rescue are actually recognized in such cases. *See generally* W. PROSSER, *supra* note 16, at 342.

<sup>189</sup> The courts apply an objective standard. *See, e.g.*, *Anderson v. Atchison, Topeka & Santa Fe Ry.*, 333 U.S. 821, 823 (1948) ("what 'a reasonable and prudent man would ordinarily have done under the circumstances of the situation.'"); *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 439, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976) ("applicable professional standards").

<sup>190</sup> Prosser describes the tendency toward leniency in this way: "When a child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved him; but the experience of the community permits the conclusion that the absence of the guard played a significant part in the drowning." W. PROSSER, *supra* note 16, at 242 (footnote omitted). It is probably fair to characterize the judicial attitude in these cases as one of relative, not complete, leniency. Thus, the surrounding circumstances established by the plaintiff must support, if not require, the conclusion that rescue would have helped. If it is clear that rescue was impossible, courts will direct verdicts for defendants. *See, e.g.*, *Ford v. Trident Fisheries Co.*, 232 Mass. 400, 122 N.E. 389 (1919).

<sup>191</sup> *See, e.g.*, *Farwell v. Kcaton*, 396 Mich. 281, 287, 240 N.W.2d 217, 220 (1976); *Zelenko v. Gimbel Bros.*, 158 Misc. 904, 904, 287 N.Y.S. 134, 135 (Sup. Ct. 1935), *aff'd*, 247 A.D. 867, 287 N.Y.S. 136 (1936) (per curiam). *See generally* RESTATEMENT (SECOND) OF TORTS § 323 (1965); W. PROSSER, *supra* note 16, at 343-48.

<sup>192</sup> *See, e.g.*, *Tubbs v. Argus*, 140 Ind. App. 695, 699, 225 N.E.2d 841, 843 (1967). Ames was the first to distinguish between one who refused to aid another and one who refused another aid when he had caused, although innocently, the other's peril. *See Ames, supra* note 135, at 111-12.

<sup>193</sup> As explained earlier, the special-relationship exception suggests fairly specific courses of action. *See supra* note 186 and accompanying text. The exception that is based on the arbitrary abandonment of a rescue attempt also suggests this. The defendant owes a duty to carry through with the specific course of action he begins to undertake. Moreover, the defendant, by volunteering, has demonstrated that the rescue required of him by law is one that

In seeking to explain in process terms the rules governing liability for failure to rescue, I am not suggesting that substantive reasons have played no role in explication. I strongly urge, however, that to attempt to explain these rescue rules solely in terms of the substantive objectives of tort law can lead to questionable conclusions. An example of this is Professor Epstein's treatment of tort rules relating to rescue. His basic thesis is that the underlying justification for allowing *A* to recover in tort from *B* is that *B* caused harm to *A*.<sup>194</sup> I interpret him to be relying on the general no-duty-to-rescue rule, together with its various exceptions, to support his position that in the absence of a cause-in-fact connection between *B*'s conduct and *A*'s harm, *A* has no moral claim against *B* for compensation.<sup>195</sup>

I submit that the foregoing process explanation of the no-duty-to-rescue rule is more helpful than Professor Epstein's explanation based on the absence of cause-in-fact. Confronting a no-duty-to-rescue rule that appears to contradict traditional principles of social morality, Professor Epstein has reasoned backwards to a substantive position that appears intuitively questionable. But whether or not his reasons are persuasive, Epstein at least has reached the right conclusion—that a general duty to rescue, even if limited in the ways suggested by Weinrib's analysis, should not be recognized. Viewed substantively, Professor Weinrib correctly discerns that an actor is morally obligated to intervene in an

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he is very likely to be capable of performing. Interestingly, the exception based on cause-in-fact does not seem to fit this pattern. The coincidence that the defendant's innocent conduct caused the plaintiff's predicament does not suggest a specific course of action, nor does it make the defendant a volunteer. Furthermore, it does not guarantee in any way that the defendant is capable of undertaking the rescue. Thus, the willingness of courts to impose a duty to rescue based merely on cause-in-fact appears, at least at first glance, to be inconsistent with my analysis.

