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A Process Theory of Torts

Jay Tidmarsh*

Torts is filled with wonderful contradictions. On the level of theory, there are the well-known oppositions of justice to efficiency and of formalism to realism and pragmatism.¹ On the level of metadoctrine, there is the dyad of strict liability and negligence.² On the more mundane level of doctrine, hosts of opposing solutions to common factual occurrences exist.³ On the level of practice, the fact that two juries hearing the same

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1. For fuller discussions of the impact of these theories on torts, see G. EDWARD WHITE, *TORT LAW IN AMERICA* 63-113 (1980), and *infra* part I.A. See also BAILEY KUKLIN & JEFFREY W. STEMPER, *FOUNDATIONS OF THE LAW* 131-92 (1994) (describing jurisprudential influences on law).

2. For descriptions of the tug-of-war between negligence and strict liability in Anglo-American history, see OLIVER W. HOLMES, JR., *THE COMMON LAW* 85-90, 102-19 (1881); C.H.S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 154-83 (1949); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 85-99 (1977); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 285-313 (2d ed. 1981); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 *UCLA L. REV.* 641 (1989) [hereinafter Schwartz, *Early Tort Law*]; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 *YALE L.J.* 1717 (1981) [hereinafter Schwartz, *Tort Law*]. Other cultures have faced the same choice. See WERNER PFENNIGSTORF & DONALD G. GIFFORD, *A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES* 50-62 (Donald G. Gifford & William M. Richman eds., 1991) (describing negligence and strict liability rules in 10 European and Pacific-rim countries); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 28, 32 (1987) (questioning negligence and strict liability rules in England, France, Germany, and former Soviet Union). On the general choice between negligence and strict liability, see RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 61-125 (5th ed. 1990); MARK F. GRADY, *CASES AND MATERIALS ON TORTS* 1-95 (1994).

3. For example, think of the many solutions proposed for the problem of the plaintiff who cannot identify the precise manufacturer of a generic product marketed by numerous independent corporations. See *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal.) (adopting "market share" approach when substantial share of manufacturers in local market is joined), *cert. denied*, 449 U.S. 912 (1980); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986)

evidence might reach different conclusions is so widely accepted that it passes without notice.⁴

I take as a starting point one of the deepest and most enduring oppositions in tort law—the metatheoretical division between "conceptualism" and "anti-conceptualism." "Conceptualism"⁵ holds that torts is (or should be) governed by a single, true foundation from which specific doctrinal consequences—the "correct" state of tort rules—follow. The opposing view, which we might call "anti-conceptualism," denies the validity of the conceptualist enterprise at every turn: Torts has no true foundation, tort rules and outcomes are culturally and historically determined, and grand conceptual theories about torts are intellectually bankrupt. Many legal economists and corrective justice theorists have lined up on the conceptual side of the debate,⁶ while most realists,⁷ pragmatists,⁸ critical

(rejecting market share approach); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y.) (allowing use of market share approach and imposing liability on basis of national rather than local market shares), *cert. denied*, 493 U.S. 944 (1989); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis.) (allowing plaintiff to sue any manufacturer of product, even if substantial share is not joined), *cert. denied*, 469 U.S. 826 (1984).

4. Cf. LEON GREEN, *JUDGE AND JURY* 185 (1930) ("[W]e may have a process for passing judgment in negligence cases, but practically no 'law of negligence' beyond the process itself."). Many even suspect that juries occasionally ignore that stated legal rule—whether it be negligence or strict liability. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("In leaving it to the jury to decide whether the inference [of negligence] has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability"); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185-86 (Mich. 1984) ("Imposing a negligence standard for design defect litigation is only to define in a coherent fashion what our litigants in this case are in fact arguing and what our jurors are in essence analyzing.").

5. The term "conceptualism" was coined by intellectual historian Edward White. See WHITE, *supra* note 1, at 211-30 (discussing "neoconceptualists" who, like original conceptualists of the late nineteenth century, have attempted to provide overarching theoretical framework for tort law).

6. *Id.*, see also *infra* notes 24-28 and accompanying text (describing various positions staked out by corrective justice and economic scholars).

7. See, e.g., GREEN, *supra* note 4; THOMAS A. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY I*, at xxv (1906) (noting that "[n]o definition of tort at once logical and precise can be given"); WHITE, *supra* note 1, at 63-113 (describing influence of realism on torts).

8. See JOHN G. FLEMING, *THE LAW OF TORTS* 5-6 (6th ed. 1983); WHITE, *supra* note 1, at 232-36 (rejecting idea that single theory holds all of tort law together); cf. Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990) ("For myself, I find it hard to discern any interesting philosophical differences between Unger, Dworkin, and Posner; their differences strike me as entirely political, as differences

scholars,⁹ and empiricists¹⁰ have lined up on the other.

At present, the anti-conceptualists hold the high ground. Disagreements by conceptualists on such basic matters as the proper foundational principle and the correct methodology have resulted in a jarring (and apparently irreconcilable) cacophony of claims about the true nature of torts and its doctrines. Today, tort law is not entirely consistent with the normative or descriptive vision of any conceptualist; indeed, torts cannot even agree on such simple matters as the meaning of "negligence"¹¹ or the proper liability principles to apply to discrete events like ground damage from aircraft¹² and injuries from rampaging ele-

about how much change and what sort of change American institutions need."). *See generally* Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987); Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

9. *See generally* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197 (1990); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) [hereinafter Bender, *Primer*]; Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993) (reviewing feminist literature concerning torts).

10. *See generally* KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?* 140 U. PA. L. REV. 1147 (1992).

11. Tort law has never settled upon a universal description of "negligence." *See, e.g.*, *Blyth v. Birmingham Water Works*, 156 Eng. Rep. 1047, 1049 (Ex. 1856) (Alderson, B.) ("[T]he defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances in ordinary years."); *Stone v. Bolton*, 1 K.B. 201, 211 (1950) (Jenkins, L.J.) ("[T]he hitting out of the ground of the ball which struck and injured the plaintiff was a realization of a reasonably foreseeable risk, which because it reasonably could be foreseen, the defendants were under a duty to prevent."); *Bolton v. Stone*, 1951 App. Cas. 850, 867 (Reid, L.J.) (appeal taken from C.A.) ("I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures."); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability be called *P*; the injury, *L*, and the burden [of adequate precautions], *B*; liability depends upon whether *B* is less than *L* multiplied by *P*. i.e., whether $B < PL$."); *see also* Schwartz, *Early Tort Law*, *supra* note 2, at 680-85 (describing different terms used for "negligence" in pre-1860 America). And juries, of course, are not confined even by the many legal definitions of negligence. More than one jury has been reputed to find a defendant at fault because that defendant was wealthy or well insured.

12. The rule regarding ground damage from aircraft has changed over time. Early in

phants.¹³ The historical and cultural relativity of torts seems manifest.

The problem with anti-conceptualism, however, is that torts does seem to work out its concerns within certain structures and with certain predictable patterns. For this reason, many scholars continue to engage in conceptualist thought despite past disappointments. The promise of conceptualism is deep understanding: understanding of tort law's recurring theories, themes, doctrines, and practices and of its limitations as a response to individual suffering or avarice. Anti-conceptualism cannot explain, much less satisfy, our intuition that torts somehow does "hang together" and is bounded in spite of its cultural and historical vagaries.¹⁴

The purpose of this Article is to push beyond this jurisprudential stalemate and to suggest an intellectual passage across the gulf separating the conceptualist from the anti-conceptualist, while also traversing the valleys that separate each of the conceptualist and anti-conceptualist camps

the history of aviation, the owner of the aircraft was strictly liable for the damage done to property or persons on the ground. See *Guille v Swan*, 19 Johns. 381 (N.Y. 1822) (damage from balloon); RESTATEMENT (FIRST) OF TORTS § 520, cmts. b, g (1938) [hereinafter FIRST RESTATEMENT]; RESTATEMENT (SECOND) OF TORTS § 520A (1977) [hereinafter RESTATEMENT]; Simeon E. Baldwin, *Liability for Accidents in Aerial Navigation*, 9 MICH. L. REV. 20 (1910). Today negligence is emerging as the basis of liability. See, e.g., *Boyd v White*, 276 P.2d 92 (Cal. Ct. App. 1954); see also 1 LEE S. KREINDLER, *AVIATION ACCIDENT LAW* § 6.01 (rev. ed. 1994) (discussing present split between strict liability and negligence jurisdictions).

