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## The Constitutive Dimensions of Tort: Promoting Private Solutions to Risk-Management Problems

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# FLORIDA STATE UNIVERSITY LAW REVIEW



THE CONSTITUTIONAL DIMENSIONS OF TORT:  
PROMOTING PRIVATE SOLUTIONS  
TO RISK-MANAGEMENT PROBLEMS

*James A. Henderson, Jr.*

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# THE CONSTITUTIVE DIMENSIONS OF TORT: PROMOTING PRIVATE SOLUTIONS TO RISK-MANAGEMENT PROBLEMS

JAMES A. HENDERSON, JR.\*

I.	INTRODUCTION.....	221
II.	CONSTRUCTING A PROBLEM-SOLVING PERSPECTIVE .....	224
	A. <i>The Building Blocks: Problems, Solutions, Implementations</i> .....	224
	B. <i>The Problem-Solving Processes Most Relevant to This Analysis</i> .....	226
	1. <i>How Individuals and Small Groups Solve Complex Problems Through the Exercise of Experience-Based Discretion</i> .....	227
	2. <i>Zero-Sum Bargaining and Collaborative Negotiation as Problem-Solving Processes</i> .....	228
	3. <i>Adjudication as a Problem-Solving Process</i> .....	229
III.	HOW TORT REGULATIONS ARE FRAMED, OFTEN DELEGATING TO PRIVATE MANAGERS, TO AVOID UNADJUDICABLE PROBLEMS.....	233
	A. <i>How Intentional Torts Avoid Presenting Open-Ended Problems Requiring Discretionary Judgment</i> .....	234
	B. <i>How Negligence Tests, But Does Not Quite Exceed, the Limits of Adjudication</i> .....	237
	1. <i>Specifying the Duty of Care Ex Ante of Accidental Injury</i> .....	238
	2. <i>Specifying the Duty of Care Ex Post</i> .....	242
	C. <i>How Strict Liability Does Not Require the Exercise of Judicial Discretion</i> .....	244
	D. <i>Enterprise Liability's False Promise of Adjudicability: Why Such Claims Have Never Gained Traction</i> .....	245
IV.	THE CONSTITUTIVE DIMENSIONS OF TORT: HOW A SYSTEM OF PUBLIC RISK REGULATION DELEGATES PROBLEM-SOLVING RESPONSIBILITIES TO PRIVATE MANAGERS .....	246
	A. <i>Ex Ante Delegations of Risk-Management Responsibility</i> .....	248
	1. <i>Passive Deferrals: Allowing Contract to Override Tort</i> .....	248
	2. <i>Active Delegations: Invitations to Private Risk Managers Imbedded in Tort Doctrine</i> .....	250
	(a) <i>Delegations to Private Risk-Management Systems: No-Duty Rules, Tort Immunities, and Reliance on Custom</i> .....	250
	(b) <i>Delegations to Individual Managers: Informal, Consent-Based Modifications of Duty</i> .....	255
	B. <i>Ex Post Delegations of Risk-Management Responsibility: Untaken Precautions and Settlements</i> .....	255
	1. <i>The Plaintiff's Power to Set the Trial Agenda: Identifying Untaken Precautions</i> .....	255
	2. <i>The Plaintiff's Power to Decide Whether to Pursue a Claim</i> .....	257
V.	CONCLUSION .....	257

## I. INTRODUCTION

This Article builds on the premise that our legal system is an instrumental enterprise aimed at solving social coordination problems. Tort law, the special focus here, consists of a core of civil regulations

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that impose public solutions to coordination problems relating to the creation and management of risk.<sup>1</sup> This Article examines the regulative dimensions of tort from a problem-solving perspective that the author and others have begun to develop.<sup>2</sup> Along with its regulative core, tort includes important constitutive dimensions; for example, within limits, persons may contract out of governmentally imposed tort regulations. In those instances, courts allow externally derived contractual arrangements to override tort. This Article explores tort's constitutive dimensions by examining the hitherto underappreciated extent to which tort law relies internally on private ordering to solve coordination problems. These internal constitutive dimensions of tort cover a much broader spectrum than does the contracting-out phenomenon. In these broader contexts, the tort system does not merely passively defer to contractual overrides but also actively delegates to private actors the power to define the norms imposed by tort law.

To demonstrate that law in general—and tort law in particular—are problem-solving enterprises, this Article begins by constructing an appropriate perspective. Problems involve perceived obstacles to achieving one's objectives. Solving problems involves discovering ways to overcome the obstacles. A problem's complexity, and thus difficulty, is a function of the number of relevant considerations and their interconnectedness. When the constituent elements of a problem are highly interconnected, it may be said to be many-centered or polycentric. Because the solution of polycentric problems requires the exercise of discretion, individuals and small collaborative groups are capable of solving them by drawing on experience-based intuition. By contrast, courts are less capable of solving polycentric problems because, according to the traditional view, they must try to avoid the exercise of broad discretion.<sup>3</sup> The traditional constraints on judicial discretion rest in part on concerns over the judiciary's lack of political accountability and, in part, on a time-honored commitment to litigants that they and their lawyers be allowed to participate meaningfully in guiding courts to proper outcomes.

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1. The analysis does not insist that tort law necessarily promotes allocative efficiency; even a system aimed at promoting corrective justice is concerned with the instrumental effectiveness of the means chosen to accomplish that objective. As long as the tort system remains faithful to the norms of justice it is free to (and must) perform instrumental, problem-solving functions. *See, e.g.*, Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 *UCLA L. REV.* 621, 629-30 (2002) (noting that the instrumental goal of deterring wrongful conduct is compatible with a noninstrumental goal of corrective justice as long as the two are conceptually sequenced so that the former gives way to the latter when they come into conflict).

2. This author develops the problem-solving perspective in James A. Henderson, Jr., *Contract's Constitute Core: Solving Problems By Making Deals*, 2012 *U. ILL. L. REV.* 89 (2012); *See also* Curtis Bridgeman, *Contracts as Plans*, 2009 *U. ILL. L. REV.* 341 (2009).

3. The traditional view, sometimes honored in the breach, is that courts should apply preexisting law, not create new law. *See* nn.37-38, *supra*, and accompanying text.

One important way that tort law avoids confronting courts with polycentric problems is by minimizing the extent to which tort doctrine relies on vague, open-textured standards. As will be demonstrated, the tort system has largely conformed to this constraint. But in order for tort law to apply flexibly and sensibly to broad ranges of factual circumstances, some measure of vagueness in tort doctrine, epitomized in negligence principles, is inescapable. Thus, the other way that tort doctrine avoids confronting courts with polycentric problems is to allow the legal standards to remain open-textured but to delegate much of the problem-solving responsibility, implicit in applying those standards, to private decisionmakers. Regarding tort litigation, for example, courts do not so much solve the substantive problems presented in cases brought under vague legal standards as they decide which litigant's proposed solution deserves to be implemented. A favorable outcome represents not so much a judicially devised solution as the implementation by the court of the successful litigant's privately derived solution to the substantive problem presented.<sup>4</sup>

Part II constructs a problem-solving perspective by setting out the conceptual framework: what problems are, what solutions are, and why it is helpful to distinguish between solving a problem and implementing a solution. Part II also identifies the nature and limits of the decisionmaking processes by which individuals and courts solve problems. Part III uses these insights regarding problem solving to explain the various doctrines comprising tort law's regulative dimensions, including intentional torts, negligence, strict liability, and enterprise liability. It shows how, through a combination of rule specificity and delegation to private ordering, tort doctrine avoids presenting courts with unadjudicable problems. Part IV uses the problem-solving perspectives from Parts II and III to identify and explain tort law's constitutive dimensions, describing how tort doctrine empowers private actors to define and adjust, *ex ante*, the legal duties they owe one another and to specify, *ex post*, the particular ways in which those duties have been breached. As has been suggested, the analyses in Parts III and IV are connected; in many instances the tort doctrines that avoid assigning courts unadjudicable problems do so by delegating relevant problem-solving responsibilities to private risk managers.

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4. To be sure, trial courts solve procedural and evidentiary problems as they arise, exercising discretion in doing so. And courts solve problems when they make substantive law. However, as the analysis will make clear, the statement in the text regarding "substantive issues" withstands scrutiny. On that score, courts are more solution-implementers than problem solvers. *See infra* note 16 and accompanying text.

## II. CONSTRUCTING A PROBLEM-SOLVING PERSPECTIVE

### A. *The Building Blocks: Problems, Solutions, Implementations*

Problems are part of the human condition; solving them is central to life on this planet.<sup>5</sup> Someone has a problem when she realizes that an obstacle is preventing her from attaining a desired objective and that an effective response strategy, which may reveal itself if appropriate efforts are undertaken, is not immediately apparent.<sup>6</sup> The obstacle itself is not the problem; rather, the problem resides in the actor's awareness that she lacks sufficient knowledge to respond effectively.<sup>7</sup> Complexity, which contributes to making problems difficult to solve, is a function of the number of relevant considerations and their interconnectedness.<sup>8</sup> When a problem's elements are strongly interconnected, consideration of any one element necessarily requires the simultaneous consideration of most, or all, of the others. Thus, it may be said that these sorts of problems must be solved "of a whole." Problems such as how to design an automobile epitomize this form of nonlinear interconnectedness.<sup>9</sup> The type and size of an automobile's engine interact with the type of transmission, both of which interact with the design of the car's suspension, all of which affect the size and weight of the vehicle, which affects the gas mileage, and so on. Such design problems, which are often referred to as many-centered or polycentric,<sup>10</sup> are centrally important when assessing the problem-solving capacities of individuals and governmental institutions, especially the judiciary. By contrast, unicentric problems present what might be characterized as "more-versus-less" tasks—determining the size or quantity of a single variable along an essentially linear axis.<sup>11</sup>

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5. See KARL POPPER, ALL LIFE IS PROBLEM SOLVING 100 (Patrick Camiller trans., 1999) ("All organisms are inventors and technicians, good or not so good, successful or not so successful, in solving technical problems.").

6. These conditions are implicated in virtually every definition advanced by leading researchers. See, e.g., ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING 72 (1972) ("A person is confronted with a *problem* when he wants something and does not know immediately what series of actions he can perform to get it.").

7. People often refer to obstacles as problems, as in "My biggest problem is that I do not own an automobile." More accurately, one should say, "My problem is that I have not figured out how I can afford to own an automobile, or how I can manage without owning one."

8. See generally ROBERT AXELROD & MICHAEL D. COHEN, HARNESING COMPLEXITY: ORGANIZATIONAL IMPLICATIONS OF A SCIENTIFIC FRONTIER 15-20 (2000).

9. Other examples, which authors have used to make this same point, include designing a football team, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978), and decorating a home, see Henderson, *supra* note 2, at 100.

10. See Fuller, *supra* note 9, at 371, 394-404.

11. See James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541, 546 (1976). Determining compensatory tort damages is a good example of a unicentric issue. To determine an appropriate award, many contested elements may require consideration; but the elements are not linked to each other in a polycentric manner that requires their reconsideration when each element is reached, in turn. Regarding unicentric issues, the parties push and pull against each other, as in a tug-of-war, along a single

To be sure, polycentric problems are sometimes posed in a binary, yes-no fashion—e.g., is the design of an automobile reasonable? But such apparent binariness does not render the underlying problem unicentric if reaching a yes-no decision requires one to evaluate the interconnected elements of the design more-or-less *de novo*. In any event, polycentricity is a matter of degree, varying with the number of relevant elements and their interconnectedness.<sup>12</sup>

Solving a problem must be distinguished from choosing one's objectives or justifying one's choices.<sup>13</sup> Problem solving assumes that objectives have been identified and involves searching for and finding a strategy by which to overcome obstacles that threaten to prevent attainment of those objectives. Discovering such a strategy solves, and thus eliminates, the problem. Although a solution may exist even if it is not implemented,<sup>14</sup> when an attempt at implementation reveals that the proposed strategy will not succeed but that another strategy may be possible, the problem, having earlier been solved and thereby eliminated, is revived.