But the cases frequently cited to support the cause-in-fact exception involve elements in addition to cause-in-fact that reduce the process difficulties just described. *Montgomery v. National Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938), and *Rains v. Heldenfels Bros.*, 443 S.W.2d 280 (Tex. Civ. App. 1969) both involved duties to aid others injured while driving on the highway. The *Montgomery* Court speaks in terms of a special relationship among all highway travelers, rather than in terms of cause-in-fact. 186 S.C. at 176, 195 S.E. at 251. Indeed, specific duties based on such a special relationship are imposed by statute in a number of states. See generally Annot., 80 A.L.R.2d 299 (1961). Another case often cited in support of the cause-in-fact exception is *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 50 N.E.2d 334 (1942). There, a child's fingers were caught in an escalator and injured before department store personnel could shut the escalator off. The court found the store negligent for failing to act quickly enough and raised the possibility that the duty to rescue the child might arise because the defendant's instrument harmed the plaintiff. *Id.* at 94-95, 40 N.E.2d at 337. However, the decision could just as easily be read to rest on the duty owed by a landowner to his invitees. *Id.*; see also *Connelly v. Kaufmann & Baer Co.*, 349 Pa. 261, 37 A.2d 125 (1944) (court found defendant liable for escalator injury because of special relationship of common carrier to passenger).

<sup>194</sup> See Epstein, *supra* note 2, 3 L. LEGAL STUD. 151.

<sup>195</sup> Professor Weinrib suggests one interpretation of Epstein's analysis—"that rescue is a moral requirement but . . . that it should [not] be a legal one." Weinrib, *supra* note 135, at 261. This view of Epstein's thesis is compatible with my process analysis.

emergency situation to save a stranger, at least when he can do so at relatively small cost.<sup>196</sup> But Weinrib overstates the moral basis for a general duty to rescue by ignoring the relevance of the comprehensibility, verifiability, and conformability constraints on primary behavior. Moreover, by focusing on the moral side of the question, he ignores the difficulties in judicially administering a rescue rule. When the administrative difficulties of applying such a rule in court are adequately considered, the traditional no-general-duty-to-rescue rule seems the fairest and most efficient course.<sup>197</sup>

### CONCLUSION

The thesis of this article is that process constraints have played an important role in shaping the content of common law rules governing tort liability. The absence at common law of a general duty to rescue is perhaps the best example of a rule that cannot be understood adequately without reference to the process perspective. Efficiency theorists have stretched their rationales to try to accommodate this no-duty rule,<sup>198</sup> and at least one fairness theorist has used the rule as part of the basis for a decidedly nontraditional substantive overview of tort law.<sup>199</sup> Notwithstanding these attempts to reconcile the no-duty-to-rescue rule with substantive tort objectives, this article has shown that the rule can be understood best from a process perspective. Courts have refused to impose a general duty to rescue largely because it would be unmanageable as a guide to either primary or adjudicative behavior. Because it fails adequately to take into account the relevant process implications, Professor Weinrib's recently-proposed "easy-rescue" rule must be rejected as unworkable.

It may serve to strengthen the conclusions reached in this article to observe that the process perspective developed herein has a broader range of applications than merely to tort law.<sup>200</sup> Although these appli-

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<sup>196</sup> Commentators have criticized the no-duty-to-rescue rule for its moral shortcoming. *See, e.g.,* Ames, *supra* note 135, at 112. Professor Weinrib makes this observation: "Criticism of the common-law position on rescue, after all, rests on the perception that, as a matter of inarticulate common sense, it is wrong for one person to stand by as another suffers an injury that could easily be prevented." Weinrib, *supra* note 135, at 260. For a more formal analysis of the moral underpinnings of a duty to rescue, see *id.* at 279-92.

<sup>197</sup> That one state—Vermont—has enacted duty-to-rescue legislation imposing criminal penalties does not detract from this analysis; the exercise of prosecutorial discretion has assured that process problems do not arise. *See also* VT. STAT. ANN. tit. 12, § 519 (1973). *See generally* Franklin, *supra* note 135, at 60.

<sup>198</sup> *See, e.g.,* Landes & Posner, *supra* note 135; *see also supra* notes 141-42 and accompanying text.

<sup>199</sup> *See, e.g.,* Epstein, *supra* note 2, 3 L. Legal Stud. 151; *see also supra* notes 194-97 and accompanying text.