13. The rule of liability for rampaging elephants differs among cultures. In colonial Burma, responsibility for damages caused by an elephant not known to be dangerous was adjudged under negligence principles. See *Maung Kyaw Dun v Ma Kyin*, 2 Upper Burma Rulings Civ. 570, 571 (1900) ("In view of the manner in, and extent to, which elephants are employed in this country [strict liability] would be manifestly unjust.") (copy on file with author). In contemporary Britain, however, courts followed strict liability principles to measure elephant damage. See generally *Filburn v. People's Palace & Aquarium Co.*, 25 Q.B.D. 258 (1890); *Current Topics*, 34 SOLIC. J. 596 (1890). The rule of strict liability for damage caused by elephants still pertains today in both Great Britain and the United States. See *Behrens v Bertram Mills Circus Ltd.*, 2 Q.B. 1 (1957); RESTATEMENT, *supra* note 12, §§ 506-507 (imposing strict liability for injuries caused by wild animal, which is defined to be "an animal which is not by custom devoted to the service of mankind at the time and in the place in which it is kept"); *id.* cmt. b ("[A]n elephant in England and America is a wild animal"); see also *H. E. Butt Grocery Co. v Perez*, 408 S.W.2d 576, 579 (Tex. Civ. App. 1966) (although declining to impose strict liability, finding that elephant is so dangerous by nature that "allegations of the animal's nature and of its escape are sufficient to establish a prima facie case of negligence").

14. Cf. JULES COLEMAN, *RISKS AND WRONGS* 428-29 (1992) (recognizing need to "argue for boundaries on tort law, confines within which it must remain if it is to have integrity and coherence"). It is that task which I attempt here.

from each other. My suggestion is that torts must be understood as a system in perpetual process—forever indefinite and infinitely malleable in its precise theoretical, doctrinal, and practical manifestations—yet ultimately bounded in its possibilities. An eternal, indefinite struggle occurs, but it occurs within defined limits. The limits are these: Torts responds only to certain types of claims (claims of loss), it responds to loss only in a certain fashion (an adjudicatory process to reallocate loss), and its adjudicatory response to loss allocation can be invoked successfully when a defendant's conduct has caused the loss (a "causal model" for loss allocation), has breached community norms (a "community model" for loss allocation), or has done both (a combined "causal-community model" for loss allocation).

This process approach views torts as an outer, empty shell within which an indeterminate struggle constantly regenerates the old face of tort theory, doctrine, and practice into the new. As a consequence, process theory separates itself from both the conceptualist and the anti-conceptualist traditions. Unlike conceptualism, the process view of torts denies that torts possesses any single conceptual form; unlike anti-conceptualism, the process view demonstrates that torts "hangs together" on a single thread—a thread woven from the friction generated by the intersection of overlapping, yet often opposing, causal and community forms. A process theory denies the existence of the static endstate so often implied in conceptualist thought. Yet the clash of the two models creates repetitive patterns to which all tort systems must respond, often in routine or predictable ways that belie the relativistic orthodoxy of anti-conceptualism.

The process view of torts flows naturally from the process metaphysics of Scottish realist Alfred North Whitehead.¹⁵ Whitehead's metaphysics suggests that every real object is in process—influenced in each moment of self-creation by the past, yet not determined by that past. Whitehead's

15. After having achieved fame as a mathematical logician at Oxford, Whitehead turned to his metaphysical enterprise rather late in his life, doing most of his work after he joined Harvard's faculty at the age of sixty-three. His major works on metaphysics are ALFRED N. WHITEHEAD, *ADVENTURES OF IDEAS* (1933) [hereinafter *ADVENTURES OF IDEAS*]; ALFRED N. WHITEHEAD, *PROCESS AND REALITY* (1929) [hereinafter *PROCESS AND REALITY*]; and ALFRED N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* (1926). An excellent short summary of his main themes, stripped of most of his technical vocabulary, can be found in ALFRED N. WHITEHEAD, *MODES OF THOUGHT* (1938) [hereinafter *MODES OF THOUGHT*]. For a short treatment of his life and work, see Dorothy M. Emmet, *Alfred North Whitehead*, in 8 *THE ENCYCLOPEDIA OF PHILOSOPHY* 290, 290-96 (Paul Edwards ed., 1967).

metaphysics have had an important effect in diverse fields such as theology,¹⁶ the natural sciences,¹⁷ and, more recently, political theory;¹⁸ but thus far, they have had little direct influence in law.¹⁹ Using torts as a testing ground, this Article demonstrates the ways in which a jurisprudential concept of law as process can overcome and justify many of the apparently irreconcilable tensions in the theories, doctrines, and practices of law.

The Article proceeds in three stages. Part I describes the problems of both conceptualism and anti-conceptualism, the need to get beyond the terms of this debate, and the failed efforts of Holmes, Posner, and Weinrib to do so. Part II develops in detail the understanding of torts as the confederation of the causal and community models. Although it is impossible to deduce precise doctrinal, theoretical, or procedural consequences from either model, Part II demonstrates that each model works best in conjunction with certain optimal conditions that adumbrate those consequences. Not surprisingly, the optimal conditions for the two models are distinct and sometimes conflicting. Because the two models are not mutually exclusive and thus can overlap as justifications for large portions

16. With such noted adherents as Charles Hartshorne, "process theology" became a significant theological movement during the middle of this century. For brief introductions to the theological dimensions of Whitehead's metaphysics and the subsequent developments in process theology, see generally JOHN B. COBB, JR. & DAVID R. GRIFFIN, *PROCESS THEOLOGY* (1976).

17. Whitehead's influence on physics and biochemistry—and in particular his influence on Albert Einstein, Nobel Prize winner Ilya Prigogine, and physicist David Bohm—is traced in GEORGE R. LUCAS, JR., *THE REHABILITATION OF WHITEHEAD 180-99* (1989).

18. See *PROCESS PHILOSOPHY AND SOCIAL THOUGHT* 1-112 (John B. Cobb, Jr. & W. Widick Schroeder eds., 1981). See generally RANDALL C. MORRIS, *PROCESS PHILOSOPHY AND POLITICAL IDEOLOGY* (1991); ROBERT C. NEVILLE, *THE COSMOLOGY OF FREEDOM* (1974); Douglas Sturm, *Process Thought and Political Theory: Implications of a Principle of Internal Relations*, 41 *REV. POL.* 375 (1979).

19. The legal scholar most associated with Whitehead was Yale's F.S.C. Northrop, who had been Whitehead's student. But Northrop's own work focused more on the merits of sociological jurisprudence rather than on the effort to translate Whitehead's metaphysics into a theory of jurisprudence. See F.S.C. NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* (1959). Richard Rorty, whose work has spearheaded the resurgent interest among legal scholars in pragmatism, also briefly embraced Whitehead's process philosophy, but ultimately rejected it as his own neopragmatism evolved. Even now, however, many of Rorty's positions are similar to those of Whitehead. See LUCAS, *supra* note 17, at 137-41.

of tort law and practice, a clash of optimal conditions arises. Out of the inevitable struggle for supremacy grow the specific manifestations of tort doctrine and practice in a particular place and time.

The final stage locates this specific understanding of torts within a broader jurisprudential concept of law as process. Part III justifies the descriptive theory of Part II by demonstrating its consistency with Whitehead's process metaphysics. It then subjects the process theory of torts to some of the major criticisms levelled against traditional conceptualist and anti-conceptualist positions and against process metaphysics. Predictably, the theory does not run the gauntlet of criticism entirely unscathed, but it does possess a satisfying normative vitality. Tort law is what tort law should be.

I. *The Methodology*

I begin with the assumption, which is noncontroversial to both the lay person and the scientist, that any theoretical discussion of torts must account for its "hard data"; in other words, any theory of torts that cannot explain its doctrine, its fact-finding and law-giving processes, and its rhetoric is irrelevant at best and dangerously misguided at worst. This inductive methodology²⁰ is, of course, controversial in law, and in tort law particularly, for two opposing reasons. The first is the normative, deductive quality that inhabits much of legal thought and analysis.²¹ The second is the profound, pragmatic skepticism toward any grand theoretical enterprise in law.²² Though they are locked in ideological conflict otherwise, both the theoretician and the skeptic unite in their disbelief that

20. On the methodology of inductive reasoning, see JAMES D. CARNEY & RICHARD K. SCHEER, *FUNDAMENTALS OF LOGIC* 330-34, 352-62 (2d ed. 1974); Karl Popper, *The Problem of Induction*, in *POPPER SELECTIONS* 101 (David Miller ed., 1985).

21. See generally Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991).

22. In talking about skepticism, I refer both to the intellectual critique of formal analysis, see Symposium, *Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) [hereinafter Symposium]; Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567-76 (1983), and to the anti-intellectual bias prevalent among some law students and members of the practicing bar, see Robert W. Gordon, *Bargaining with the Devil*, 105 HARV. L. REV. 2041, 2047-48 & n.16 (1992) (reviewing RICHARD D. KAHLBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992)); Project, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1469-72 (1992).

the jumble of clashing verdicts, doctrines, and justifications²³ can be reconciled in the world of actual legal fact.