One must also distinguish solutions to problems from resolutions of conflicts. A conflict arises when two or more actors assert incompatible claims to the same resource. Each party's claim in a conflict situation presents an obstacle to the achievement of the other party's objectives and thus presents each side with the problem of designing a strategy, or game plan, by which to maximize that side's chances of prevailing over the other. Thus, when adversaries engage in zero-sum bargaining, or when they litigate, or when they go to war, resolving the underlying conflict, as such, does not constitute solving a problem. In the course of the contest, each of the adversaries must solve their own strategic and tactical problems unilaterally as they arise, and initial game plans invariably must be revised or abandoned as events unfold.<sup>15</sup> But the end result—the resolution of the

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quantitative axis. Framing equitable relief tends to be different from assessing money damages. For example, ordering that a complex business operation be reconfigured to reduce air pollution presents a polycentric problem of design. *Cf. supra* note 9 and accompanying text.

12. See Fuller, *supra* note 9, at 397.

13. The formulation and expression of personal preferences are forms of decisionmaking that do not, in themselves, involve problem solving. Instead, they constitute assertions of personal sovereignty. See generally Sarah Lichtenstein & Paul Slovic, *The Construction of Preference: An Overview*, in THE CONSTRUCTION OF PREFERENCE 1, 1-2 (Sarah Lichtenstein & Paul Slovic eds., 2006).

14. One prominent planning theorist has asserted, erroneously by this account, that a solution exists only if it has been adopted and followed. See SCOTT J. SHAPIRO, LEGALITY *passim* (2011). For a useful development of the planning theory see generally Bridgeman,); *supra* note 2.

15. A nineteenth century Prussian military officer observed that “[n]o plan of operation extends with certainty beyond the first encounter with the enemy’s main strength.” MOLTKE ON THE ART OF WAR: SELECTED WRITINGS 45 (Daniel J. Hughes ed., Daniel J. Hughes & Harry Bell trans., 1993).

conflict between the parties—is not, itself, a solution but rather the implementation of the prevailing party’s solution.<sup>16</sup>

Implementation of a solution consists of efforts, using the solution as a guide, to remove the obstacle giving rise to the problem. Even when successful, such efforts often create new problems requiring new solutions.<sup>17</sup> And implementation of those solutions may create additional problems, and so on. Thus, implementation of a solution frequently involves an ongoing decision process rather than a singular event. Moreover, when a solution calls for cooperative assistance from others, or when a solution must be validated by an official authority such as a court or legislature, then implementation involves two stages, often separated in time: first, the implementers must obtain the necessary assistance or validation; and second, the resources required to eliminate the obstacle(s) must actually be expended.<sup>18</sup>

### *B. The Problem-Solving Processes Most Relevant to This Analysis*

The discussions that follow focus mainly on decision processes employed by individuals and by courts. The author has recently considered a more inclusive spectrum of problem-solving processes,<sup>19</sup> but a limited exposition will serve this Article’s purposes. Individual and small-group problem solving is important because courts largely delegate to private decisionmakers; judicial problem solving is important because courts are the primary implementers of solutions reached by such private orderers. As will be explained, individuals solve polycentric problems by exercising experience-based discretion. Single individuals and very small groups are paradigmatic solvers of such problems. By contrast, judges and juries, the primary creators and appliers of tort law, function under institutional constraints that significantly limit discretionary decisionmaking. Thus, to understand how tort law relies on both private actors and courts to develop and implement solutions, it will be necessary to consider the methodologies upon which both categories of problem solvers rely.

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16. Of the examples offered in the text, the most directly relevant to this analysis is litigation. As subsequent discussions will reveal, each party engages in problem solving by preparing for trial (or later, appeal) and by participating in solving procedural and evidentiary problems during trial. The trial court solves procedural and evidentiary problems, exercising discretion in doing so. *See generally* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 843-45 (2008). But the court decides the case substantively by choosing one side’s proposed solution on the merits—that is, by resolving the conflicts between the parties.

17. Johann Wolfgang von Goethe observed that the solution of every problem is another problem. *See* SIDNEY H. MORSE & JOSEPH B. MARVIN, 8 THE RADICAL 111, 183, 259, 403 (1871).

18. Implementations of solutions to large-scale social problems often require large-scale resources, which explains why problem solvers seek validation and sponsorship from large organizations and institutions.

19. *See generally* Henderson, *supra* note 2.



1. *How Individuals and Small Groups Solve Complex Problems Through the Exercise of Experience-Based Discretion*

Individuals solve most minor problems so automatically that they hardly notice, relying on combinations of mental shortcuts and rules of thumb.<sup>20</sup> Regarding more deliberative problem solving, the human mind is capable of dealing with complex situations, employing techniques that researchers have explored for decades. One of the most highly regarded researchers of the twentieth century was Herbert Simon, best known for his work on the role of mental shortcuts, or heuristics. Simon coined the phrase “bounded rationality” to refer to processes by which individual problem solvers search their memories for preexisting solutions and then choose which solution to implement from among the available alternatives.<sup>21</sup> Lon Fuller, upon whose work with the forms and limits of adjudication subsequent discussions rely, used the term “managerial direction” to refer to this decisionmaking process.<sup>22</sup> Herbert Simon teamed with Allen Newell in the early 1970s to produce the first ambitious study of individual problem solving.<sup>23</sup> Building on the insight that the human brain processes information in basically the same way as a computer, the authors describe back-and-forth movements between the elements of the problem and possible solutions drawn from experience.<sup>24</sup> In their view, the key to success lies in the problem solver being able to deal simultaneously with the constituent elements of a polycentric problem and the problem as an interconnected whole.<sup>25</sup>

Donald Schön, a philosopher concerned with deliberative problem solving, provides further insights.<sup>26</sup> According to Schön, when attempting to solve a complex, polycentric problem, an expert intuitively relies on rules of thumb developed through experience and searches for analogies to previously derived solutions.<sup>27</sup> The author’s case studies demonstrate how experienced problem solvers make the transition from a problem involving many interconnected elements to an integrated solution-of-a-whole. The author speaks of the problem solver’s back-and-forth consideration of the individual constitutive elements and the problem in its entirety as a reflective “conversation”

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20. See 3 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: EMPIRICALLY GROUNDED ECONOMIC REASON* 291-94 (1997).

21. See *id.*

22. See Fuller, *supra* note 9, at 398 (In the exercise of managerial direction “a good deal of ‘intuition’ is indispensable.”).

23. See NEWELL & SIMON, *supra* note 6 *passim*.

24. *Id.* at 87-140. See generally Earl Hunt, *Problem Solving*, in *THINKING AND PROBLEM SOLVING* 215, 217-22 (Robert J. Sternberg ed., 2d ed. 1994).

25. See Hunt, *supra* note 24, at 227; see also Fuller, *supra* note 9, at 403.

26. See DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

27. See generally *infra* notes 49-50.

between the problem solver and the problem.<sup>28</sup> Referring to an architecture professor reviewing a student's proposed design of a school complex and suggesting changes, Schön observes:

The web of [possible] moves has many branchings, which complicates the problem . . . . As he reflects . . . on the situation created by his earlier moves, the designer must consider not only the present choice but the tree of further choices to which it leads . . . .

. . . .

He also demonstrates how the whole is at stake in every partial move. Once a whole idea has been created, a bad placement of the [school] administration can ruin it. Hence the designer must oscillate between the unit and the [whole] . . . .<sup>29</sup>

A small group of architects might collaborate to perform the same problem-solving task that the individual architect solved in Schön's example.<sup>30</sup>

## 2. *Zero-Sum Bargaining and Collaborative Negotiation as Problem-Solving Processes*

Zero-sum bargaining, by means of which contracting parties work out the basic terms of a deal, is a form of conflict resolution that an earlier discussion distinguished from problem solving.<sup>31</sup> In most instances, the parties have solved their own problems unilaterally, employing the individual or small-group techniques described in the preceding section, and then bargain their way to agreement regarding the terms over which they are in conflict. Once the contracting parties agree on these remaining terms, or perhaps while bargaining over them, they may collaborate to solve mutual problems embedded in the emerging deal.<sup>32</sup> As with collaborative problem solving outside of the framework of deal making, the success of collaborative contract

28. *Id.* at 93-95.

29. *Id.* at 99-102.

30. With regard to the size of problem-solving groups, the author of this Article recently observed in Henderson, *supra* note 2, at 108-09:

Experience reveals that only if the group is quite small—two or three is ideal—can the members collaboratively engage in the back-and-forth process between the problem and possible solutions that . . . Schön describe[s]. Such a work environment minimizes ego-driven, zero-sum competition, allowing the collaborators to travel through the problem space together, building on each other's contributions.

31. Zero-sum bargaining occurs when a gain to one side generates a corresponding loss to the other. It may be distinguished from collaborative bargaining, from which joint gains are possible. *See generally* Henderson, *supra* note 2, at 110-11. Regarding conflict resolution, *see supra* notes 15-16 and accompanying text.

32. *See generally* Henderson, *supra* note 2, at 110-11; *infra* notes 105-11 and accompanying text.

negotiation depends on shared purposes, willingness to cooperate, and workable group size.<sup>33</sup> Since the paradigm of deal making involves one party-in-interest on two sides of a deal, group size is usually not problematic.<sup>34</sup> Collaborative problem solving is most likely to occur when the negotiating parties seek an arrangement whereby they will cooperate in the future in an ongoing enterprise.<sup>35</sup>

### 3. *Adjudication as a Problem-Solving Process*

Regarding the capacity of courts to solve complex social problems by making and applying law, the individuals who serve as judges should be as capable as was the architect in Schön's case study.<sup>36</sup> After all, judges—especially federal judges—tend to be mature, intelligent, well-educated people who perform their judicial tasks either individually (trial judges) or in small groups (appellate panels).<sup>37</sup> To be sure, courts may not seek out social problems to solve; they must wait for the parties to bring proposed solutions to them for approval and implementation.<sup>38</sup> But for substantive issues that reach them and require problem solving—primarily making new law in comparatively dramatic fashion—courts would seem to combine the appropriate decision structures with the appropriate personnel to make them effective problem solvers. This picture of judicial competence changes when attention turns to the traditional constraints on courts' official problem-solving capabilities. Whatever inherent capacities judges as individuals may possess, as institutional decisionmakers their potential for solving complex social problems is constrained in ways that render courts only marginally effective as social problem solvers.<sup>39</sup> Thus, reflecting concern for the fact that judges and juries are not politically accountable, a cluster of justiciability doctrines limit

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33. See *supra* note 30 and accompanying text.

34. When a larger number of parties-in-interest are involved, negotiations can be difficult. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 7 (2d ed. 1991) ("When there are many parties, . . . bargaining is even worse.").

35. See Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 676-80 (1976).

36. See *supra* note 29 and accompanying text.

37. Supreme courts are on the borderline of manageability, but their members are repeat players who develop a shared sense of collegiality that allows for collaborative decisionmaking. See generally FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1338 (1998). When federal courts of appeals sit en banc, the large numbers of decisionmakers can present special difficulties, see Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425 (2000); Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 712 (2000).

38. See generally Jeffrey J. Rachlinski, *Bottom-Up versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 935-37 (2006).

39. Regarding the underlying social issues, courts resolve conflicts rather than solve problems. See *supra* note 16 and accompanying text.

courts to addressing sharply framed cases and unicentric controversies brought to them for decision.<sup>40</sup> And in reaching decisions, the traditional view is that courts should, to the extent possible, avoid trying to solve broad social problems by creating law.<sup>41</sup>

Who, if not courts on a case-by-case basis, provide public solutions to the social coordination problems that give rise to litigated tort claims? Lawmakers, including courts employing the gradual, accretive common law process, formulate generally applicable public solutions by creating the tort law that courts apply to reach outcomes in litigated cases. And then tort litigants take the initiative in solving the problems presented in particular cases by shaping their claims and preparing game plans for how best to engage their opponents at trial. In this view, the central task of the trial court, besides exercising discretion in solving fact-sensitive procedural and evidentiary problems as they arise, is to resolve the conflicts between the parties relating to which side's proposed solution to the social problem underlying the claim deserves to be officially implemented.<sup>42</sup> In performing this implementative function, courts help to solve broader social problems by marginally adjusting existing law when new fact patterns arise. But in most instances, they perform this law-making function only incrementally as part of an ongoing common-law process rather than by a single trial judge or appellate panel acting in sweeping, decisive fashion.<sup>43</sup>

Lon Fuller approaches the limits of courts' problem-solving capabilities from a somewhat different direction, but he ends up in the same place.<sup>44</sup> Instead of focusing on the extrinsic, top-down normative constraints traditionally imposed on judicial problem solving, Fuller invokes what may be characterized as an intrinsic, bottom-up perspective.<sup>45</sup> To provide litigants the opportunity to argue that they are entitled to favorable outcomes as a matter of right, Fuller reasons that law must consist of rules and standards that are sufficiently specific to separate the elements of complex, polycentric problems

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40. Article III states that the judicial power of the federal courts extends only to cases and controversies that arise under the Constitution, federal laws of the United States, and its treaties. U.S. CONST. art. III, § 2. See generally Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76-77 (2007).

41. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 342 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) ("[T]he development of a body of decisional law is only a byproduct of the judicial process.").

42. See *supra* note 16 and accompanying text.

43. See *infra* notes 57-59 and accompanying text.

44. See Fuller, *supra* note 9.

45. It will be observed that Fuller's most famous essay on the subject, see *supra* note 8, refers to "the limits of adjudication" rather than limits *on* adjudication, clearly envisioning intrinsic, organic limits. Examples of extrinsic, normative limits include political constraints based on political unaccountability. See *supra* notes 37-38 and accompanying text.

and to arrange these elements in linear sequences that allow the litigants to take the tribunal through a logical chain of reasoning to the right result.<sup>46</sup> Tort law performs this function by disaggregating aspects of the underlying social problems into constituent elements, each of which may be determined in a sequence along an essentially linear, more-versus-less, axis.<sup>47</sup> In connection with the intentional tort of battery, for example, to establish a prima facie claim, a plaintiff must prove that the defendant acted, intending a harmful or offensive contact with the person of another, and that a harmful or offensive contact with the plaintiff's person resulted.<sup>48</sup> In effect, tort doctrine solves large, complex coordination problems ahead of time, leaving courts with the more manageable task of applying relatively specific rules to found facts to reach particular outcomes. Regarding less formal areas of tort such as negligence, the analysis of tort law in Part III, *infra*, explains how courts manage (sometimes only barely) to stay within their bounds.<sup>49</sup>

Under Fuller's analysis, if the applicable substantive law lacks the specificity necessary to reduce the polycentricity of the social problem underlying a tort claim—if the only guide to decision is reasonableness under the circumstances—litigants face difficulties in trying to progress through linear chains of logic that lead to the proper outcome. Instead, excessive vagueness in the relevant legal norms forces the litigants and the tribunal to address the complex underlying social problem “of a whole,” as did the architect designing a school complex in Schön's example.<sup>50</sup> Superficially, it might appear that the circumstances confronting the court are different from those confronting the architect. After all, Schön's task facing the architect was to create a design more-or-less from scratch. By contrast, the court's task is to decide, ostensibly on a binary, yes/no basis, whether or not the defendant behaved unreasonably under all the circumstances. But these tasks are much more similar than might at first appear. To determine the unreasonableness of the defendant's conduct in a tort case, a tribunal is required to review the interconnected circumstances surrounding that conduct much as it might if it were, as was the architect, designing a course of action in the first instance. The fact that the outcome is expressed in a yes/no format does not greatly

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46. *Id.* at 394-404.

47. See pp. 4-5 *supra.*, n.9.

48. See RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

49. In prior normative analyses, this author has criticized aspects of negligence doctrine for providing courts with inadequate guides to decision. See, e.g., James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467 (1976) [hereinafter Henderson, *Expanding the Negligence Concept*]; James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

50. See *supra* notes 26-30 and accompanying text.

reduce the complexity of the court's task in reaching its decision.<sup>51</sup> Of course, given that polycentricity is a matter of degree, the binariness of a yes/no decision may reduce the tribunal's difficulties somewhat.<sup>52</sup> But any such reduction under a reasonableness standard faithfully applied would be marginal; it would not by itself render the tribunal's task adjudicable.

To the extent that a vague standard of unreasonableness does not provide an adequate basis on which the parties can join issue in arguing for a favorable outcome as a matter of right, the litigants on both sides necessarily are reduced to entreating the tribunal to empathize with them and to exercise broad discretion in their favor.<sup>53</sup> Such a circumstance denies the parties their traditional opportunities to participate meaningfully as advocates who seek the court's assistance not primarily as a social problem solver, but as an implementer of the parties' own proposed solutions. The architect in Schön's example was under no similar obligation to give anyone the equivalent of a day in court; he was free, as courts traditionally are not, to exercise broad discretion, basing his solution on instinct and intuition informed by experience.

How is it that courts are capable of making law? Once relatively specific standards have been developed and are in place, polycentricity is presumably minimized when applying those standards. But how do courts avoid solving polycentric problems in designing those common law standards to begin with? One part of the answer is that courts do not develop common law "of a whole," as did Schön's architect with regard to the school complex.<sup>54</sup> Rather, courts create and expand common law doctrine implicitly, gradually, and marginally by applying established rules and standards to new fact patterns that differ from earlier patterns only incrementally.<sup>55</sup> But what of the beginnings of the common law? Were not courts required to solve polycentric problems in order to get tort law started?

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51. See *supra* text following note 11.

52. The judicial decisionmaker(s) under a yes-no approach might feel more at liberty to employ a heuristic—in this context a "cheat"—inviting reliance on an intuitional hunch that largely ignores the intricacies of the plaintiff's arguments and frees the decisionmaker to substitute its own single-factor test. Cf. *infra* note 117 and accompanying text (describing how, by contrast to the yes-no approach, the untaken-precaution approach in negligence cases actually does reduce the polycentricity of the issues for decision).

53. This same situation would arise if a court were to consider the adoption of a radically new substantive rule and invite the parties to present policy arguments for and against the rule, including suggested modifications. Sponsors of legislation can threaten to withhold political support in order to persuade legislators to vote favorably. But litigants can make no similar threats. When courts are free to exercise broad discretion, litigants are in the position of politicians entreating their constituents to vote for them. Courts avoid placing litigants in such positions by making new law only marginally and incrementally. See *supra* notes 39-41 and accompanying text; *infra* note 55 and accompanying text.

54. See *supra* note 29 and accompanying text.

55. See *supra* note 43 and accompanying text; *infra* note 59 and accompanying text.

Not nearly to the extent that might first appear. The common law of torts began with formal writs of trespass, invoking boundary-crossing concepts that avoided reliance on fault and that continue, to this day, to minimize polycentricity in connection with intentional torts and strict liability.<sup>56</sup> Negligence, which courts developed into approximately its current form in the nineteenth century, did not begin with the potentially polycentric problem of assessing defendants' failures to take reasonable care but with the more unicentric and hence adjudicable problem of assessing whether or not the plaintiff's harm flowed indirectly (rather than directly) from trespasses to the persons and property of others.<sup>57</sup> Influential scholars helped to conceptualize and articulate emerging tort concepts at critical junctures.<sup>58</sup> However, at no point in the development of the common law did single judicial decisions create complex tort doctrine from scratch, as did the architect in Schön's earlier example.<sup>59</sup> Even notable doctrinal "leaps" almost always reveal themselves, on closer inspection, to have been premised on precedential lines of incremental doctrinal growth.<sup>60</sup> Thus, it is no exaggeration to observe that the historical development of Anglo-American tort law rests as much, if not more, on the necessity of avoiding relatively unadjudicable, polycentric problems as on the promotion of substantive policy objectives. The question of which came first, procedure (courts) or substance (law), has intrigued legal scholars for quite some time.<sup>61</sup>

### III. HOW TORT REGULATIONS ARE FRAMED, OFTEN DELEGATING TO PRIVATE MANAGERS, TO AVOID UNADJUDICABLE PROBLEMS

This Part uses the preceding accounts of problem solving and the limits of adjudication to explain tort law's regulative dimensions—the remarkable extent to which tort rules generally are framed sufficiently formally to allow courts to avoid heavy reliance on the exercise of discretion in reaching outcomes. Although tort regulations presumably aim at achieving coherent substantive objectives, this

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56. See Kenneth J. Vandavelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 450-55 (1990); see also *infra* Part III.A.

57. See generally Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 225-26 (1971).

58. The most important of these was Oliver Wendell Holmes. See Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652 (1873). For a description of Holmes' creative role in helping to conceptualize the emerging law in the nineteenth century see Vandavelde, *supra* note 56, at 458-62.

59. Even the architect used his past experiences in drawing analogies to the current problem. See SCHÖN, *supra* note 26, at 49.

60. A classic example is found in Cardozo's opinion in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), given credit for abolishing the requirement of privity of contract in products liability litigation.

61. See Fuller, *supra* note 9, at 372 ("Which comes first, courts or rules?").

Part explains how one can adequately understand tort law only by appreciating how substance plays off of form and process.<sup>62</sup> Whatever overall objectives tort law may pursue, whether tort promotes efficiency or corrective justice, this analysis explains the forms and processes employed in that pursuit. Thus, Part III is concerned primarily with form rather than with substance—with how the regulative rules of tort reduce the polycentricity of social coordination problems sufficiently to allow litigants to have meaningful days in court.<sup>63</sup>

*A. How Intentional Torts Avoid Presenting Open-Ended Problems  
Requiring Discretionary Judgment*

Previous discussions reveal that the most telling challenges to adjudicability occur when tort regulations purport to require courts to assess the unreasonableness, under all relevant circumstances, of harm-causing conduct.<sup>64</sup> In such contexts, most prevalent in negligence, the “relevant circumstances” tend to be interconnected and the judicial task of law-application, often involving cost-benefit analysis, tends to require the exercise of discretion. By contrast, intentional torts avoid such open-ended, polycentric issues mainly by focusing on intended, unconsented-to boundary crossings as the primary liability triggers and then adopting a relentless, “chips fall where they may” approach to determining the scope of a boundary-crossing actor’s legal liability.<sup>65</sup> As long as the relevant boundaries are defined formally to minimize the need for discretionary assessments of unreasonableness; and the pivotal concepts of intent and consent do not incorporate notions of unreasonableness as the primary guides to decision; intentional torts do not present unadjudicable claims.<sup>66</sup>

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62. See also 1 DAN B. DOBBS, *THE LAW OF TORTS* 12 (2001); cf. *supra* note 61 and accompanying text. See generally JAMES A. HENDERSON JR. ET AL., *THE TORTS PROCESS* 2 (8th ed. 2012) (“[T]his book is dedicated to the proposition that the substantive law can be understood only in relation to the processes by which it is applied.”).

63. As earlier discussions make clear, a “day in court” is meaningful only to the extent that the litigant has the opportunity to participate in the decisionmaking by making respectful demands on courts to reach legally required outcomes. See *supra* notes 39-54 and accompanying text.

64. See *supra* text following note 49.

65. Intentional trespassers are strictly liable for the harm they cause to the persons or properties upon whom, or which, they intrude. See generally JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 411, 412 (8th ed. 2012). And proximate causation is easier for plaintiffs to establish in connection with battery claims than it is in connection with negligence claims. In battery, the defendant is liable for all the harm that directly or indirectly results from the wrongful contact. See *RESTATEMENT (SECOND) OF TORTS* § 13 (1965).

66. Regarding trespass to the person (battery), the requisite element is contact with the plaintiff’s person, which is defined uncentrically. See *RESTATEMENT (SECOND) OF TORTS* § 18 cmt. c (1965). The same thing is true regarding trespass to land, see HENDERSON ET AL., *supra* note 62, at 411-13, and intent and consent are defined so as to minimize polycentricity, see *infra* notes 67-75 and accompanying text.



A key to success in this regard lies in defining intent in terms of subjective mental states that do not depend primarily on open-ended assessments of unreasonableness. Thus, an actor intends a consequence of his act—e.g., in a battery, harmful or offensive contact with the person of another—when the actor either subjectively desires that the consequence occur or actually knows that it is substantially certain to follow.<sup>67</sup> The greatest threat to adjudicability would occur if courts were to allow triers of fact to infer intent from the unreasonableness or recklessness of the act and the relative probability that injurious consequence would follow. If that were to occur, it would be a short step to transform essentially unicentric inquiries regarding actors' subjective states of mind and their direct consequences into many-centered inquiries regarding the costs and benefits of defendants' actions under all the circumstances.<sup>68</sup> The second prong of the definition of intent—the “knowledge with substantial certainty” prong<sup>69</sup>—helps to prevent the transmutation of focused contests over subjective desire into open-ended contests over what reasonable persons would have desired under similar circumstances. Knowledge-with-certainty plays out on a linear axis. Such knowledge is not simply circumstantial evidence that, along with other interconnected elements, supports an inference of desire-based intent; it constitutes intent, in and of itself.<sup>70</sup>

Moreover, by requiring that the defendant intend the consequences of an act rather than merely the act itself,<sup>71</sup> tort doctrine avoids treating as intentional torts a wide range of deliberate conduct that causes harm only inadvertently.<sup>72</sup> In this manner, tort doctrine makes

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67. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 (2010).