<sup>200</sup> The law of contracts reflects the norms, perhaps even more so than in the law of torts. For an interesting treatment of the process implications of the legal requirement of consideration, see Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). Professor Fuller distin-

cations are beyond the scope of the present analysis, one area—substantive criminal law—is sufficiently analogous to tort law to merit brief comment. Certainly no other area of law reflects a clearer recognition of the comprehensibility constraint. Courts and commentators both have recognized that criminal law rules must be understandable if they are to serve as guides to primary behavior.<sup>201</sup> Indeed, vagueness is an independent ground for invalidation of criminal rules.<sup>202</sup>

Some of the most interesting features of substantive criminal law are the techniques relied upon to accommodate the verifiability constraint. Criminal law invites process problems with its rhetorical commitment to the inherently nonverifiable culpability of the individual.<sup>203</sup> As might be expected from the foregoing analysis of tort law, upon closer examination the rules of decision are more objective than the culpability rhetoric would lead one to believe.<sup>204</sup> Substantive criminal law nevertheless retains sufficient subjectivity in connection with issues such as intent and competency to generate significant problems of verifiability.<sup>205</sup> The most important technique with which the system has tried to cope with these problems is the requirement that the state prove

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guishes between the "formal" and "substantive" aspects of consideration, and resolves to disentangle them. *Id.* at 799-800. He describes three functions generally performed by legal formalities: (1) the evidentiary function, which he thinks of as primarily being useful to the parties; (2) the cautionary function, which aids the contracting parties by impressing upon them that they are legally bound; and (3) the channeling function, which assists courts in trying to determine the enforceability of promises. *Id.* at 800-03. All three of Fuller's "functions of formality" relate to my verifiability constraint. His first function relates to the need for one party to be able to prove to the other the existence of a contract. His second function relates to the desirability of allowing each party to verify for himself that he is entering an enforceable contract. His third function relates to the need for courts to be able to verify the existence of the contract after the fact.

<sup>201</sup> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." *United States v. Brewer*, 139 U.S. 278, 288 (1891).

<sup>202</sup> *See id.* *See generally* W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 11 (1972); Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923).

<sup>203</sup> *See generally* W. LAFAVE & A. SCOTT, *supra* note 202, at § 27.

<sup>204</sup> "Despite its subjective-sounding rhetoric, the criminal law is generally unwilling to vary legal norms in order to accommodate a particular individual's capacity to meet the standards they prescribe." Arenella, Book Review, 80 COLUM. L. REV. 420, 427 (1980); *see also* Dix, *Psychological Abnormality As a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 313, 316-17 (1971).

<sup>205</sup> The process problems associated with what one author has described as "the criminal law's attempt to draw a sharp line between the 'mad' actor who is not criminally responsible for his behavior and the 'bad' actor who is accountable" have received a great deal of attention. *See* Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828 (1977). The source of the difficulty lies in the practical impossibility in many instances of distinguishing between illness and evil. For a recent and extensive bibliography of writings on the subject, *see* H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 299-310 (1979).

the defendant's guilt beyond a reasonable doubt.<sup>206</sup> This requirement reflects a recognition that verification errors will occur frequently, and tries to ensure that most of the errors are of the "guilty actor goes free" variety.<sup>207</sup>

Even if the elements of subjectivity associated with standards of criminal culpability present problems of verifiability, they help to solve some of the potential problems of conformability. Except for small pockets of strict liability that have been criticized by commentators,<sup>208</sup> substantive criminal law avoids setting standards of conduct to which individuals are unable to conform. Regarding the constraint of manageability, substantive criminal law avoids presenting courts with highly complex, polycentric problems. Criminal cases are typically bipolar disputes in which the major issues requiring resolution are of the "what happened?" variety. This is especially significant given the system's heavy reliance on traditional forms of adjudication.<sup>209</sup>

In advancing the process perspective outlined in this article, I have been careful not to insist that process constraints present mandates in anything approaching absolute terms. What is required is an accommodation of substantive objectives and process constraints. The most significant example of such an accommodation in traditional tort doctrine is the development of the rules governing liability for harm caused by negligent conduct. Although the underlying negligence principle of "reasonableness under the circumstances" threatens to ask more of the courts than they can deliver, adjustments in doctrines and processes have succeeded by and large in keeping traditional negligence law on the right track. Indeed, a number of these doctrinal adjustments can be understood adequately only from a perspective that includes process as well as substantive considerations.