Viewed from the perspective of result, this disbelief is justified. It is impossible to reconcile the *outcomes* of all tort cases—if we mean by "outcome" legal doctrine, the reasons used to justify that doctrine, and the reality that a second jury hearing similar or identical evidence might return a different verdict. Compounding the impossibility is the fact that any truly inductive theory about torts must accommodate seemingly irreconcilable perspectives on the role of theory and process. An inductive theory of torts must, therefore, find common ground and justificatory force in places other than the principles, the rules, and the specific results of tort law

The immediate response, of course, is, "But what else is there in tort law?" I come to that answer in Part II. Before I get there, however, I must explain the reasons that an inductive theory is both necessary and useful. The justification has two parts: first, a demonstration of the deficiencies of the present conceptualist/anti-conceptualist discourse; and second, a proof that an inductive theory can avoid those deficiencies in a useful way

A. *The Deficiencies of the Present Tort Discourse*

Discussion about the nature and the future of tort law has tended to divide into two camps: the "conceptualists" and the "anti-conceptualists." Although the labels suggest a clear dichotomy rather than the spectrum of views that actually exists, this division nicely captures the two general approaches of the judicial and academic commentary about torts.

The conceptual approach begins with a set of "first principles" and develops specific answers to doctrinal questions from those principles. Conclusions are as varied as the source and nature of the first principles themselves. For some, the source of first principles lies in notions of

23. It should be unnecessary to prove in any great detail my assertion that tort law is not entirely consistent in its doctrine, its theory, or its judgments. Casebooks are filled with examples of different approaches to doctrinal questions. See, e.g., EPSTEIN, *supra* note 2, at 97-101 (discussing reception of *Rylands v. Fletcher*); *id.* at 476-97 (discussing various approaches to duties owed by landowners); *id.* at 666-89 (discussing various interpretations given to term "design defect"); *id.* at 231-46 (discussing different possible roles for judge and jury). Inconsistency in theory is also evident. See *infra* part I.A.

autonomy,²⁴ community,²⁵ utility,²⁶ individual rights,²⁷ or corrective obligations²⁸ fashioned for different purposes by philosophers as diverse as Nozick, Rawls, Mill, Kant, and Aristotle. For others, the specifics of tort law derive from the efficiency or wealth-maximizing principles of economics.²⁹ For still others, the critical first principles are not grand jurisprudential notions external to torts; rather, they are either the more pedestrian goals of deterrence, compensation, convenience, and fairness

24. See David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 438-53 (1993). See generally Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

25. See Owen, *supra* note 24, at 453-59. See generally John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677 (1988).

26. See James B. Ames, *Law and Morals*, 22 HARV L. REV. 97, 110-13 (1908); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 280-87 (1980).

27. See, e.g., *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 441 (Mo. 1984) (en banc) (Welliver, J., dissenting) (adopting "Rawls' principle of fairness" to solve products liability issue); RONALD DWORKIN, *LAW'S EMPIRE* 276-312 (1986); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

28. See generally COLEMAN, *supra* note 14; George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV L. REV. 537 (1972).

29. There is a distinction in law and economics theory between normative and positive methodologies; normative analysis argues that policymakers should adopt an efficiency stance in resolving tort questions, whereas positive analysis merely uses economic methods to analyze, and in some cases explain, common-law rules. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 2.2 (4th ed. 1992); Mark Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799, 799-800 (1983). I include within the "conceptualist" category the normative branch, see, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); cf. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (attempting to hitch theory of efficiency to concept of autonomy articulated by Robert Nozick rather than to utilitarianism), as well as the rather large portion of the positive branch which uses economic methods to discover the set of tort rules that would be efficient, see, e.g., SHAVELL, *supra* note 2; John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973). Although the latter group does not necessarily contend that efficiency ought to be a relevant norm, that implied premise is the basis for their work. Thus, like normative law and economics scholars, many positive scholars use efficiency as the starting concept from which further analysis descends.

Some scholars in the law and economics movement, however, purport merely to use economic analysis to describe the actual state of tort doctrine. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 19-24 (1987); POSNER, *supra*, at 17. For a discussion of that positive effort, which begins with the data of actual cases rather than with a concept, see *infra* notes 71, 78-80 and accompanying text.

that tort law sets as its own internal purposes³⁰ or the related instrumental demands of public policy and expediency³¹ Whatever the first principles, however, the methodology is the same: identify the relevant principles and choose the doctrinal rule dictated by those principles.

This conceptualist approach has fatal defects. The most obvious deficiency results from the choice of relevant first principles. Even assuming that all could agree about the meaning and content of concepts like "autonomy," "individual rights," "efficiency," or "sound public policy" (and in reality we cannot), no one can resolve as a normative manner which principle(s) should be entitled to primacy Each of us may have a preference, and each may be able to support the chosen preference with reasons. However, equally rational counterarguments exist, so any preference that we espouse must ultimately rest upon belief.³² Someday, perhaps, we will come to universal knowledge and acceptance of the one true principle and its consequences. In the meantime, the claims of any first principle to primacy in torts has an ipse dixit quality that decimates the prescriptive force of conceptualism.³³

30. See, e.g., 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 23-33 (1991) [hereinafter ALI STUDY] (stating that goals of tort law are corrective justice, social grievance redress, compensation, risk distribution, and injury prevention); W PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 4 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 73 (1975) (identifying goals of loss spreading, wealth distribution, collective deterrence, and market deterrence). For critiques of the coherence of tort law's purported goals and of tort law's ability to achieve them, see STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 3-72 (1989) (describing failings of safety, compensation, and justice rationales); Stephen F Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV L. REV. 932 (1993) (critiquing deterrence rationale).

31. See, e.g., HOLMES, *supra* note 2, at 95-96; CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 7-9 (2d ed. 1980); PROSSER & KEETON, *supra* note 30, § 53, at 358 (noting that "duty" is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection"). Holmes did not rely entirely on public policy for his conclusions about tort doctrine; he also adopted a more inductive approach considered *infra* notes 70, 74-77 and accompanying text.

32. See F.S.C. NORTHPROP, *supra* note 19, at 52, 62, 68-70, 165-72; Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptation of the New Legal Formalism*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 186 (Drucilla Cornell et al. eds., 1992); HENRY J. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS 34-35, 90-91, 138 (1987); Unger, *supra* note 22, at 578, 618-33; Wells, *supra* note 8, at 2373.

33. Some conceptualists have sought to avoid the problem by demonstrating that multiple

Furthermore, the problem of indeterminacy lies in wait behind the apparently unresolvable problems of content and primacy. As Roberto Unger has cogently argued, no general principle can determine all doctrinal consequences.³⁴ Some of the problems may be informational; for instance, many people now recognize that an economic approach to tort doctrine (if efficiency is our first principle) cannot choose among tort liability rules without considerable information about transaction costs, relative value of competing activities, risk aversion, moral hazard, and strategic behavior.³⁵ More typically, however, the first principle will operate at such a level of generality that at a certain point in the derivation of specific doctrinal consequences, any of two or more doctrinal choices would be equally consistent with the principle.³⁶ Although the choice may be made by

principles support a particular doctrine or approach, thus obviating the need to denominate one principle as "primary." See, e.g., *Halphen v Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986) (using efficiency and fairness arguments to justify products liability standard); CALABRESI, *supra* note 29, at 24-26, 291-308 (recognizing possible justice constraints on maximization principle); Attanasio, *supra* note 25 (developing philosophical notion of "aggregate autonomy" to buttress Calabresi's economic argument for strict products liability); Robert Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 CHI.-KENT L. REV. 523 (1987) (creating theory of liberty that supports economic efficiency); Owen, *supra* note 24 (contending that negligence is required by blend of freedom and community considerations); Weinrib, *supra* note 26 (arguing for easy duty to rescue on both Kantian and utilitarian grounds); cf. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991) (describing inevitable distributional concerns that underlie economic analysis). As the disagreement between Attanasio and Owen demonstrates, however, a blend of approaches does not guarantee agreement about rules or results. Cf. Unger, *supra* note 22, at 569 (denying existence of "meta-principles that would settle, once and for all" conflict between principles and counterprinciples that inhabit all bodies of law). In any event, the problem of selecting a single primary principle is merely replaced by the equally difficult task of selecting the (two or three or four) primary principles.

34. Unger, *supra* note 22, at 570-73; see also Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 664 (1987); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 514 (1988); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 874 (1991); Wells, *supra* note 8, at 2375-76. For an effort to reconcile formalism with indeterminate outcomes, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1008-12 (1988).

35. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11-25, 46-52, 72-74 (2d ed. 1989); SHAVELL, *supra* note 2, at 21-32, 73-85, 206-15, 262-70.