68. Had American courts not broken off intentional torts from fault-based torts in the nineteenth century, this might have been an eventual consequence. See generally Vandevelde, *supra* note 56, at 452. It will be remembered that, in the immediate aftermath of the break-off, the fault-based branch of tort did not call for a polycentric weighing of social costs and benefits, See *supra* note 57 and accompanying text.

69. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1(b) (2010); see *supra* text accompanying note 67.

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1(b) (2010). Of course, the plaintiff is free to ask the trier of fact to infer the actor's desire to cause a consequence from the high risk that an adverse consequence will follow. But even when the trier of fact concludes that the defendant did *not* desire the consequence, the “substantial certainty” branch remains as a possible independent basis for supporting a finding of intent. See, e.g., Garratt v. Dailey, 279 P.2d 1091, 1094 (Wash. 1955).

71. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 (2010); see *supra* text accompanying note 67.

72. American law builds into the definition of “act” the element of volition, thereby leaving to the concept of intent the sole responsibility for dealing with the consequences of acts. See RESTATEMENT (SECOND) OF TORTS § 2 (1965) (An act is “an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended.”) Thus, an act may result in a negative consequence, but unless that consequence is intended, no liability for intentional tort follows. Before trespass-on-the-case (fault) broke off from trespass in the nineteenth century, the bedrock concept was that of a volitional

clear that an actor commits an intentional tort only when the actor intends certain specifically defined, antisocial consequences, thereby resisting the temptation to ask courts to solve polycentric problems involving the social costs and benefits of actors' deliberate, but unintentionally harm-causing, conduct.

Tort law's treatment of consent, a centrally important element in both defining defendants' wrongdoing and providing affirmative defenses,<sup>73</sup> parallels its treatment of intent. Thus, consent consists not only in the victim's subjective willingness for a consequence to occur but also in the objective manifestation of such willingness irrespective of the victim's subjective state of mind.<sup>74</sup> Again, as with intent, if consent were simply subjective willingness in fact, then in a range of circumstances in which victims objectively manifest willingness *ex ante* but insist *ex post* they were not subjectively willing, courts would be tempted to engage in evaluations of the surrounding circumstances including the reasonableness of both parties' interactions.<sup>75</sup> By all but eliminating the relevance of such potentially polycentric inquiries, the rule that equates manifestation-of-willingness with binding consent helps courts to maintain the adjudicability of intentional tort claims in which consent is an issue.

In at least two important contexts, intentional tort doctrine relies on ostensibly open-textured reasonableness standards. To invoke a privilege of self-defense, an actor's belief that defensive action is necessary must be reasonable;<sup>76</sup> and to constitute an offensive battery, an unconsented-to contact with another's person must be such as to offend a reasonable sense of personal dignity.<sup>77</sup> Although, in both instances, tort doctrine appears to rely on the same concept of reasonableness that threatens courts with difficulties in connection with negligence claims;<sup>78</sup> the intentional tort contexts are importantly different. As will be explained, reliance on the reasonableness standard in the negligence context pressures courts to exercise discretion in addressing the polycentric question of whether harm-causing conduct,

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act; the shift of focus to the consequences of acts accompanied the emergence and development of the fault-based tort. *See generally* Vandeveld, *supra* note 56, at 451-52.

73. Part of the definition of an offensive contact is the lack of consent by the victim. *See* DOBBS, *supra* note 62, at 54-56. And consent also serves as an affirmative defense to intentional torts. *See id.* at 216-17.

74. *See, e.g.,* O'Brien v. Cunard Steamship Co., 28 N.E. 266, 266 (Mass. 1891).

75. In the O'Brien case, the plaintiff claimed that the steamship company's doctor had vaccinated her against her will even though she admitted that she had not objected when the vaccination occurred. *Id.* at 273. The Supreme Court of Massachusetts concluded as a matter of law that the defendant company had a right to presume consent under the circumstances. *Id.* at 274-75. A full-blown inquiry into the reasonableness of the parties' behaviors, avoided by the apparent-consent rule, would have presented a polycentric problem.

76. *See* RESTATEMENT (SECOND) OF TORTS §§ 63, 65 (1965).

77. *Id.* § 19.

78. The concepts are similar in that in all of these contexts such "mixed questions of law and fact" are mostly for juries to decide. *See* HENDERSON ET AL., *supra* note 62, at 85.

in light of an interconnected web of various social costs and benefits, should have been engaged in less riskily.<sup>79</sup> By contrast, the self-defense privilege exerts no similar pressure toward polycentric problem solving. Instead, the issue is whether, on essentially more-versus-less, linear axes, the defendant actor believed that the defensive use of force was necessary and that this belief was adequately rooted in reasonable appearances and common sense.<sup>80</sup> And the offensiveness of an unconsented-to personal contact in the battery context is determined on an essentially linear scale of social unacceptability that does not require the court to exercise significant discretion in reaching a conclusion.<sup>81</sup>

*B. How Negligence Tests, But Does Not Quite Exceed, the Limits of Adjudication*

The source of difficulty with the negligence doctrine has already been identified. Judging harm-causing conduct against a vague standard of unreasonableness<sup>82</sup> in most circumstances would require a court to exercise discretion in solving a polycentric problem involving a number of interdependent variables.<sup>83</sup> As will be explained, in actuality, courts in negligence cases routinely implement a number of doctrinal adjustments designed to reduce the interconnectedness of the issues presented. But the fact remains that, unlike intentional torts that invoke reasonableness only collaterally and unicentrically,<sup>84</sup> negligence doctrine rests fundamentally on a polycentric version of that vague concept. As the following discussion makes clear, in seeking to reduce polycentricity to manageable levels, courts rely on two coping mechanisms. First, tort law adjusts duties of care and limits elements of recovery *ex ante*, before the fact of accidental injury. In these contexts, tort doctrine either replaces the vague reasonableness standard with more specific liability rules or eliminates liability altogether. And second, in contexts where specific doctrinal rules are unavailable and the duty of care remains vague, negligence doctrine adjusts *ex post* by requiring plaintiff-victims to demonstrate specifically how the defendants breached their general duties and how those breaches caused the plaintiffs' harms.

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79. See *infra* note 82 and accompanying text.

80. See *supra* note 76 and accompanying text; see generally DOBBS, *supra* note 62, at 159-61 (“[C]ourts do not expect the defendant to make a ‘microscopic analysis’ of the situation, only to act reasonably considering the emergency.”).

81. The court need not judge offensiveness based on a web of interconnected, possibly countervailing elements. See RESTATEMENT (SECOND) OF TORTS § 19 cmt. a (1965) (To be offensive, contact “must . . . be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.”).

82. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010).

83. See *supra* notes 44-53 and accompanying text.

84. See *supra* notes 76-81 and accompanying text.

### 1. *Specifying the Duty of Care Ex Ante of Accidental Injury*

Examples of *ex ante* specifications of duties of care abound. Thus, courts incorporate the specific customary standards of professional defendants such as physicians and lawyers, judging their conduct by what other professionals actually do in similar circumstances.<sup>85</sup> And courts defer to specific standards established in relevant safety statutes and regulations.<sup>86</sup> Moreover, courts often adjust the general negligence standard without reference to exogenous sources, sometimes raising the relevant duties and sometimes lowering them. Thus, in this latter connection, common carriers owe their passengers a heightened duty that in some jurisdictions approaches an obligation to prevent injury regardless of the relevant costs,<sup>87</sup> and possessors of land owe lessened duties to some categories of entrants, most notably trespassers, to the point of owing no duties of care at all.<sup>88</sup> In each instance, these adjustments in the duty of reasonable care significantly reduce the polycentricity of the issues presented, thereby substantially reducing the need for the exercise of judicial discretion.<sup>89</sup> In connection with duties owed to entrants on land, some observers and courts have argued normatively in favor of an expanded duty of reasonable care owed to all entrants, including trespassers.<sup>90</sup> Although the case law has moved marginally in response to these entreaties, more extreme adjustments have rarely held sway.<sup>91</sup>

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85. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13 cmt. b (2010); DOBBS, *supra* note 62, at 632-34.

86. Unexcused violations of safety statutes and regulations are generally treated as negligence per se. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 14, 15; DOBBS, *supra* note 62, at 315-16.

87. See, e.g., *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 76 (Colo. 1998). See generally DOBBS, *supra* note 62, at 383-84. At some point, of course, such a rule translates into one of strict liability, under which actors set their own standards and simply pay victims for the harms the actors cause. See *infra* note 89.

88. See, e.g., *Wagner v. Doebring*, 553 A.2d 684, 686 (Md. 1989) (noting that possessors owe trespassers only a duty to refrain from wanton and willful conduct).

89. To the extent to which the rules raising and lowering the duties of care based on the parties' status approach the functional equivalents of strict liabilities and strict immunities, they become single-factor tests that are not polycentric; both strict liability, see *infra* note 124 and accompanying text, and strict immunity, see *infra* note 109 and accompanying text, avoid the necessity of courts determining reasonableness.

90. See, e.g., Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820, 821-23 (1975); Comment, *Torts—Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants—“Invitee,” “Licensee,” and “Trespasser” Distinctions Abolished*, 44 N.Y.U. L. REV. 426, 426, 431 (1969). The leading case adopting the broader duty is *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968). See generally HENDERSON ET AL, *supra* note 62, at 230-42; Henderson, *Expanding the Negligence Concept*, *supra* note 49, at 479-82 (discussing critically judicial broadening of duty).

91. See, e.g., *Mallet v. Pickens*, 522 S.E.2d 436, 446 (W. Va. 1999) (abolishing the licensee/invitee distinction while retaining the trespasser category). See generally James A. Henderson, Jr., *The Status of Trespassers on Land*, 44 WAKE FOREST L. REV. 1071, 1071-73 (2009).

Analogous to the all-but-nonexistent duties of care owed by land possessors to trespassers, American courts refuse to recognize a general duty to rescue strangers, thereby avoiding a host of polycentric problems.<sup>92</sup> Courts recognize important exceptions that render the operative liability rules manageably specific.<sup>93</sup> Once again, tort scholars who overlook the limits of process and focus exclusively on substance have argued in favor of a general reasonableness-based duty to rescue strangers.<sup>94</sup> But strong process arguments support the traditional rule, which appears to retain its validity.<sup>95</sup> A functionally similar approach to maintaining adjudicability involves limits on negligence-based recovery for emotional upset and economic loss. From the perspective of this Article, if courts were to impose no limits on recovery or were to abolish recovery entirely for these elements of harm, polycentric problems requiring the exercise of broad judicial discretion would be avoided.<sup>96</sup> But when substantive considerations dictate that courts steer a middle course,<sup>97</sup> determining on a case-by-case basis who may recover under vague reasonableness standards, difficulties arise. Thus, American courts reject a broad right to recover on the part of bystanders who suffer emotional upset upon observing or learning of a negligently caused accident.<sup>98</sup> Tort plaintiffs who suffer upset resulting from their own physical injuries or whose upset is caused intentionally do not present serious adjudicability problems and may recover.<sup>99</sup> But as a general rule, onlooker or bystander plaintiffs may not.

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92. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 (2010) (Preliminary Draft No. 4, Sept. 5, 2003); HENDERSON ET AL., *supra* note 62, at 244-72; DOBBS, *supra* note 62, at 853-56. For an explanation of why a general duty to rescue would present polycentric problems see James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 938-40 (1982) [hereinafter Henderson, *Process Constraints*].

93. DOBBS, *supra* note 62, at 856-64.

94. See, e.g., Saul Levmore, *Waiting for Rescue: An Essay on the Evaluation and Incentive Structure of Affirmative Obligations*, 72 VA. L. REV. 879, 881 (1986); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 247-48 (1980).