Accepting for argument's sake that the traditional tort system has managed to accommodate substantive objectives within the relevant process constraints, one may wonder if reasons exist for believing that we may be in a period of transition toward some new regime in which process considerations are given less weight or perhaps ignored altogether. I would be the first to concede that if our traditional tort system were someday entirely replaced by a bureaucratically administered system of social insurance,<sup>210</sup> the process constraints would matter less or at

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<sup>206</sup> See, e.g., *In re Winship*, 397 U.S. 358, 361 (1970). See generally MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 798-99 (2d ed. 1972).

<sup>207</sup> See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, *supra* note 206; Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 806, 816 (1961).

<sup>208</sup> See generally W. LAFAVE & A. SCOTT, *supra* note 202, § 31; Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422-25 (1958).

<sup>209</sup> The sixth amendment to the United States Constitution creates a right to jury trial in criminal cases. U.S. CONST. amend. VI.

<sup>210</sup> For a description and analysis of the New Zealand Compensation System, which all

least would have very different applications.<sup>211</sup> But what if the tort system survives more or less intact, purporting to rely on both prospective, self-applying rules of conduct and traditional forms of adjudication—will it continue to accommodate substantive objectives within process constraints?

I can discern two factors that will test the continuing vitality of the process constraints in the coming years. The first of the factors is a growing impatience of courts and commentators with trying to accommodate substantive objectives within the constraints of process. Traditionally, the primary objective of tort law has been the resolution of private disputes between individuals.<sup>212</sup> Larger issues concerning public welfare have always been reflected in tort decisions, but the major focus has been on defining the rights and duties between individual litigants. Given this traditional focus, it is easy to understand how the tort system has accommodated the constraints of process. In recent years, however, the focus in tort cases has shifted towards courts' addressing the larger social issues more directly; judges are increasingly being asked to define their roles more as vindicators of public interests than as resolvers of private disputes.<sup>213</sup> The "ends justify the means" flavor of recent trends in public law litigation appears to be spilling over into areas traditionally thought to be part of the private law of torts.<sup>214</sup> To some extent, of course, this last observation begs the question of whether tort law is, or has become, public law.<sup>215</sup> But unlike these emerging areas of public law, the tort system continues to rely on both self-applying rules of conduct and traditional forms of adjudication. Moreover, the social imperatives that arguably justify the abandonment of traditional process constraints in areas such as public school desegregation and voting rights are not so strong in areas such as products liability and environmental torts.<sup>216</sup> It follows that the growing impatience with traditional

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but abolishes tort liability in that country, see G. PALMER, *COMPENSATION FOR INCAPACITY* (1979).

<sup>211</sup> The first three constraints would be relevant to the behavior of the bureaucrats administering the system. Depending upon the nature of the compensation system, the constraints might apply to primary behavior as well.

<sup>212</sup> See generally Englard, *supra* note 86, at 27-28.

<sup>213</sup> *Id.* at 28-30; see also Henderson, *supra* note 5, at 523.

<sup>214</sup> With respect to parallel trends in tort law, the Supreme Court of California has become something of a role model.

<sup>215</sup> Some commentators argue that tort law should become public law:

The conclusion is that the New Torts must be made to deal more explicitly with the question of what large enterprises and other clusters of power owe to the individual caught in their toils . . . . The New Torts then will emphasize more sharply the question of what defendants representing significant clusters of different kinds of power owe to our civilization in the way of behaving in a civilized manner.

Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN. L. REV. 330, 334-35 (1970).

<sup>216</sup> These areas of tort law involve disputes that affect persons other than the immediate parties. For example, when an injured consumer sues a manufacturer, claiming that the de-

process constraints is less legitimate in the latter areas than in the former. Simply stated, the process constraints should count for more in products liability actions than in school desegregation cases.<sup>217</sup>

The second factor that can be expected to present process difficulties in coming years is the effect of complex technology on the tort system.<sup>218</sup> Most of the difficulties are likely to arise in the context of applying negligence principles in reviewing highly technological behavior. Not only do cases involving complex technology tend to involve polycentric issues for decision,<sup>219</sup> but also the presence of technological issues interferes with the opportunity for judges and juries to rely on empathy. Confronted with exceedingly difficult issues in such cases, and unable to rely on a combination of empathy and intuition, decisionmakers are left with a limited number of alternatives. They may assume the posture of a manager and decide the case based on a mixture of discretion and intuition;<sup>220</sup> they may attempt to quantify the relevant variables to the point that the "correct" decision can be reached mechanically;<sup>221</sup> they may limit their involvement in the decision pro-