36. The obvious example is the economic approach, which holds that in the absence of transaction costs and other variables discussed *supra* text accompanying note 35, any liability rule is efficient. See, e.g., LANDES & POSNER, *supra* note 29, at 31-38; POLINSKY, *supra* note 35, at 11-12. But a similar problem infects those who profess allegiance to the Kantian categorical imperative or the Rawlsian "original position." How those principles would make

resorting to a set of "second-tier" tie-breaking principles,³⁷ those principles are also likely to have the problems of content, primacy, and indeterminacy that plague the first principle. Resort to second-tier principles also highlights the inability of the first principle to capture adequately the true nature and operation of the tort system. Assimilating the second-tier principles into the first tier avoids this difficulty, but a third type of indeterminacy haunts such "multi-principled" conceptualist thinking.³⁸ Sooner or later, one or more of the principles will pull in one doctrinal direction, and other principles will pull in another. Whether the resolution

the choice among pure comparative fault, "not as great as" comparative fault, or pure contributory negligence is not at all clear. Compare Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV 1141, 1179-93 (1988) (using one version of corrective justice to derive proper form of joint and several liability) with Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV 1125 (1989) (arguing that joint and several liability is unfair).

37 See JOHN RAWLS, *A THEORY OF JUSTICE* 42-44 (1971) (discussing use of "lexical" ordering of principles); George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV L. REV 1658, 1667 (1993) (reviewing COLEMAN, *supra* note 14) (noting that "theorist of a mixed system of justice and utility needs a meta-theory to determine the optimal combination").

38. "Multi-principled" analysis, which attempts to determine consequences by examining the extent to which a particular rule or outcome advances each of a series of relevant principles and then deciding whether on balance the weight of those principles favors the rule or outcome, see Ernest J. Weimrib, *Understanding Tort Law*, 23 VAL. U. L. REV 485, 487-88 (1989), is perhaps the most common analytical approach in modern tort law. See ALI STUDY, *supra* note 30, at 34 (suggesting that torts must seek to accomplish broad variety of goals attributed to torts); WHITE, *supra* note 1, at 139-79 (discussing methodology of William Prosser); cf. Schlag, *supra* note 34, at 819-28 (discussing methodology of "technical doctrinalists"). Much of multi-principled analysis takes the form of asking whether a particular doctrine fulfills the perceived multiple purposes of tort law, discussed *supra* note 30 and accompanying text, or the multiple purposes of a particular subset of tort doctrine. See, e.g., *Beshada v Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982). But even adherents of a particular conceptual approach sometimes check their results against other, competing approaches to demonstrate the appeal of their position. See *supra* note 33.

Multi-principled analysis, which often travels under the rubric of public policy, is difficult to distinguish from the pragmatic approach to law. The one difference is that a conceptual approach treats principles such as risk spreading, deterrence, and compensation as exogenously given and unchangeable and then tries to develop rules from those factors; a pragmatist sees these factors merely as expressions of the good that the law can achieve and constantly adds to or subtracts from those expressions in light of experience and context. See generally Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990) (discussing pragmatic method); Symposium, *supra* note 22 (same). In any event, little in this Article turns on this admittedly fine distinction.

of the conflict relegates some of the principles to a second tier or simply enforces a compromise faithful to none, the specific result cannot be logically determined from the first principles themselves.³⁹

Another deficiency of conceptual analysis is its neglect of process and people. Having devoted itself to the revelation of the correct doctrinal solution, conceptualism pays scant attention to the effects of procedure and adversarial ability on the outcomes of actual tort cases. For instance, conceptualists rarely acknowledge the possibility that a jury might disagree with or be unable to apply a particular standard; the rogue jury is dismissed as a deviation from perfection⁴⁰ or analyzed as a "transaction" or "error" cost.⁴¹ Furthermore, the effects of "objectively correct" legal rules on the lives of those for whom the rules work an injustice are sometimes acknowledged, but are ultimately ignored;⁴² individual injustice must be sacrificed to intellectual purity.⁴³ Aside from the obvious ethical issues that surround a normativity blinded to people and process, any theory (however intellectually satisfying) that rejects the reality of a process that causes (and perhaps assures) some slippage between rule and result can possess only partial relevance to the subject that we call torts.⁴⁴

More broadly, present normative theories of torts have difficulty accounting for the wide and unruly smorgasbord of rules and processes

39. See ALI STUDY, *supra* note 30, at 34; Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 29-30 (1980); Weinrib, *supra* note 38, at 495-503.

40. For a description of the normative adjudicatory model and the ways in which it deviates from the contextual, pragmatic model that often informs actual decision-making, see Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1731-36 (1990).

41. POSNER, *supra* note 29, § 21.1, SHAVELL, *supra* note 2, at 79-85.

42. See HOLMES, *supra* note 2, at 79 ("If, therefore, there is any common ground for all liability in tort, we shall best find it by eliminating the event as it actually turns out"); Wells, *supra* note 8, at 2372-73.

43. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 954-58 (1991). Although a common-law process of adjudication can mitigate the problem, no one can pretend that it eliminates all individual instances of injustice. See, e.g., *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198 (N.Y.), *cert. denied*, 112 S. Ct. 197 (1991).

44. This was the fundamental and enduring insight of Leon Green. See, e.g., GREEN, *supra* note 4, at 185; WHITE, *supra* note 1, at 77; Leon Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357 (1957); see also MORRIS & MORRIS, *supra* note 31, at 1-9; Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579 (1987); Schlag, *supra* note 34, at 834, 858-62.

offered around the world and within our own country⁴⁵ Any "true" solution derived from "correct" first principles must necessarily posit as "false" (in methodology, conclusion, or both) all those solutions that descend from "incorrect" first principles. Moreover, unless those first principles can change,⁴⁶ conceptualism will inevitably create a single, static, "true" state of affairs. Of course, the inconvenient fact that torts is not, and has never been, a consistent, frozen body of law does not bother the conceptualist, who thinks in terms of "ought" rather than "is." I suspect, however, that few conceptualists would wager that tort law will ever reach an Elysian state in which all rules are universally accepted and forever immutable. If universal and eternal uniformity is impossible, and (many of us would say) even undesirable, what then is the point of the conceptualist enterprise?

None of my critiques of conceptualism is unique; realists, pragmatists, empiricists, and critical scholars have been making similar points for seventy years. As different as their starting and ending points may be, all of these scholars share the belief that torts cannot be "done" from the top down; it must be done from within. Grand theory⁴⁷ fails to capture the

45. Think, for example, of our country's numerous permutations on the meaning of terms such as (1) "defect," *see* SCOTT BALDWIN ET AL., THE PREPARATION OF A PRODUCT LIABILITY CASE §§ 2.2- 4 (2d ed. 1993); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV 1512, 1532-34 (1992), (2) "negligence," *see supra* note 11, and (3) "duty," *compare, e.g.,* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (using foreseeability approach) *with* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (using seven-factor duty test) *and* Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326 (Or. 1987) (rejecting duty analysis in many cases).

46. For the most part, conceptualists do not acknowledge the impermanence of their principles. The one possible exception would be those who contend that tort rules derive from "public policy" factors. *See supra* note 31 and accompanying text. But even here "public policy" conceptualists only contend that as the content of public policy changes, the rules should also change. *See, e.g.,* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting). They do not suggest that the first principle (public policy) from which the rules are derived should change. Nor do they always make the changes that public policy deems desirable. *See, e.g.,* Fuller v. Buhrow, 292 N.W.2d 672, 673-74 (Iowa 1980) (declining to adopt comparative fault principles judicially even though "the desirability for change" was manifest).

47. On the meaning of "grand theory" and its conflation with formalism and foundationalism, *see* Smith, *supra* note 38, at 424 n.73. *See also* Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV 1019, 1022-24 (1991) (discussing grand theory as paradigm of legal normativity).

political and practical dimensions of torts. Torts is more than rules divinely received; its rules and outcomes are also sensitive to, if not driven by, the rhetoric of the lawyers, the social biases of the jury, and the political predispositions of the judge. A need to recouple theory with experience, a rejection of prescriptive conventions that operate without concern for contexts, and an instrumental, forward-looking nature are the common points of "anti-conceptualism."

In a certain sense, even a conceptualist (at least one who has been around to see a few tort cases pushed through the system) knows that the anti-conceptualist speaks the truth.⁴⁸ Nonetheless, in tort law, conceptualism has remained a living approach in tort scholarship and judicial opinions⁴⁹—so much so that it is difficult to find good anti-conceptualist discussions in torts today.⁵⁰ For all its defects, conceptualism must fill some void that anti-conceptualism cannot.

It is not difficult to see what that void is. Although the variance among anti-conceptualists is at least as great as it is among conceptualists,⁵¹ all are ultimately better on the attack than on the defense. The realist, the

48. Cf. LANDES & POSNER, *supra* note 29, at 312 ("There is a gap between the law in the books and in action"). Indeed, even Judge Posner, who might well be the "frontrunner" for the office of leading legal formalist of our era, see Smith, *supra* note 38, at 426, considers himself a pragmatist. See Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1660 (1990).