95. See, e.g., Henderson, *Process Constraints*, *supra* note 92.

96. Without reasonableness-based limits—no limits at all, or total bars—calculating recoveries would be done on unicentric, linear axes. See *supra* note 11 and accompanying text; see also *supra* note 89 and accompanying text. Substantively, these approaches would presumably produce too much liability (no-limit rule) or too little (no-recovery rule). But either approach would be adjudicable.

97. Both emotional upset and economic loss have their own sets of supporting substantive considerations, including difficulties of proof. But the one they share in common is concern over potentially crushing liability.

98. See, e.g., *Jorgenson v. B.F. Yenny Constr. Co.*, 255 A.D.2d 1008 (N.Y. App. Div. 1998). See generally HENDERSON ET AL., *supra* note 62, at 316-33. (stating that courts have rejected a general rule, adopting “a variety of liability-limiting approaches,” instead).

99. HENDERSON ET AL., *supra* note 62, at 316 (“Recovery for mental and emotional upset resulting from tortiously caused physical injury is not controversial.”) Regarding the right to recover for intentionally caused mental and emotional upset see RESTATEMENT (SECOND) OF TORTS § 46 (1965); see also *supra* note 66 and accompanying text.

How have American courts managed to steer a middle course regarding bystander recovery for mental upset under negligence law? Beginning with a no-duty rule barring judicial inquiry, the earliest extension of liability allowed recovery by plaintiffs who were physically impacted, even if not physically injured, by the defendant's conduct.<sup>100</sup> Subsequently, plaintiffs in the zone of danger could recover for their upset.<sup>101</sup> Further expansion, though measured and cautious, has followed. Today, a majority of American courts allow bystanders outside the zone of danger to recover for mental upset only when it is suffered by a primary victim's close family members who contemporaneously witness the upsetting event.<sup>102</sup> These formal elements, although they achieve adjudicative manageability, have been controversial.<sup>103</sup> In any event, the point here is that none of these approaches requires, to a significant degree, the exercise of judicial discretion to implement.

The second type of negligence-caused harm for which courts have developed limits on recovery is pure economic loss, for which courts will not generally allow recovery in tort.<sup>104</sup> As with mental upset, the reasons for imposing limits in the first instance are substantive; without any such limits, courts could presumably adjudicate awards for such losses without difficulty.<sup>105</sup> But to try to limit economic loss awards based on case-by-case determinations regarding the appropriateness of recovery would exceed the limits of adjudication.<sup>106</sup> Thus, by confining fault-based recovery to instances where the plaintiff's economic losses flow parasitically from tortiously caused harm

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100. See, e.g., *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 354-55 (N.Y. 1896) (adopting the "impact rule"). Determining whether someone has suffered physical impact is determined along a linear, unicentric axis.

101. See, e.g., *Waube v. Warrington*, 258 N.W. 497, 501 (Wis. 1935) (stating that plaintiff must be in "peril of physical impact" and fear for own well-being). Whether the plaintiff was or was not in such a zone is determined along a linear axis.

102. See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 821, 830 (Cal. 1989) (holding that mother who did not witness the accident in which her child was injured could not recover damages for emotional distress); *Dillon v. Legg*, 441 P.2d 912, 924-25 (Cal. 1968) (holding mother who was in close proximity to accident made prima facie case of emotional distress against defendant).

103. In *Thing*, the majority opinion of the Supreme Court of California stressed the need for greater rule formality. Justice Kaufman, concurring, refers to both the majority and a dissent as "institutionalized caprice." 771 P.2d at 831, 835. For an argument that foreseeability should be the only limit, see Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984).

104. Pure economic loss is loss that does not flow parasitically from harm to persons or property. Cf. *infra* note 107 and accompanying text.

105. See *supra* notes 11, 96 and accompanying text. The assessment of damages presents linear, not polycentric, problems.

106. A number of interconnected factors—the remoteness in time and space of the losses from the immediate tangible effects of the accident, the size of the losses compared with the values of the tangible harms to persons and property, unusual vulnerability of the victim to suffering such loss, to name a few—would present a polycentric problem for solution.

to persons or property<sup>107</sup> and otherwise confining recovery for economic loss to claims “channeled” by contractual agreements with the direct victims,<sup>108</sup> negligence doctrine helps to protect courts and litigants from unadjudicable controversies.

In similar fashion to the no-duty and limits-on-recovery rules, courts recognize several important immunities from fault-based liability. Although immunities, in theory, do not eliminate the underlying duties of care, functionally they operate, as do no-duty rules, to remove difficult polycentric problems from the judicial agenda.<sup>109</sup> Governmental immunity, for example, prevents courts from being required to review the reasonableness of highly polycentric designs of governmental policy and regulation. The Federal Tort Claims Act (FTCA), by which the federal government generally consents to be sued,<sup>110</sup> excludes claims based on the exercise of discretionary judgment, thereby preserving the important barrier against broad-based judicial review.<sup>111</sup> The tort claims that the FTCA allows—typically claims based on lower-level operatives’ negligent implementation of governmental operations—do not present unmanageable process difficulties.<sup>112</sup> Intrafamily immunities from negligence-based liability, although quite different substantively from governmental immunities, serve the same process function.<sup>113</sup> Courts would face unmanageably polycentric problems if they attempted, on a case-by-case basis, to

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107. See generally HENDERSON ET AL., *supra* note 62, at 596 (“From a strictly economic point of view, impairment of ability to earn may be the most justifiable element of general compensatory damages.”).

108. Thus, when a negligent actor causes damage to the plaintiff’s person or property and the plaintiff consequently incurs economic loss due to a contract with a third party, the plaintiff may recover those contract-based damages from the negligent actor who harmed his person or property. The third party’s economic losses are said to be “channeled” to the negligent actor through the harm to the plaintiff’s person or property. See, e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 55 (1st Cir. 1985).

109. An immunity prevents a victim from succeeding legally against a wrongdoer. When the latter waives the immunity, thereby consenting to be sued, the former may proceed to recover for the underlying wrong. See *infra* note 115 and accompanying text. By contrast, a privilege eliminates the wrong in the first instance. See generally DOBBS, *supra* note 62, at 575-76.

110. See 28 U.S.C. § 2680 (2006).

111. See *id.* § 2680(a) (stating that liability is precluded for claims based on the “exercise or performance or the failure to exercise or perform a discretionary function or duty”). If these claims were allowed, they would present highly polycentric issues. For a discussion of state and local governmental immunities, see generally DOBBS, *supra* note 62, at 716-32.

112. See *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (“[T]he *design* of a course of governmental action is shielded by the discretionary function exception, whereas the *implementation* of that course of action is not.”); see also DOBBS, *supra* note 62, at 732-37.

113. See generally DOBBS, *supra* note 62, at 751-60; HENDERSON ET AL., *supra* note 62, at 405-09.

adjust negligence law to take into account the social interests served by protecting intrafamily interactions from outside review.<sup>114</sup>

## 2. *Specifying the Duty of Care Ex Post*

It remains to be considered how courts deal with negligence claims when *ex ante* doctrinal adjustments of the sorts just considered are not available—when, for a number of substantive reasons, reasonableness-under-the-circumstances survives as the applicable legal standard. In these contexts, American courts require the plaintiff in a negligence action to perform two related tasks. First, the plaintiff must identify specifically one or more precautions that the defendant did not take, but should have taken, and show how taking that precaution would have reduced the plaintiff's harm.<sup>115</sup> And second, the plaintiff must persuade the tribunal to adopt that solution as its own.<sup>116</sup> In using this “untaken precaution” approach to solve the fault or causation problem, the plaintiff is free to rely on any plausible alternative behavior, including the adoption of new technology available at the time the defendant acted in an allegedly negligent manner. From the problem-solving perspective described in this analysis, by setting the adjudicative agenda in this manner, the plaintiff implicitly transforms the vague standard of reasonable care into a more specific standard that, once adopted or rejected by the tribunal, determines the outcome.<sup>117</sup>

Admittedly, in deciding whether or not to embrace the plaintiff's proposed precautionary alternative, to some extent a court must solve the underlying problem on its own—the bedrock legal standard remains one of unreasonableness, after all. But the plaintiff's specific proposal significantly reduces the open-endedness of the problem by limiting the number of constituent elements that the court must consider and by arranging them into a linear sequence in which each may be determined, more-or-less, on its own terms. The question becomes less one of whether the plaintiff's proposed alternative course of conduct is reasonable in the abstract and more one of whether it represents a marginal improvement over the defendant's actual

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114. See RESTATEMENT (SECOND) OF TORTS § 895F cmt. h (1977) (“The intimacy of the family relationship may also involve some relaxation in the application of the concept of reasonable care, particularly in the confines of the home.”). In recent years, courts have abrogated several of the intrafamily immunities. DOBBS, *supra* note 62, at 752, 754-56. These abrogations do not expose courts to unmanageable difficulties when either they are conditioned on specific factual circumstances or when courts make no efforts to take family relationships into account.

115. See generally Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139 (1989) (arguing that the untaken precaution is the central concept of negligence law).

116. See *id.* at 143 n.13. The RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (2008) makes clear the plaintiff's burden in this regard.

117. In other contexts, private orderers not only set the agenda, they dictate the outcome by determining the applicable standard of care. See *supra* note 86 and accompanying text.



conduct.<sup>118</sup> The leaps of intuitional judgment left for judge and jury in such a regime are not likely to be so great as to exceed the tribunal's institutional capacities.

One of the clearest examples of how the untaken-precaution approach renders the fault-based tort liability system judicially manageable is the development of workable legal standards for determining defective product designs. With few exceptions, American courts require products liability plaintiffs to prove that a specifically-described reasonable alternative design would have cost-effectively reduced or prevented their injury.<sup>119</sup> By contrast, when a plaintiff attacks a generic category of products—e.g., cigarettes, firearms, or all-terrain vehicles—as inherently defective, thereby invoking an aggregative rather than a marginal risk-benefit analysis, courts reject such claims as a matter of law, reflecting a combination of concerns over preserving judicial manageability and promoting consumer choice.<sup>120</sup>

Further evidence supporting the hypothesis that tort doctrine avoids polycentric problems is found in the near-universal rejection of claims that attack broad patterns of institutional behavior on the ground that they are antisocially dangerous. In a manner similar to judicial rejection of categorical attacks in product design liability contexts, whenever plaintiffs argue that patterns of institutional behavior should be fundamentally redesigned, or that the generic risks inherent in those patterns are inimical to social welfare, courts invoke “no-duty” rhetoric and deny such claims as a matter of law.<sup>121</sup> Thus, courts have rejected recent attempts by plaintiffs to invoke radically new versions of public nuisance law to condemn entire industries as antisocial.<sup>122</sup> These so-called “aggregative torts” seek to enlist the judiciary in helping to redesign the American popular culture; and most

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118. This reduction of a polycentric issue to a marginal comparison between specific alternatives is different conceptually from the posing of a polycentric problem in a binary, yes-no format. Regarding the latter, see *supra* notes 51-52 and accompanying text. Regarding the former, see generally David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. MICH. J.L. REFORM 239 (1997); David G. Owen, *Toward a Proper Test for Design Defectiveness: “Micro-balancing” Costs and Benefits*, 75 TEX. L. REV. 1661 (1997).

119. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (2008).

120. *Id.* § 2 cmt. d (explaining that legislatures and administrative agencies are preferred over courts when considering the desirability of widely used and consumed products); *id.* § 2 cmt. e (describing that courts will second-guess market choices only when they are irrational). See generally James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

121. See, e.g., *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001) (action against multiple handgun manufacturers for accidental handgun injuries; “we are unconvinced that the duty plaintiffs wish to impose is either reasonable or circumscribed”).

122. See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *State v. Lead Indus. Ass'n* 951 A.2d 428 (R.I. 2008).

American courts, largely for the reasons developed in this Article, will have none of it.<sup>123</sup>

In demonstrating how negligence doctrine transforms highly polycentric social problems into clusters of relatively manageable issues, this analysis does not argue that the transformations are invariably complete and successful. At the end of the day, many fault-based claims require fact finders to take intuitive leaps of judgment and to exercise discretion in doing so. This is true, to some extent, of all tort claims, including the earlier-discussed boundary-crossing claims based on intentional wrongs. The point here is not that formal tort doctrines do, or ever could, eliminate polycentricity altogether. Rather, the point is that they reduce it sufficiently for litigants to receive a meaningful day in court.