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sign of the manufacturer's product is unreasonably dangerous, the ease has implications beyond the plaintiff's right to recover damages. Design alterations to avoid future lawsuits may increase the price of the product, a consequence that affects a large number of persons. The broader implications of dangerous product designs can be, and in fact have been, addressed by other means of governmental control. No political impasse need be overcome to hold the manufacturer liable to pay damages. Consumers in this country will not be abandoned to their fates at the hands of manufacturers if courts focus on the private remedy aspects of design eases and continue to give considerable weight to the process constraints.

<sup>217</sup> Perhaps the most difficult tort actions to contain within traditional boundaries are those involving toxic substances such as DES and Agent Orange. In recent years, thousands of plaintiffs have joined in class actions to recover for harms allegedly caused by widely distributed drugs and chemicals. *See, e.g., Sindell v. Abbott Labs*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). Cases of this sort require new approaches to procedures and remedies. To the extent that these eases exceed the abilities of the courts to manage them, they will almost certainly be addressed legislatively, very probably by the Congress. The availability of such alternative approaches underscores a basic difference between tort law and the public law controversies discussed earlier. Courts should feel less pressured to abandon the traditional process constraints in these tort eases because there are other ways of dealing with the broader issues of social policy. *See generally* Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV. L. REV. 489 (1981); Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584 (1981); *supra* note 41.

<sup>218</sup> For an early article exploring some of the problems likely to be encountered, see Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587 (1969). *See generally* Henderson, *supra* note 5, at 484-501; Yellin, *supra* note 217.

<sup>219</sup> Just as a court would confront high levels of polycentricity in determining the reasonableness of a city manager's budget decisions, *see supra* notes 34-36 and accompanying text, a court would confront polycentricity in determining the reasonableness of an engineer's decisions concerning the application of advanced technology. *See generally* Henderson, *supra* note 5, at 484-501.

<sup>220</sup> *See supra* text accompanying note 41.

<sup>221</sup> Such an approach creates, at best, a misleading illusion of precision and certainty. *See generally* Tribe, *supra* note 56.



cess to merely deciding, on the basis of credentials and general demeanor, which expert's opinion to adopt as their own;<sup>222</sup> or they may simply (and secretly) flip a coin.<sup>223</sup>

Consistent with this analysis, the areas of tort law in which the process constraints are most likely to be ignored in coming years are those involving judicial determinations of the reasonableness of high-technology decisions affecting large numbers of persons—areas such as products liability, environmental torts, and actions based on the disposal of hazardous wastes. Not surprisingly, process difficulties are already being encountered in these areas.<sup>224</sup> Assuming that these developments in tort law reflect legitimate substantive concerns, the desirable objective should not be to eliminate entirely the process difficulties. Again, what we should strive to achieve are reasonable accommodations of substantive objectives within process constraints. What can be done to maintain and in some instances to restore such accommodations? First, courts and commentators working with what I have called “private tort law” could become more sensitive to the inherent limitations of process while pursuing legitimate substantive goals. Second, in those areas in which the substantive pressures appear too great to resist, serious attention should be given to replacing traditional approaches with new ones that do not rely so heavily on prospective, self-applying rules of conduct or on traditional forms of adjudication.<sup>225</sup> Until such reforms occur, it will be necessary to formulate liability rules that, while reflecting the relevant substantive objectives, serve effectively as guides to primary and adjudicative behavior. This is not an easy task, but it must be accomplished if we are to have an effective tort system.

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<sup>222</sup> For an enlightening treatment of the use and abuse of expert testimony in product design litigation see Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEXAS L. REV. 1303 (1974).

<sup>223</sup> See *supra* note 66 and accompanying text.

<sup>224</sup> See generally Henderson, *supra* note 5, at 484-501; Note, *supra* note 217.

<sup>225</sup> The thrust of this analysis is not that our tort system must continue to rely on these traditional elements, but rather that as long as it does continue to rely on them, conformity to the process constraints described herein is necessary if the system is to achieve its objectives. If the system purports to rely on self-applying rules and the traditional processes of adjudication while ignoring the relevant process constraints, it will be guilty of hypocritical lawlessness.