49. See *infra* notes 161-63, 217-22 and accompanying text. If anything, the past 30 years has seen a renaissance of conceptualism in tort theory at the same time that pragmatism has become a dominant theory elsewhere in law. Compare WHITE, *supra* note 1, at 211-30 (discussing use of "neo-conceptualism" in torts after 1960) with Symposium, *supra* note 22 (discussing rise of pragmatism) and Smith, *supra* note 38 (discussing pragmatic methodology). Conceptualism is considerably less relevant in tort practice than in scholarship and opinions.

50. This may seem to be a surprising statement until we reflect on the number of academic articles and judicial opinions that (1) do not attempt to propose some grand meta-theory, (2) do not merely follow in a formal way the established doctrines and policies of prior authorities, and (3) consciously admit that they are adopting a particular outcome only because it is the best available approach considering all the circumstances (a pragmatic effort) or because it empowers certain social interests (a realist or critical approach). In my view, such articles and opinions are few and far between. Cf. Delgado, *supra* note 43, at 933 ("Today, the normative orientation remains the unspoken dominant mode of legal analysis and scholarship."). Regardless of their exact number, however, the fact is that a core of conceptual thought remains in torts.

51. Remember that anti-conceptualists include realists, pragmatists, critical and feminist scholars, and empiricists, whose common feature is a skepticism toward, or rejection of, grand theory. Otherwise, the various anti-conceptualists themselves can disagree markedly about methodologies and conclusions.

pragmatist, the feminist, and the critical scholar can attack the surface neutrality of tort doctrine and grand theory by showing us that everything in torts is power⁵² or practical judgment.⁵³ Staking out and defending a coherent, rational alternative to conceptualism, however, is another matter. The anti-conceptualist can stand against universal, neutral principles, but she cannot stand for them.⁵⁴ She is forced to concede that tort law is whatever the political and social trends of the moment let it get away with.⁵⁵

Such an irreverent attitude about a subject that "matters"⁵⁶ is neither morally appealing nor rationally satisfying. The anti-conceptualist response is to deny the validity of morality or logic as a primary way of thinking about torts, but that response inevitably has a normative component. The observation that torts is not moral, efficient, or logical is an interesting fact, but no more interesting than the fact that the word "torts" starts with a "t"—unless it is hitched to the premise that we should not (the proper normative tense) heed theories that inaccurately describe their subject matter.⁵⁷

52. See, e.g., *supra* note 9; cf. IZHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* 60-69 (1993) (critiquing Abel and Balkin).

53. See Smith, *supra* note 38, at 434-37; Wells, *supra* note 8.

54. See Smith, *supra* note 38, at 444; Weinrib, *supra* note 34, at 951-52; Cornel West, *The Limits of Neopragmatism*, 63 S. CAL. L. REV. 1747 (1990).

55. I intend this statement to be as stark as it sounds. Anti-conceptualists may differ about what tort law is, or should be, getting away with. For instance, the critical scholar might claim that torts is getting away with a subsidy of industry, see HORWITZ, *supra* note 2, at 63-108; on the other hand, the pragmatist might claim that torts should be getting away with advancement of the public good or the community's interests, see Smith, *supra* note 38, at 420-22. Whatever the result of that debate, tort law's instrumental nature means that the only constraints on its reach are the political and social limitations which prevent those who control tort outcomes from fully achieving their personal objectives through tort law.

56. Why it matters is not at this point important. It is enough that, for some reason, legal curricula and judges find "torts" a useful category.

57. A great deal of anti-conceptualist thought rests on other implicit normative premises as well. Realism, for instance, debunked formalism by demonstrating the political, social, and economic milieu of legal rules. That point gained relevance, however, only in conjunction with the normative claim that rules and processes should be based explicitly on such political, social, and economic considerations. See GREEN, *supra* note 4, at 76-77. Likewise, the feminist observation that tort law's "reasonable man" focus excludes women's insights, see, e.g., Bender, *Primer*, *supra* note 9, at 20-25, gains its power from the normative premise that women's voices are entitled to an equal hearing in tort law. On the inherent normativity of anti-normative thought, see Radin & Michelman, *supra* note 47.

Of course, catching anti-conceptualism in the act of trading with the enemy is hardly strong proof of conceptualism's correctness,⁵⁸ but, in a sense, correctness is unimportant. Nearly all tort scholarship and reported tort decisions invoke conceptualist methodologies at least to some extent. Conceptualism is a part of torts, every bit as much as the political or process-oriented perspectives of the anti-conceptualists.⁵⁹ To reject conceptualism is also to reject a part of what tort law is. That the rejection can be accomplished only by normative claims about the way torts "should be" understood is a sweet irony, but the more important point is that the appeal to an overreaching sense of morality or logic is an inveterate aspect of the practice of torts. The gnawing sense of incompleteness and irrelevance with which conceptualism left us⁶⁰ has not been removed; in fact, anti-conceptualism's implicit premise that theories which inaccurately describe reality are invalid makes its incompleteness a greater and less forgivable sin.⁶¹

Additional critiques of various branches of anti-conceptualism (such as amorality, intellectual bankruptcy, relativism, and nihilism) have been widely rehearsed in the literature⁶² and will become important later.⁶³ For now, it is enough to note that anti-conceptualism has been unable to eradicate our desire to think about torts conceptually. But the same is true

The normative statement in the text, however, is slightly different. It asserts only that theory not reflective of reality is invalid. It does not ask what that reality is or how tort law should respond to it. Nonetheless, even this more minimalist assumption creates difficulty for anti-conceptualism. See *infra* notes 60-61 and accompanying text.

58. Pierre Schlag calls the inevitable normative dimension of anti-normative thought "performative contradiction," but refuses to bend the anti-normative critique in the face of the contradiction. See Schlag, *supra* note 34, at 805-07, 925. For a pragmatically oriented attempt to help him out of the dilemma, see Radin & Michelman, *supra* note 47.

59. Cf. NORTHROP, *supra* note 19, at 171 (noting that existence of natural law jurisprudence in major world cultures "shows that the burden of proof rests upon anyone who would affirm that [natural law] has no significance").

60. See *supra* notes 32-48 and accompanying text.

61. See WHITE, *supra* note 1, at 212 ("The significance of neoconceptualism in Torts literature thus far lies in its reaffirmation of the value of abstract theorizing itself, not in the seminality of any of the theories its proponents have advanced.").

62. See, e.g., Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071 (1991); Walter B. Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 FORDHAM L. REV. 272 (1936); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1625 (1990); Schlag, *supra* note 34, at 828-52.

63. See *infra* notes 371-84 and accompanying text.

of conceptualism: It has not yet offered a system of principles that confirms our experience of the subject.

At this point, I doubt that this two-sided dialogue about torts can find much more of interest to say. Undoubtedly, a new first principle could be found to replace "corrective justice" or "wealth maximization," and conceptualists and anti-conceptualists alike could debate its intrinsic merits and its fidelity to our experiences. New anti-conceptual movements will become fashionable, as have realism, pragmatism, and critical legal studies in their time; new discoveries and experiences in the physical and social sciences will bring to light now-neglected experiential dimensions of tort law; greater insight into process and more contexts for judgments will accumulate as humanity proceeds through history. Undoubtedly the next 200 years of tort law will see changes (some marginal, some radical) in doctrines, processes, attitudes, and theories. However, the structure of the debate will not change, and, barring a dramatic, universal revelation that proves one side's validity, the outcome of the debate will be equally indeterminate. Faulkner's words about Dilsey well describe the fate of the opposing positions: "They endured."⁶⁴

B. *Toward a Different Understanding of Torts*

If torts cannot shed its aspiration to normativity or its grounding in reality, then it is time, perhaps, to move beyond that debate and to recognize that the tension between the conceptual and the anti-conceptual is constitutive of torts.⁶⁵ In spite of our efforts to force a choice of sides upon it, torts has chosen both: It exists in a "no-persons' land" claimed by both sides, but actually belonging to and understood by neither.

I can appreciate the immediate reaction to my claim of torts as a "*tertium quid*." How can something be both conceptual and pragmatic? How can something profess allegiance both to the neutral rule of law and to the political, contextual nature of outcomes? How can it ignore process

64. WILLIAM FAULKNER, *THE SOUND AND THE FURY* 22 (Modern Library 1946).

65. See Fletcher, *supra* note 37, at 1678 ("The life of the law is not simple logic, for all too often there are multiple logics, multiple paradigms, at work in legal disputes."); George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 *LAW & PHIL.* 63, 63 (1983) ("A pure commitment to either positive or normative theory might be ideal, but the tension between the two, particularly in legal theory, seems inescapable."); cf. ROGER A. SHINER, *NORM AND NATURE* 323 (1992) (concluding that legal theory is "condemned eternally to the rivalry between positivist and anti-positivist theories of law").

and embrace process? How can it be just and efficient, yet neither?