### C. *How Strict Liability Does Not Require the Exercise of Judicial Discretion*

Because strict liability eliminates the need to determine fault, it presents no polycentric core of reasonableness-under-the-circumstances.<sup>124</sup> Of course, to avoid process difficulties the applicable doctrine must identify formally the factual circumstances that trigger strict liability. The trick, which strict liability doctrine is careful to accomplish, is to define the triggers along unicentric axes. Thus, the core concepts of “highly” and “abnormally” dangerous activities are not problematic<sup>125</sup>: the former invites a “more-versus-less” calculation along a linear axis of relative risk,<sup>126</sup> and the latter invites a marginal, unicentric comparison with actual, customary patterns of behavior.<sup>127</sup> Moreover, tort doctrine is not content to rely entirely on these core concepts in defining the boundaries of strict liability. Over time, judges as a matter of law (not juries as a matter of fact) develop specific subcategories such as blasting, confining wild animals, and accumulating water in artificially maintained reservoirs.<sup>128</sup> These strict liability triggers may be likened to the specifically defined boundaries of intentional torts which, when crossed without privilege, trigger liability without fault.<sup>129</sup>

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123. See generally James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2006).

124. See generally James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1541 (1973).

125. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (2010) (Abnormally dangerous activity supports strict liability; activity is abnormally dangerous if it creates highly significant risk and is not one of common usage.) Both of these elements may be litigated on linear axes.

126. See *supra* note 11 and accompanying text.

127. See *supra* note 85 and accompanying text.

128. See generally HENDERSON ET AL., *supra* note 62, at 464-65.

129. See *supra* note 66 and accompanying text.

It is also significant that American courts generally require strict liability plaintiffs to establish a causal connection between the conduct for which the defendant is held liable and the plaintiff's harm. Causation must be established not only in the but-for sense but also in the proximate, result-within-the-risk sense.<sup>130</sup> Regarding the latter proximate causation element, the harm to the plaintiff must be the type of harm that one had in mind when defining the strict liability trigger in the first instance.<sup>131</sup> As long as judges begin such a proximate cause analysis by identifying the specific risks that played a role in the initial assignment of responsibility to the defendant, courts remain within their limits. Were courts to approach this task by asking more broadly whether holding the defendant liable for a certain type of harm would further the overarching objectives of the civil liability system, they would approach and arguably exceed the limits of their institutional competence.<sup>132</sup>

*D. Enterprise Liability's False Promise of Adjudicability:  
Why Such Claims Have Never Gained Traction*

Some tort scholars, invoking normative analyses, have urged the adoption by courts of enterprise liability, in which commercial enterprises would be strictly liable in tort for the harm their activities cause.<sup>133</sup> Such a system would presumably shield courts from trying to solve the polycentric problem of how much care enterprises must exercise. However, as explained earlier in Part III.C., *supra*, for strict liability to remain adjudicable the threshold circumstances that trigger liability must be defined with sufficient specificity to render manageable the task of deciding which activities are strictly liable for which sorts of harms. Regarding the "which activities?" question,

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130. The result-within-the-risk limitation is captured in the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2010).

131. *See id.*; RESTATEMENT (SECOND) OF TORTS § 519 (1977).

132. A recent decision in the Supreme Court of New Jersey has arguably exceeded these limits in adopting an approach to determining whether the intentional-wrong exception to the worker compensation bar applies on the facts of individual cases. *See Laidlow v. Hariton Mach. Co.*, 790 A.2d 884 (N.J. 2002). In what the court terms the "context prong," trial judges are to determine whether the employer's imposition of risk on the injured employee was beyond what the legislature could have contemplated as the "simple facts of industrial life" when limiting employees to their statutory rights to compensation. *See id.* at 898.

133. *See, e.g.*, VIRGINIA E. NOLAN & EDMOND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY (1995); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993); Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285 (2001). This discussion focuses on common law tort liability, not statutory no-fault compensation. *Cf.* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 260-63 (3d ed. 2007).. Because statutory schemes would presumably be specific and structured, they could avoid adjudicability problems. *See generally* James A. Henderson, Jr., *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659 (1982).

enterprise liability proposals presumably include all commercial enterprises.<sup>134</sup> Thus, the threshold task of determining which defendants are subject to strict liability would be manageable enough.<sup>135</sup>

However, regarding the “all the harm they cause” issue, because a broad-based enterprise liability system presumably would not select among commercial enterprises based on the uniqueness of the risks they create, the applicable doctrine would provide no adequate basis for establishing a logical link between any given commercial enterprise’s activities and the harm those activities cause.<sup>136</sup> Thus, the only type of causation that a plaintiff could be required to prove would be actual, but-for-the-activity causation. In any given situation a fairly large number of enterprises would satisfy that criterion—most accidents are the result of many but-for causes.<sup>137</sup> It follows that courts would be required, presumably applying overarching policies under an open-ended scheme of enterprise liability, to exercise broad discretion in deciding which commercial enterprises should be responsible for which harms.<sup>138</sup> These would be complex, value-laden tasks that would clearly threaten to push courts beyond their institutional capabilities. Thus, from the perspective in this analysis, it is not surprising that academic proposals for broad-based enterprise liability have not gained traction in American courtrooms.<sup>139</sup>

#### IV. THE CONSTITUTIVE DIMENSIONS OF TORT: HOW A SYSTEM OF PUBLIC RISK REGULATION DELEGATES PROBLEM-SOLVING RESPONSIBILITIES TO PRIVATE MANAGERS

While the discussion that follows begins by examining explicit contractual modifications of tort, it goes further to reveal that tort law’s constitutive dimensions extend well beyond the contracting-out phenomenon. Thus, in addition to deferring passively to contract, tort law actively delegates authority to private problem solvers in two important ways that are developed in the sections that follow. First,

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134. See generally Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190 (1996).

135. Admittedly, the concept of “commercial enterprise” is fuzzy around the edges. But presumably courts would work out adequately specific boundaries over time.

136. Cf. *supra* note 131 and accompanying text.

137. See James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 391 (2002).

138. *Id.* at 396 (arguing lack of doctrinal focus would lead to “conceptual chaos”).

139. Thus, in the products liability context, courts have never imposed strict liability for harm caused by the generic risks of product designs. See Henderson, *supra* note 124, at 1554 & n.98. For an analysis of how courts replaced earlier enterprise liability systems with negligence law to give American industry breathing room in the second half of the nineteenth century see generally Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 228-30 (1971). For a discussion of whether more limited statutory schemes of no-fault compensation may be developed in the future see ABRAHAM, *supra* note 133, at 260-63.

by invoking no-duty rules and immunities, tort law explicitly places certain areas of conduct beyond its regulative reach, thereby deferring them to mostly private systems of risk management. And second, regarding those areas of conduct retained within its reach, tort law often delegates, on a piecemeal basis, the setting of the relevant tort standards to individual risk managers. Both of these active modes of deferral—system-wide and piecemeal—may be said to promote private ordering and consumer choice.<sup>140</sup> But only in connection with the second—piecemeal delegation—do the externally established standards become tort standards, thus subjecting noncompliant actors to tort liability. Moreover, while in both modes of active deferral many of the adjustments occur *ex ante*, before the fact of the plaintiff's injury, they may also occur *ex post* when courts require tort plaintiffs to specify how the defendants breached the relevant general duties of care. A previous discussion in Part III, *supra*, explains how this *ex post* specification requirement avoids polycentricity, helping to render negligence claims adjudicable. Now this Part explains how it empowers plaintiffs to set the substantive agenda in negligence litigation, thereby steering the regulatory dimension of tort in the direction of the plaintiff's, rather than the court's, choosing.<sup>141</sup>

Before considering the different ways in which tort doctrine delegates responsibility to private managers, it would be helpful to consider briefly why it makes such delegations in the first instance. One important reason has been identified: private individuals and small collaborative groups are on the whole more capable solvers of complex planning and design problems than are courts. But beyond this consideration of comparative advantage lies a strong normative tradition in American law and culture: that problems with a significant private dimension should, whenever private problem solvers can be trusted fairly to consider the interests of would-be victims, be solved by private, not public, actors.<sup>142</sup> This Article does not argue normatively that private ordering should be promoted. Rather, it observes

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140. See generally Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 BROOK. L. REV. 781 (2009).

141. With rare exceptions the trial will focus on the untaken precaution(s) upon which the plaintiff chooses to rely. See *infra* note 196 and accompanying text.

142. This commitment to private ordering is most often voiced in connection with the constitutive powers conferred by contract law. See, e.g., Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941) ("Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy."); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 367 (1921). ("[I]t was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation of contract."). The underlying assumption is that contracting parties can protect their own interests. Cf. *infra* note 149 and accompanying text.

empirically that the American legal system does, in fact, place significant value on the delegation of decisionmaking to private orderers.<sup>143</sup>

A. *Ex Ante Delegations of Risk-Management Responsibility*

The subsections that follow distinguish between passive deferrals and active delegations of regulative responsibility. As will be explained, passive deferrals involve private risk-management decisions that the tort system neither initiates nor encourages, but rather reviews for fairness and for the most part accepts as legally effective. Most examples of passive deferral involve contracting out, in which the tort system bows to contractual overrides. By contrast, tort doctrine actively invites private decisionmaking by employing no-duty rules and tort immunities to delegate regulative responsibility and by explicitly incorporating into its duty structure interparty modifications, short of formal agreements, based on mutual consent and customary conduct.<sup>144</sup>

1. *Passive Deferrals: Allowing Contract to Override Tort*

When actors anticipate future tort disputes, they often agree to modify the relevant tort standards and to adjust potential liabilities. As long as the parties are reasonably competent, have adequate access to relevant factual information, are in positions to act effectively on that information, and do not reach agreements that are objectively unconscionable, courts will give legal effect to such agreements.<sup>145</sup> As indicated earlier, the tort system does not actively encourage such arrangements by leaving gaps in tort doctrine, but passively accepts contractual overrides when they occur. Indeed, many insist that contract comes first, so-to-speak—that the primary function of tort law is to provide baseline default rules that apply only when deal-making in

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143. See HART & SACKS, *supra* note 41, at 286 (“The overwhelming proportion of the things which happen and do not happen in American society . . . are the result of decisions which people make in the exercise of a private discretion, accorded to them by official recognition of a private liberty.”).

144. It could be argued that, by standing ready to enforce formal contractual departures from tort obligations, courts thereby actively encourage such departures. But even if the passive/active distinction is one of degree, this analysis sees a difference between courts deferring to contractual overrides of existing tort doctrine, on the one hand, and tort doctrine leaving regulatory gaps that presumably only private ordering can fill, on the other. See *infra* note 161 and accompanying text. Jules Coleman draws a similar distinction between gaps in contracts (that contract doctrine fills) and failures to contract in the first instance (which tort doctrine fills). See Jules L. Coleman, *Contracts and Torts*, 12 LAW & PHIL. 71, 75 (1993).

145. See generally DOBBS, *supra* note 62, at 541-42; HENDERSON ET. AL., *supra* note 62, at 383-84. Courts do not allow such agreements to adversely affect the rights of third parties. See DOBBS, *supra* note 62, at 768.

the marketplace is either not possible or not desired by the affected parties, or when such deal-making fails of its purpose.<sup>146</sup>

Market failures in this context occur most often when either transaction costs are too great<sup>147</sup> or one of the interested parties is uninformed or lacks the capacity to enter enforceable deals.<sup>148</sup> Regarding whether the parties have the capacity to contract out of tort, two fact patterns dominate. First, a majority of instances in which all sides are competent to protect their interests involve commercial actors allocating future economic gains and losses resulting from accidents that may occur in the course of their joint business activities.<sup>149</sup> And second, a majority of instances in which courts will not enforce the exculpatory agreements involve “David and Goliath” circumstances in which commercial enterprises try to reduce or eliminate their tort liabilities to individual victims.<sup>150</sup> In the first instance, contract could be said to rescue competent actors from tort; in the second, tort could be said to rescue incompetent actors from contract. Of course, when the parties agree to raise the relevant duties of care, courts are less concerned with protecting incompetent actors. Thus, almost without exception, courts accept and enforce agreements that seek to expand, rather than to contract, liability for accidentally caused injuries.<sup>151</sup>

It remains to consider whether actors may contract out of the judicial procedures by which tort law is traditionally administered. Although some American courts during the early development of so-called “alternative dispute resolution” methodology balked at the prospect of parties ousting the judiciary of jurisdiction to hear civil disputes,<sup>152</sup> the tide has turned in recent years. As long as the earlier-described criteria for allowing contracting out of tort are satisfied, courts are content to allow private actors to agree to submit their tort

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146. See, e.g., Coleman, *supra* note 144, at 75.