The short, and perhaps sufficient, answer is: "Because it is."⁶⁶ As Holmes said, torts "did not begin with a theory," and it "has never worked one out."⁶⁷ Ultimately torts must be understood as being in perpetual process, a timeless battlefield scarred by previous skirmishes among theories, doctrines, and practices, which fluidly adjusts to absorb new assaults that redirect the struggle. The conceptual and the pragmatic, the neutral and the political, the efficient and the just are all locked in a tense battle in which it is, quite simply, impossible to reject any dimension because doing so denies an aspect of tort law's nature—denies, in other words, a part of the heritage that has made torts what it is and that therefore constitutes a formative element of what torts will be.⁶⁸ Aspects of the balance may fall from favor, and others may become dominant for a time. But all influences unite in the present—i.e., the precise manifestation of tort law in California on June 1, 1994—and all remain subject to recall as the interaction of ideas, experiences, and prior options pushes torts, day-by-day and case-by-case, at glacial speed to the very different pattern of rules and practices in California on June 1, 2094. As much as we might wish to obliterate formalism or pragmatism or efficiency, as much as we might wish to make torts prisoner to our pet conceptualist or anti-conceptualist theories, we cannot; whatever piece of torts that we cage is less than its total and will invariably die in captivity.

What remains is to demonstrate that the description of torts as perpetual struggle has both validity *and* value as a way of understanding tort law. Validity, of course, is the bedrock requirement: Unless this description is an accurate one, the first justification for this view of torts ("Because that's what it is") necessarily collapses, and the "description" becomes the type of normative claim that the descriptive method rejects. In order to be relevant, a valid description must also have value. For example, a valid description of tort law would describe (or merely

66. The longer answer—"Because that's what it should be"—is reserved for Part III.

67. HOLMES, *supra* note 2, at 77.

68. Those already familiar with the philosophy of Alfred North Whitehead may particularly recognize his influence in this statement. But the statement also draws on the more recent insights of chaos theory, which, at least as I understand it, largely validates Whitehead's metaphysics. For short treatments of chaos theory, see generally Andrew W. Hayes, *An Introduction to Chaos and Law*, 60 UMKC L. REV. 751 (1992); Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991); Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329 (1993).

reproduce) the complete record of every case, book, and article that has ever sounded in tort. But that description would have no utility; a useful description must help us understand the history of torts, its future, and its potential boundaries.⁶⁹

In attempting a valid yet valuable description of torts, I follow in large footsteps. Holmes, Posner, and Weinrib have each attempted a similar enterprise: to search for the least common denominator in torts and then to build from that essence the appropriate shape of the tort system. For Holmes, the essence of tort was voluntary action; from that central feature, Holmes argued that torts should be based on negligence.⁷⁰ Posner's central feature is efficiency, which, depending on the circumstances, can favor either a negligence or a strict liability system of rules.⁷¹ Weinrib's approach is less monolithic. He finds that tort law arises from the tension between a pair of central, yet opposing, features: a defendant who has acted and a plaintiff who has suffered loss.⁷² According to Weinrib, accommodation of the tension between "doing and suffering" requires a negligence system with the central doctrinal features that the system now possesses.⁷³

By asking first what torts is (i.e., attempting a valid description) and then developing that description into a theory that assists our understanding of torts (i.e., creating something of value), Holmes, Posner, and Weinrib

69. My claim that a description must have both validity and value is another way of saying that any argument about torts must be both descriptively and prescriptively satisfying. See DWORKIN, *supra* note 27, at 285 ("A successful interpretation must not only fit but also justify the practice it interprets."); POSNER, *supra* note 29, § 1.3. The failure of the existing conceptual and anti-conceptual discourse to satisfy both (and in some cases, either) of these prongs (allowing market share and imposing liability on the basis of national rather than local market shares) formed the core of my prior critique of that discourse. See *supra* part I.A.

70. See HOLMES, *supra* note 2, at 90-95. Holmes was not content to rest on such an inductive claim; he also supported a negligence system with instrumental, policy-oriented arguments. *Id.* at 78, 95-96.

71. See LANDES & POSNER, *supra* note 29, at 54-122; POSNER, *supra* note 29, §§ 6.1, 6.5. For some of the economic factors that can determine the use of negligence or strict liability in particular cases, see *supra* text accompanying note 35.

72. Weinrib, *supra* note 38, at 493-95. Weinrib, whose work has influenced me greatly, has elaborated on other aspects of this theme in a wealth of recent articles. See, e.g., Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV 407 (1987) [hereinafter Weinrib, *Causation*]; Weinrib, *supra* note 27; Weinrib, *supra* note 34, at 969-71, Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

73. Weinrib, *supra* note 38, at 514-23.

all engage in the only method that in my judgment can lead to a true understanding of torts. But each of them ultimately fails, largely on the issue of validity. For Weinrib and Holmes, it is enough to note that at least in limited circumstances, tort law imposes liability even when the defendant fails to act,⁷⁴ which thereby undermines their claim of the essential nature of an act.⁷⁵ Moreover, neither Holmes nor Weinrib can explain the areas of strict liability that torts has long tolerated⁷⁶ or the more than occasional behind-closed-doors rejection of negligence liability by juries.⁷⁷ Posner too has problems with validity. Although many scholars have criticized his theory and methods,⁷⁸ Posner's own admissions that tort

74. For instance, torts imposes liability for a failure to rescue when a special relationship exists between the victim and the would-be rescuer. See PROSSER & KEETON, *supra* note 30, § 56. Similarly, landowners can sometimes be held liable for failing to correct natural conditions on their property, *id.* § 57, at 391, or can be liable for failure to remove defamatory material placed on their property by others, *id.* § 113, at 801.

75. Having written an important article arguing for a limited duty to rescue, see Weinrib, *supra* note 26, Weinrib could hardly have been unaware of tort law's occasional proclivity to impose liability even in the absence of a defendant's "doing." His later work, in which he develops his argument for the essentiality of doing, contains virtually no reference to his earlier argument for a duty to rescue even in the absence of action. *But see* Weinrib, *supra* note 34, at 967 (making ambiguous reference to essentiality of distinction between misfeasance and nonfeasance in tort). His apparent willingness to accept some deviations in doctrine as long as there is no "systematic absence" of the essential features of doing and suffering, see Weinrib, *supra* note 38, at 493, and his recent effort to link his corrective justice principle to the same Kantian natural rights tradition in which he also located a duty to rescue, compare Weinrib, *supra* note 27, at 421-24 (linking corrective justice to Kant) with Weinrib, *supra* note 26, at 287-92 (linking Kant to duty of easy rescue), suggest that Weinrib can tolerate the tort duty to rescue. See also Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 406-07 (1989) (demonstrating tolerance for cases in which element of causation was not present, as long as pattern was not systematic). The duty to rescue, however, clearly stands outside his doing/suffering framework.

76. Holmes, for instance, shrugs off the strict liability results achieved in *Rylands v. Fletcher*, 1 L.R.-Ex. 265 (1866), *aff'd*, 3 L.R.-E. & I. App. 330 (1868), and elsewhere at common law as simply being negligence cases in disguise or else wrong-headed. HOLMES, *supra* note 2, at 89, 116-19.

77. Holmes was well aware of these process and practice concerns, but seemed to view them as impurities in a properly functioning tort system. See HOLMES, *supra* note 2, at 122-29; WHITE, *supra* note 1, at 58. Weinrib has not discussed at length the difficulties that discordant process and practice pose, but it is likely that he would hold the similar view that they should not interfere with the understanding or implementation of his theory.

78. For several, albeit nonexhaustive, critiques, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114-85, 242-95 (1987); Unger, *supra* note 22, at 574-75; Weinrib, *supra* note 38, at 503-10. Posner himself addresses some of the criticisms in POSNER, *supra*

doctrine is not always efficient⁷⁹ and that an efficiency analysis may be difficult to implement in practice⁸⁰ drain the efficiency hypothesis of its descriptive power.

Indeed, Holmes, Posner, and Weinrib all become too normative too soon. Upon finding a fact with explanatory force over large areas of tort law, they ignore the failure of that fact to explain all of tort doctrine through the typical normative argument that the nonconforming aspects of tort law can (or should) be rejected.⁸¹ Moreover, none pays adequate attention to the realities of procedure and practice, which can lead to results at odds with the supposedly essential nature of tort law⁸² And each is guilty of attempting to find a single solution to irreconcilable tensions for which a permanent solution is quite impossible.

In science, a theory of gravity that predicted the outcome of only seventy-five percent of a series of gravity experiments would be rejected even though the theory's ability to predict most of the actual results suggests that a kernel of truth lies at its heart.⁸³ I have the same attitude about Holmes, Posner, and Weinrib. Their methodology of developing theory from existing data is unassailable, and their ability to predict important aspects of tort law suggests that kernels of truth inhabit each of their views. Unfortunately, each of their theories ultimately fails to justify

note 29, §§ 1.3, 2.3, and LANDES & POSNER, *supra* note 29, at 9-24.