147. When the parties involved in an accident have no practical opportunity to interact before the accident, tort law solves the coordination problem that the parties would presumably have solved if they had been able to interact. In the absence of transaction costs, tort law arguably would not be needed. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

148. See generally HENDERSON ET AL., *supra* note 62, at 57-59, 383-84.

149. See, e.g., Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643 (Cal. 1968) (indemnification agreement concerning future property damage); Brown v. Two Exch. Plaza Partners, 556 N.E.2d 430, 432-33 (N.Y. 1990) (indemnification agreement regarding future personal injury).

150. See, e.g., Sweeney v. City of Bettendorf, 762 N.W.2d 873 (Iowa 2009); Provoncha v. Vt. Motocross Ass'n, 974 A.2d 1261, 1263 (Vt. 2009).

151. See, e.g., Baxter v. Ford Motor Co., 12 P.2d 409, 410 (Wash. 1932) (discussing express warranty); HENDERSON ET AL., *supra* note 62, at 214-16 (discussing promise to effect medical cure); *supra* note 112 and accompanying text (discussing waiver of immunity).

152. See generally Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 406-08 (1998) (describing early judicial hostility to alternative dispute resolution agreements).

disputes to alternative dispute resolution methodologies.<sup>153</sup> Under more ambitious academic proposals, the parties to foreseeable but fairly narrowly defined tort disputes would agree *ex ante* to replace the relevant liability standards and judicial procedures with privately designed and funded, no-fault systems of recovery.<sup>154</sup>

## 2. *Active Delegations: Invitations to Private Risk Managers Imbedded in Tort Doctrine*

In the preceding Part, private actors take the initiative by contracting out of tort. In this Part, tort doctrine takes the initiative by invoking no-duty rules, immunities, and explicit deferrals to private ordering, thereby inviting private risk managers to fill the regulative gaps. Subsection (a), *infra*, deals with doctrinal delegations to private management systems;<sup>155</sup> subsection (b) deals with deferrals to individual decisionmakers.

### (a) *Delegations to Private Risk-Management Systems: No-Duty Rules, Tort Immunities, and Reliance on Custom*

American tort law includes high-profile, no-duty rules that deny liability in various circumstances where one would, on general principles, expect liability to be forthcoming.<sup>156</sup> Part III.B, *supra*, identifies some of these rules to show how courts frame tort doctrine to avoid presenting polycentric problems. This Part explains how tort law uses no-duty rules to delegate relevant management responsibilities to private decisionmakers. A good example occurs in the area of products liability, where courts delegate to product purchasers much of the responsibility, by means of a no-duty rule, for deciding whether to adopt optional safety devices.<sup>157</sup> Perhaps the most notorious of these rules denies a general duty of care to rescue strangers from peril.<sup>158</sup> Whatever other substantive and procedural objectives this

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153. See, e.g., *Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. 265 (1995).

154. See, e.g., Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985).

155. Judicial deferrals to legislative regulation are not included because legislation trumps court-made tort law in any event, and because Part IV focuses on the *constitutive* dimensions of tort, which are by definition limited to private ordering.

156. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010) (policy-based, no-duty exceptions to general duty of care). See generally HENDERSON ET AL., *supra* note 62, at 316 (heading in negligence chapter of torts casebook titled "Special Instances of Nonliability for Harmful Consequences that Are . . . Foreseeable"). This is the "exemption" sense of the duty concept as developed in John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 718-21 (2001) (certain classes of actors do not owe certain classes of victims the same general duty of reasonable care ordinarily owed by all to all).

157. See generally James A. Henderson, Jr. & Aaron D. Twerski, *Optional Safety Devices: Delegating Responsibility for Product Safety to the Market* (2013) (unpublished manuscript) (on file with author).

158. See *supra* note 93 and accompanying text.



no-duty rule may serve,<sup>159</sup> it clearly defers the relevant behavior-management responsibilities for encouraging rescue to the broad system of social and cultural interests that promote bonds of interpersonal caring among members of society.<sup>160</sup> Indeed, observers have argued that public law regulation supports these interpersonal bonds and natural impulses to rescue most effectively by not attempting to promote them by threatening penalties.<sup>161</sup>

The general rule that tortfeasors are not liable for the emotional upset of bystander-strangers who witness accidental injuries to primary victims, or for the upset of relatives and friends of primary victims who later learn of the injuries to their loved ones, functionally parallels the general no-duty-to-rescue rule.<sup>162</sup> By denying a tort remedy to most bystander victims who suffer loss in the form of severe emotional distress, tort law defers responsibility for addressing and managing those losses to the private mechanisms by which individuals and social groups traditionally cope with the psychological aftermath of emotional trauma and personal loss.<sup>163</sup> Observe that in this context the focus is on managing situations *ex post* to reduce the extent of the victim's losses rather than, as with the rescue rule, managing the would-be loss-avoider's conduct *ex ante* to avoid accidental losses in the first instance. But the two no-duty rules are functionally similar in that they both shield courts from polycentric problems<sup>164</sup> and they both delegate risk- and loss-management responsibilities to systems of private ordering.

The no-duty tort rule that disallows recovery for pure economic loss<sup>165</sup> self-consciously delegates risk management responsibilities to

159. See generally Henderson, *Process Constraints*, *supra* note 92.

160. Lon Fuller distinguishes between legal duties and human aspiration. Instead of bludgeoning actors with the former, the no-duty-to-rescue rule "invit[es] us to join them in realizing a pattern of life . . . worthy of human nature[.]" LON L. FULLER, *THE MORALITY OF LAW* 10 (rev. ed. 1969). For a treatment of how cultural processes reinforce natural tendencies to behave altruistically see Felix Warneken & Michael Tomasello, *The Roots of Human Altruism*, 100 *BRIT. J. PSYCHOL.* 455 (2009).

161. See, e.g., FULLER, *supra* note 160, at 5-6, 9, 27-28; William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J. LEGAL STUD.* 83 (1978).

162. See *supra* note 98 and accompanying text.

163. In *Thing v. La Chusa*, 771 P.2d 814, 828-29 (Cal. 1989), the Supreme Court of California justified a formal, restrictive approach to bystander recovery in part on the ground that emotional distress can be dealt with adequately by private coping mechanisms. Although the court acknowledges that such distress is a serious form of personal injury, the majority opinion observes that it "is an unavoidable aspect of the 'human condition,'" concluding that it "is an intangible condition experienced by most persons . . . at some time during their lives." *Id.* See generally Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 *WAKE FOREST L. REV.* 1197, 1206 (2009) (referring to the requirement that to be actionable, intentional infliction of emotion distress must be extreme and outrageous, the author observes that "putting up with occasional conduct that is harsh and hurtful is part of the normal course of life").

164. See discussions *supra* Part III.

165. See *supra* note 104 and accompanying text.

the constitutive dimensions of contract. As observed earlier in connection with the contracting-out phenomenon, most instances in which plaintiffs succeed in recovering in contract for economic loss arise out of commercial dealings.<sup>166</sup> When contract remedies are not available to plaintiffs, either because the parties never made a deal or because their loss-allocating efforts succumb to contract law defenses, courts refuse a tort remedy.<sup>167</sup> Another example of tort doctrine delegating responsibility for risk management to private decisionmakers involves liability for generic risks inhering categorically in allegedly defective product designs. When such risks cannot be eliminated by reasonable design modifications and are obvious, generally known, or adequately warned against, courts refuse to impose design liability however great or arguably unreasonable those risks may be.<sup>168</sup> When courts reach these conclusions, it is often quite clear that they are deferring to consumers' choices in the products marketplace.<sup>169</sup>

American courts adopt an equally deferential approach to private ordering when a member of a private organization—business, social, or otherwise—seeks to recover in tort against a fellow member based on conduct to which the organization's private, internal regulations apply. Consistent with their responses to contracting out<sup>170</sup> and intrafamily tort disputes,<sup>171</sup> courts generally defer to the private regulations when they call for a result different from that called for by tort.<sup>172</sup> This “let them work it out themselves” attitude extends to the internal management of business organizations. The so-called “business judgment rule” delegates to corporate management primary responsibility for making decisions that may adversely affect

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166. See *supra* note 149 and accompanying text.

167. See *supra* note 104 and accompanying text.

168. See, e.g., *Adamo v. Brown & Williamson Tobacco Corp.*, 900 N.E.2d 966, 967-69 (N.Y. 2008) (plaintiff attacked defendant's cigarettes with a proposed alternative design that smokers clearly would not accept; court rejected the claim as a matter of law, concluding that it was the functional equivalent of an impermissible, categorical attack on cigarettes). See generally RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmts. d, e; Henderson & Twerski, *supra* note 120.

169. See, e.g., *Adamo*, 900 N.E.2d 966; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998) (“[T]he range of consumer choice among products are factors that may be taken into account” in determining whether a product design is defective.). See generally Geistfeld, *supra* note 140. Courts will even allow purchasers to choose among optional safety features when the purchasers are not, themselves, the ones at risk of injury. See, e.g., *Scarangella v. Thomas Built Buses, Inc.*, 719 N.E. 2d 679 (N.Y. 1999). See generally Thomas E. Powell, II, *Products Liability and Optional Safety Equipment—Who Knows More?*, 73 NEB. L. REV. 844 (1994).

170. See *supra* notes 145-54 and accompanying text.

171. See *supra* notes 113-14; *infra* notes 175-78 and accompanying text.

172. See, e.g., *Stelluti v. Casapenn Enters.*, 1 A.3d 678, 695 (N.J. 2010). (deferring to an exculpatory clause in a gym club contract on the ground that private arrangements should be upheld).

shareholders, and courts refuse to second-guess those decisions when made in good faith.<sup>173</sup>

Although immunities from liability are conceptually distinguishable from no-duty rules,<sup>174</sup> from the functional perspective of this analysis they serve essentially the same purpose. Intrafamily immunities, still recognized by most states, are good examples. When close family members—spouses, parents, and unemancipated children—bring tort actions against one another, American courts recognize immunities from liability that delegate risk management authority to the family unit or to members of the unit,<sup>175</sup> much as no-duty rules defer to social and business organizations regarding the potentially tortious interactions of their members.<sup>176</sup> With regard to intrafamily tort actions, courts have expressed concern that such actions, if sincere, disrupt family cohesion<sup>177</sup> and, if insincere, encourage collusion and fraud.<sup>178</sup> But on the view taken here, many intrafamily immunities also promote private ordering for its own sake—who knows better than the family itself how best to manage family affairs? And who can better be trusted fairly to control intrafamily risks? Governmental immunities function in much the same manner as intrafamily immunities;<sup>179</sup> however, they are not emphasized in this analysis because they involve deferrals to public, rather than to private, risk-management systems.

Charitable immunities are more difficult to explain from the problem-solving perspective. For starters, harking back to an earlier discussion in Part III, *supra*, tort actions against charities present no more likelihood of being unadjudicable than do tort actions generally.<sup>180</sup> Moreover, from the constitutive perspective in this Part, no basis

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173. See, e.g., *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (“A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court . . . will not substitute its own notions of what is or is not sound business judgment.”). See generally S. Samuel Arshat, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

174. See *supra* note 109 and accompanying text.

175. See *supra* notes 113-14 and accompanying text.

176. See *supra* note 175 and accompanying text.

177. See generally DOBBS, *supra* note 62, at 756 nn.23-24 and accompanying text. Of course, when a family member commits a harmful intentional tort on another member, this substantive, family harmony rationale seems weak.

178. *Id.* Reflecting hostility toward immunities, Dobbs argues that fraud is no more likely in this context than in others.