79. LANDES & POSNER, *supra* note 29, at 27, 312-14.

80. See *United States Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982) (Posner, J.) ("Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that B, P, and L all be quantified, which so far as we know has never been done.").

81. See HOLMES, *supra* note 2, at 77-78; LANDES & POSNER, *supra* note 29, at 95 (giving efficiency reading to doctrine of last clear chance even though it admittedly leads to some inefficient results); Weinrib, *supra* note 38, at 514-15.

82. Although all three pay some attention to procedural concerns, only Posner attempts to account for them in a systematic way. See POSNER, *supra* note 29, §§ 21.1, 21.3, 21.6, 21.8, 21.12. But even his treatment is abbreviated and is more concerned with the effect of process on rules than the integral nature of process itself.

83. Indeed, Niels Bohr constructed the notion of "complimentarity" precisely to deal with this problem. Bohr, who was attempting to determine whether light is a wave or a particle (it has empirical characteristics of both), hypothesized that the totality of physical reality is explicable only through the use of contrasting, mutually exclusive models. Thus, Bohr suggested that light was both a wave and a particle, which is a logical *nonsequitor*. For a short treatment of complimentarity, see ENGLARD, *supra* note 52, at 85-90. I discuss and critique Englard's use of complimentarity to understand tort law *infra* note 104.

torts on its present terms. Holmes, Posner, and Weinrib have blazed trails toward true understanding that we can follow but from which we must ultimately depart.

The remaining issue is whether my hypothesis of torts as perpetual process helps us understand torts—from the dual viewpoints of validity and value—better than their theories did. Before I turn to the issues of validity in Part II and value in Part III, however, I should caution against two inaccurate conclusions that might be drawn from my hypothesis. The first is to assume that because torts is engaged in irresolvable conflict, we can understand torts without reference to that conflict. Like the biologist who, unable to decide whether humanity is good, evil, or neither, chooses to describe humanity in clinical terms that omit reference to our opposing proclivities, we could simply say that tort law is the body of legal rules and policy arguments that we find in a *Restatement*, a hornbook, or a digest for a particular jurisdiction. Avoidance of the underlying tensions, however, does not make them disappear; it merely makes the inexorable flow of torts incomprehensible. Put in the terms I have chosen here, avoidance lacks validity and value: validity because avoidance neglects a critical dimension of torts and value because avoidance is reactive and docilely descriptive rather than predictive and justificatory

Equally inappropriate is an assumption that perpetual struggle makes torts a formless system capable of spreading like cancer to choke off criminal responsibility, environmental regulation, tax legislation, and the like. If a system of perpetual process is to survive, it must possess some measure of order; it must aim at certain ideals or forms and not at others.⁸⁴ In the system we call "torts," therefore, the struggle at any given moment must be over something—some irreducible, immutable "form" or group of "forms" around which the battle swirls. Necessarily, the form or forms must be minimalistic; if they become too specific, they run into the problems of validity experienced by Holmes, Posner, and Weinrib. Nonetheless, as a system that has survived for centuries, torts must contain some form.⁸⁵

84. COBB & GRIFFIN, *supra* note 16, at 14; MODES OF THOUGHT, *supra* note 15, at 73-76, 118-23; PROCESS AND REALITY, *supra* note 15, at 311, 515. The relationship between form and process is considered at greater length *infra* part III and in Jay Tidmarsh, "Perpetually Perishing': The Relevance of Whitehead's Metaphysics to Law" (unpublished manuscript on file with author).

85. My claim that torts must have a "form," but that the form is largely unable to determine specific consequences, is another example, at a heightened level of generality, of

"Form," of course, is a loaded word, and I use it advisedly. I do not mean to suggest that torts has a "form" in the way that those engaged in the formalist/realist debate understand the term. That type of "form"—a set of a priori or imminent principles from which all issues of doctrine and practice are deduced logically and definitively⁸⁶—is clearly antithetical to the hypothesis of torts in perpetual and indeterminate conflict. The essence of torts must be understood in terms of structure—what problems does torts concern and how does it go about addressing those concerns—rather than in terms of immutable substantive principles. In other words, the "form" of torts is its boundaries: the outer limits within which the perpetual struggle occurs.

To use a spatial analogy, the traditional notion of a "form" is a dense and rigid nucleus from which the orthodoxy of tort rules is inexorably extracted. My view of a "form" is an empty and flexible shell within which an indeterminate struggle takes place. When the struggle punctures the shell, we are no longer "doing torts"; as long as the conflict remains within that shell, however, the shell can take an infinite variety of equally acceptable shapes. Like a balloon continually expanded and contracted, any particular shape of tort law is evanescent, but all shapes are given form by the shell—the structure—and thus are recognizable as torts.

The ultimate mistake of Holmes, Posner, and Weinrib was to attempt to divine the nucleus of tort law and build outward from that discovery. I propose instead to describe the outer shell of tort law and to see whether that structure accurately predicts the nature and the breadth of actual tort theory, rules, and practices occurring within its boundaries. If this methodology is accurate, we have at last a valid description of torts, and we are closer to understanding the value of torts as well.

II. Validating the Hypothesis

In the last Part, I demonstrated that in the effort to understand tort law, we should not fall prey to either the Scylla of conceptualism or the Charybdis of anti-conceptualism; rather, sailing a third course is necessary

the inherent tension between a conceptualist thought, which builds forms, and an anti-conceptualist thought, which destroys them. It is obvious that some form must exist (else the anti-conceptualists will have triumphed), but that the form cannot hold to immutable, unchallengeable propositions of substantive law (else the conceptualists will have triumphed).

86. For a modern example of the debate over formalism in this sense, compare Unger, *supra* note 22, at 570-73 (rejecting formalism) with Weinrib, *supra* note 34 (advocating formalism) and Schauer, *supra* note 34, at 546-47 (advocating "presumptive formalism"). See also Smith, *supra* note 38, at 428-29 (discussing various understandings of "formalism").

and, at least in theory, possible as well. In this Part, I bear the burden of making that theoretical possibility concrete. I do so in three stages. In the first stage, I describe the outer structure of torts. Rather than being a simplistic structure, however, torts must be understood as the loose confederation of two distinct methods for allocating loss. This first stage sketches the basic features of the two methods, which I call the "causal model" and the "community model," and demonstrates their loose and overlapping nature.

In the second stage, I examine each of the two models independently as a means of determining kinds of issues, both practical and theoretical, that are likely to be encountered when that model is used to adjudicate actual cases. Because the two models do not operate in isolation from each other, my discussion will not be exhaustive; we need get only the general flavor of the concerns with which each model grapples.

The third stage is the heart of this section. Because the two models overlap, torts can be divided into three categories: losses for which both the causal model and the community model can resolve allocational issues, losses for which only the causal model operates, and losses for which only the community model operates. In the third stage, I show that the tensions inherent in each model are redoubled in the real world where the models overlap and that these tensions shape the practical, doctrinal, and theoretical problems that inhabit tort systems.

Remembering the counsel of the last Part—that doctrinal or practical solutions vary over time and among cultures—this Part does not attempt a resolution of specific tort problems. Rather, it argues that torts must be viewed in structural terms, as a process within which each society decides for itself how to deal with the problem of allocating loss. The most that can be said is that the two loosely joined models of torts combine to establish the outer limits on these decisions and foreshadow the common problems that all tort systems must confront.

A. Torts as the Confederation of Two Models

Trying to find any limit on the outer boundaries of tort law is a tricky business. Without a least common denominator—an element or elements without which a controversy would not be a *tort* controversy—it is impossible to think fruitfully about torts as a distinct enterprise.⁸⁷ On the

⁸⁷ It might still be possible to think about branches of tort law (like negligence cases, landowner liability cases, or product liability cases) as distinct enterprises. My interest,

other hand, it is difficult to see what common theme(s) or structures unite cases as diverse as *Palsgraf v Long Island Railroad*,⁸⁸ *Rylands v Fletcher*,⁸⁹ and *Tarasoff v Regents of University of California*,⁹⁰ yet exclude cases such as *Hadley v Baxendale*,⁹¹ *Brown v Board of Education*,⁹² and *Regina v Dudley*.⁹³ In my view, the only way in which we can productively think about what torts is, and about how it is distinct as a descriptive matter from other legal enterprises, is to ask two empirical questions: What does torts concern, and how does it act on those concerns?

The answer to the first question—what does torts concern—is simply this: Torts concerns the allocation of loss.⁹⁴ Nothing more, nothing less. Loss allocation is the only common concern of all tort cases.