179. See *supra* note 110 and accompanying text. Besides avoiding polycentricity, governmental immunities arguably avoid excessive interference by the judicial branch with the legislative and executive branches. For an argument that governmental immunity is not supportable on separation-of-powers grounds see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1217-19 (2001).

180. By contrast, tort actions against governmental agencies are likely to include attacks on polycentric policy decisions, see *supra* notes 110-11 and accompanying text, and actions among family members raise polycentric problems when they attempt, as they

exists for believing that charities know better, or can be better trusted, to manage the risks of harming third party victims than noncharitable actors and enterprises generally.<sup>181</sup> Thus, from the outset, the main motive underlying charitable immunities appears to have been substantive—to subsidize charitable activities by protecting them from the financial burdens of tort liabilities.<sup>182</sup> With the development of the modern liability insurance industry,<sup>183</sup> this subsidization rationale has lost much of its power and, coincidental with this loss, judicial recognition of charitable immunities has steadily declined.<sup>184</sup>

Negligence law defers to private risk management systems in another important way. Regarding defendants engaged in providing professional services—e.g., doctors and lawyers—courts measure their conduct against the standards of care established by the profession rather than by independent, judicially derived standards of reasonableness.<sup>185</sup> Thus, based in part on an assumption that professionals act in the best interests of their clients, the professions establish the safety standards by which their individual members are judged, and conformance to those customs bars liability.<sup>186</sup> The level of trust that tort law thereby places in the professions does not extend to industries and other nonprofessional risk management systems, whose customs do not establish the relevant legal standards.<sup>187</sup> That is not to say that industry custom carries no weight in negligence litigation. Evidence of conformance to custom is admissible and presumably influences triers of fact in favor of defendants.<sup>188</sup> And evidence of departure from industry custom is believed to be even more influential.<sup>189</sup> But courts do not routinely confer controlling authority on customs adopted by nonprofessional risk management systems.

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must, to accommodate the special values within particular family unit, see *supra* note 114 and accompanying text.

181. Thus, unlike the other immunities, no process reasons exist for courts to delegate regulative authority to charities.

182. See HENDERSON ET AL., *supra* note 62, at 405.

183. For a discussion on this development see KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 14-38 (2008).

184. See, e.g., *Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286, 294, 295 (Me. 2009) (conducting a thorough review of history, concluding that charitable immunity “has generally been acknowledged as bankrupt”). See generally DOBBS, *supra* note 62, at 763; Note, *The Quality of Mercy: “Charitable Torts” and Their Continuing Immunity*, 100 HARV. L. REV. 1382 (1987).

185. See *supra* note 78 and accompanying text.

186. See *supra* note 85 and accompanying text.

187. For a leading decision see *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), *cert. denied*, 287 U.S. 662 (1932).

188. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13(a) (2010); DOBBS, *supra* note 62, at 393-99.

189. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13(b) cmt. c (2010).

(b) *Delegations to Individual Managers: Informal, Consent-Based Modifications of Duty*

Consent plays a larger role in tort than simply supplying an affirmative defense to claims of intentional tort. In fact, the absence of consent is arguably the single most important element in the definition of what makes intentional boundary-crossings wrongful.<sup>190</sup> To be sure, the so-called “glass cage” doctrine limits an actor’s power to define her own personal boundaries.<sup>191</sup> But within those limits, the power to withhold consent leaves it to individuals to define the duties owed by others to refrain from violating the boundaries of personhood. Moreover, in the context of negligence, analogous to the role of consent in connection with intentional torts, assumption of the risk confers lawmaking power on individuals. In what courts refer to as its “primary sense,” assumption of the risk allows actors to modify their reciprocal rights and duties through *ex ante* interactions in which the actors tacitly agree to accept tailor-made adjustments of the relevant general standards of care.<sup>192</sup> Were the parties to capture these same adjustments in a formal agreement, one could speak of their “contracting out” of off-the-rack tort liability.<sup>193</sup> In effect, assumption of the risk in the primary sense accomplishes the same objective, albeit less formally.

B. *Ex Post Delegations of Risk-Management Responsibility: Untaken Precautions and Settlements*

1. *The Plaintiff’s Power to Set the Trial Agenda: Identifying Untaken Precautions*

As explained in Part III, *supra*, one of the important ways that courts avoid the necessity of addressing negligence claims under vague reasonableness standards is by requiring plaintiffs to identify specifically the precaution that the defendant failed to take *ex ante* which, if taken, would have reduced or prevented the plaintiff’s injury *ex post*.<sup>194</sup> This section follows up on that earlier discussion and observes that this “untaken precaution” requirement also constitutes an important delegation of power to tort plaintiffs pursuing negligence claims. By assigning to the plaintiff the power to choose which un-

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190. See *supra* note 73 and accompanying text. See generally Geistfeld, *supra* note 140, at 781 nn.1-6 and accompanying text.

191. See, e.g., *McCracken v. Sloan*, 252 S.E.2d 250, 251-52 (N.C. Ct. App. 1979) (plaintiff not allowed to erect a “glass cage” in order to convert passive smoking claim into offensive battery).

192. See, e.g., *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992). (finding that plaintiff’s continued willingness to participate in increasingly violent touch football game lowered the duty of care owed to her by fellow participants). See generally DOBBS, *supra* note 62, at 540-41.

193. See *supra* note 145 and accompanying text.

194. See *supra* note 115 and accompanying text.

taken precaution(s) to focus on at trial, the tort system is not delegating the power to regulate, given that the plaintiff cannot unilaterally impose his choice on the defendant. Rather, the system is delegating to the plaintiff the power to set an important element of the trial agenda—the power significantly to limit proof and argument regarding the nature of the defendant's breach. To be sure, the defendant may dispute the plaintiff's proposed agenda—for example, by arguing that the superficially attractive, low-cost precaution proposed by the plaintiff would not have prevented all of the harms that a reasonable person would have anticipated.<sup>195</sup> Nevertheless, the agenda proposed by the plaintiff is presumptively controlling and carries great weight.<sup>196</sup> The plaintiff may ultimately lose the war by failing to prove defendant's fault; but he gets to choose the terrain over which the relevant battles will be fought.

Lest the false impression be created that agenda-setting is solely the plaintiff's prerogative in negligence litigation, observe that tort law delegates to defendants parallel agenda-setting powers in connection with those issues that defendants may or may not choose to raise at trial. An example of current interest relates to the issue of plaintiff's contributory fault. Before the arrival of comparative negligence, contributory fault was an affirmative defense and the defendant had the choice of whether or not to raise that issue.<sup>197</sup> However, in this era of comparative negligence,<sup>198</sup> plaintiffs who pursue marginally plausible claims may prefer to confess their own fault and let the jury allocate percentages of responsibility rather than risk a jury finding that the defendant was totally free from blame—better

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195. Employing hindsight, often the plaintiff can identify a low-cost precaution that a jury could find would have prevented or reduced the plaintiff's harm. The defendant typically responds, that from the standpoint of foresight, a reasonable person would have assumed that a more sweeping, higher-cost precaution was necessary to prevent injury, and that the risk of suffering harm was not sufficiently great to warrant such higher costs of precaution. *See, e.g.,* *Washington v. La. Power & Light Co.*, 555 So. 2d 1350, 1354 (La. 1990) (involving the family of an electrocuted homeowner who claimed that utility should have buried or insulated high voltage wires in decedent's back yard; ruling for utility as a matter of law, the court held that, to save all persons in decedent's position, the entire system would require safeguarding). *Id.*

196. *See* Grady, *supra* note 115, at 144 (“[B]y selecting an untaken precaution . . . the plaintiff defines the analysis that everyone else will use.”). In *Washington v. La. Power & Light Co.*, 555 So. 2d 1350 (La. 1990), the plaintiffs attempted to convince the court that the decedent's situation was sufficiently unique that a reasonable electric utility would have treated him with greater care. That effort was unsuccessful, but it is clear that the defendant utility bore the burden of overturning the plaintiff's assertion of uniqueness—the court goes to great length to justify its conclusion that, as a matter of law, the undertaken precaution urged by the plaintiffs was inappropriately modest. *Id.* at 1353-55.

197. *See generally* DOBBS, *supra* note 62, at 494 n.5 and accompanying text.

198. *See generally* William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950); Daniel Orr, *The Superiority of Comparative Negligence: Another Vote*, 20 J. LEGAL STUD. 119 (1991).

to recover something rather than nothing, as it were. The question of law in that context is whether the plaintiff may raise the issue of her own fault if the defendant, sensing the likelihood of a total victory for defendant if comparative fault is not an issue, chooses not to raise it.<sup>199</sup> In a manner parallel to that involving untaken precautions, the issue here is one of deciding who has the power to set the relevant agenda. The point in both contexts is that agenda-setting is an important aspect of the American system of adversary justice and that delegating the relevant choices to private litigants gives them significant *ex post* powers of risk management.

## 2. *The Plaintiff's Power to Decide Whether to Pursue a Claim*

It remains to consider the most basic *ex post* choice of all in the context of American tort litigation—the injured plaintiff's choice of whether or not to pursue a legal claim in the first instance and whether, having pursued a claim, to settle with the defendant. From the perspective adopted in this analysis, it is remarkable that an ostensibly public system of risk regulation would delegate to private decisionmakers the power to determine in the first instance whether or not that system will address individual instances of wrongdoing. The normative implications of this most basic delegation to private ordering, especially from a corrective justice standpoint, have captured the attention of tort scholars.<sup>200</sup> From the problem-solving perspective advanced in this Article, this would appear to constitute the most fundamental delegation to private ordering of them all.

## V. CONCLUSION

From an instrumental perspective, law in general and tort law in particular are problem-solving enterprises. Even if one believes that corrective justice is tort's ultimate, noninstrumental objective, one must be concerned with the means of achieving that objective. Viable legal standards must be created and maintained, claims must be prepared and processed, and appropriate outcomes must be reached. All of these elements necessitate solving coordination problems of one sort or another. On the surface, the tort system would appear to feature courts as the primary problem solvers, subject to powers given to

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199. Comparative negligence is universally treated as an affirmative defense. *See, e.g.*, ABRAHAM, *supra* note 132, at 151-60; DOBBS, *supra* note 62, at 503-34. Thus, one could present the issue as one of whether the plaintiff may raise an affirmative defense. For a decision allowing the plaintiff to raise the issue when the defendant chooses not to raise it, see *Philip Morris USA, Inc., v. Arnitz*, 933 So. 2d 693 (Fla. 2d DCA 2006).

200. *See generally* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 82-90 (1998). *See also* ABRAHAM, *supra* note 139, at 14-16 (“[A]s the connection between injurer and victim becomes less direct, corrective justice seems less relevant.”); Symposium, *Civil Recourse Theory*, 39 FLA. ST. U. L. REV. 1 (2011).

private actors to contract out of tort-based obligations. On this view, courts appear to solve social problems not only when they create law *ex ante*, but also when they apply it *ex post*. Despite first appearances, however, courts are not institutionally suited to solving complex social problems. Most of the underlying substantive problems with which tort law is concerned—complex problems of coordinating human behavior—are many-centered, or polycentric. Their constituent elements are interconnected, so that a tentative decision regarding any single element affects all the other elements. Individuals and small groups solve polycentric problems by exercising experience-based discretion. But courts do not ordinarily exercise broad discretion, partly because of traditional views regarding political unaccountability and partly to ensure litigants a meaningful opportunity to participate in guiding courts to appropriate outcomes. Even when courts make law as part of the evolutionary common law process, they do so only marginally, considering only one relatively small, non-polycentric piece of the larger puzzle at a time.

Two important conclusions flow from the fact that private actors can solve social problems that courts cannot solve nearly so effectively. First, the regulative dimensions of tort doctrine have evolved in ways that largely avoid giving courts the sorts of open-ended problems that are beyond their institutional capabilities. And second, the constitutive dimensions of tort delegate to private risk managers major responsibilities for solving those same problems. This Article has examined the breadth of tort doctrine to support both of these conclusions. The analysis is descriptive rather than normative. It does not argue that tort law should necessarily conform to the patterns it identifies; rather, it demonstrates that tort law does conform in ways that reflect the comparative problem-solving capabilities of courts and private decisionmakers. One need not take sides normatively to gain understanding from this analysis. Thus, a major value of the problem-solving perspective may reside in its capacity to explain tort law without the necessity of employing overarching philosophical abstractions to try to justify it.