The immediate objection to this answer is that the concern for the allocation of loss is not unique to tort law. Although a concern for loss allocation distinguishes torts from criminal law, which deals with societal punishment for actual or threatened harm,⁹⁵ it cannot distinguish torts from many other fields of law or human endeavor. Loss allocation also drives large areas of the civil law, such as breach of contract and antitrust claims, as well as important extralegal processes, such as insurance or, more generally, contract.

The objection is unfair in some ways and fair in others. It is unfair because I am not attempting a rigid, essentialist definition of torts that

however, is to see whether we can join all of those branches into a coherent whole and learn anything useful from that description.

88. 162 N.E. 99 (N.Y. 1928).

89. 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, 1 L.R.-Ex. 265 (1866), *aff'd*, 3 L.R.-H.L. 330 (1868).

90. 551 P.2d 334 (Cal. 1976).

91. 156 Eng. Rep. 145 (Ex. 1854).

92. 347 U.S. 483 (1954).

93. 14 Q.B.D. 273 (1884).

94. See COLEMAN, *supra* note 14, at 320 (describing torts as "practice that takes the victim's loss as its point of departure"). In some cases, torts also concerns the risk of future loss. For further discussion of this point, see *infra* notes 119-24 and accompanying text.

95. Even this statement is a generalization. With the rise of victim compensation statutes and the power of a sentencing judge to order restitution, criminal law has taken on an increasingly allocational approach. See 18 U.S.C. §§ 3663-3664 (1988 & Supp. IV 1993) (allowing restitution as aspect of criminal sentencing). See generally *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating "Son of Sam" statute that required criminals to repay victims from profits of literary accounts of their crimes).

neatly excludes all "nontorts." Such a definition would be impossible. We are all aware that a single set of facts might give rise to a tort claim *and* a breach of contract claim; we all know that torts might abstain in favor of contract, insurance, or antitrust law as the proper vehicle for formulating an allocational response. Just because loss allocation is the concern of torts—an outer permissible boundary, if you will—does not mean that torts must necessarily expand to the full limits of that boundary or that other methods of loss allocation might not overlap the boundary

On the other hand, the objection is fair because it forces us to ask whether loss allocation is the only boundary on tort law. Here, the answer is no: Torts in fact has two additional aspects that narrow its outer boundaries. Both aspects, however, are "process constraints." In other words, they concern the second of the two empirical questions that I set out above: How does torts act on its concern for allocation of loss?

The first of the two process constraints is, at least on its face, noncontroversial: Torts allocates loss through an adjudicatory process. Indeed, the adjudicatory dimension of torts is so obvious that it is usually ignored. At the same time, it is vitally important. It distinguishes tort law from legislation, which can also be used to allocate loss,⁹⁶ and from contract and insurance, which typically allocate loss *ex ante* through private agreement. Moreover, the adjudicatory nature of torts suggests that torts must conform to the limitations established by the form of adjudication.⁹⁷ Finally, it brings to the fore a matter almost universally neglected by conceptualists, but widely understood by anti-conceptualists: Process has as much influence over liability decisions as doctrine and theory.⁹⁸

Of course, objections to even this process boundary for tort law are

96. See, e.g., 42 U.S.C. §§ 300aa-10 to -17 (1988 & Supp. IV 1993) (authorizing petitions against government compensation fund for injuries due to childhood vaccines); 42 U.S.C. § 2210 (Supp. IV 1993) (authorizing compensation for victims exposed to radiation from nuclear weapons testing).

97. For a complete development of those limits, see *infra* note 134 and accompanying text.

98. See JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 31 (1988) ("What distinguishes the American tort system from its counterparts in other countries is not so much the substance of its 'black-letter' rules as its unique institutional arrangements."); GREEN, *supra* note 4, at 145; James A. Henderson, Jr., *Process Constraints in Tort*, 67 *CORNELL L. REV.* 901 (1982) (identifying four process concerns that influence doctrine). See generally JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* (3d ed. 1988) (intertwining study of procedural and substantive tort rules); *id.* at 14 ("Adjudication is the heart of the torts process").

possible. An empiricist might claim that because most tort claims ultimately settle, adjudication cannot be a necessary condition of torts.⁹⁹ But that argument simply repeats in different fashion an objection previously refuted. People are free to allocate loss through nonadjudicatory means such as a settlement agreement, which is simply a type of contract. Torts and contract overlap in their allocational concerns; and torts, with its adjudicatory process, can certainly defer to contract, with its negotiation process, as the proper vehicle for loss allocation.¹⁰⁰ The desire to avoid a threatened or impending adjudication may serve as the catalyst for agreement, but it does not turn that agreement into an adjudication. The only way that torts itself is capable of allocating loss is by means of adjudication.

Quite a different attack upon adjudication as a constitutive element of torts could be launched by conceptualists, who might view adjudication as a distinct field with independent constraints that prevent torts from reaching its true potential.¹⁰¹ Yet any claim that process and torts are distinct simply flies in the face of our history, in which the study of torts *was* the study of process at least until the time of Holmes,¹⁰² and of our present practical experience. As any tort practitioner will acknowledge, knowledge of procedure is at least as crucial (and perhaps more so) to the success of a tort case than knowledge of "the law." To contend that these concerns are mere side constraints upon perfection is to live in an idealized world. Any

99. See JAMES A. HENDERSON, JR., ET AL., *THE TORTS PROCESS* 6-7 (4th ed. 1994) (arguing that because most cases settle, "it is important not to overstate [adjudication's] function" in tort law); Saks, *supra* note 10, at 1226 (estimating that 85% of tort claims that result in demand for payment settle before trial).

100. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV L. REV 353, 357-65 (1978) (demonstrating that organization by common aim (such as elections), by reciprocity (such as contracts), and by adjudication are different methods of resolving dispute); see also *infra* notes 115-17, 298, 309-12 and accompanying text (discussing relationship between torts and contract).

101. It would be unfair to attribute this precise criticism to any particular conceptualist, but Coase's Theorem, which holds that all legal rules are efficient in the absence of transaction (e.g., litigation) costs, and the legal economists' concern with effects of adjudicatory "errors" on efficient outcomes, suggest that law and economics adherents would be willing to make the argument. See POSNER, *supra* note 29, §§ 21.2, 21.6; SHAVELL, *supra* note 2, at 79-85. Other conceptualists, however, have integrated, albeit incompletely, some procedural insights into their view of torts. See *supra* note 77 and accompanying text; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Epstein, *supra* note 24.

102. See WHITE, *supra* note 1, at 4-19.

system to allocate loss must be accompanied by some process to accomplish that result.

By combining these first two boundaries of torts, we can begin to see the structure within which the tort debate must occur. Torts is an adjudicatory process designed to allocate loss. But that description is broad, for it suggests that torts has the potential to expand to consider many types of losses that it presently leaves to other legal or extralegal processes. Moreover, neither of these two elements suggests any sort of doctrinal or theoretical limitations within which tort principles must be crafted. The issue, therefore, is whether some additional criteria delimit the structure of torts.

The answer is a qualified "yes"; torts does make allocational decisions within certain "meta-doctrinal" boundaries. But this answer has two qualifications. The first should be obvious from the nature of my descriptive enterprise: The meta-doctrinal parameters for torts are of such generality that they can shape only the outer terms within which the debate about specific rules occurs; they cannot resolve conflicts when two or more rules are both consistent with the parameters. The second qualification is that tort law is not consistent with any single meta-doctrinal parameter. The examples of Holmes, Posner, and Weinrib illustrate the futility of trying to organize all of tort doctrine around any single principle,¹⁰³ and I cannot pretend to possess a single explanatory principle that has eluded tort law's many extraordinary thinkers.

At this point, however, the vision of torts as perpetual conflict comes to our aid. Although there can be no *single* meta-doctrinal principle that informs all specific choices of rules, *two or more* such principles may together have the potential to describe all of tort law. Because multiple principles cannot be entirely consistent, they contend for outcomes that are inconsistent. That sort of tension is precisely what a vision of torts as perpetual conflict would predict.

In our search for such metadoctrinal parameters, we can quickly reject three methods of searching. The first would be to seek parameters that are diametrically opposed: for example, to suggest that all tort doctrine can be accounted for by a model that imposes liability for action and one that imposes liability for non-action.¹⁰⁴ Although it is certainly true that all tort

103. See *supra* notes 77-82 and accompanying text.

104. Two scholars have attempted to create a tort structure out of the clash of opposing tendencies. See ENGLARD, *supra* note 52, at 7-92; Balkin, *supra* note 9. Englard develops

doctrines must be either "A" or "not-A," that approach defines the entire universe and thus imposes no doctrinal or theoretical limitations on torts except that it be an adjudicatory process allocating loss. Moreover, the use of mutually exclusive parameters also makes the growth and regeneration of tort law, which is an observable phenomenon, difficult to explain.

the more interesting approach. He argues that torts must be understood as the combination of three sets of mutually opposing pairs of tendencies: moral responsibility and social utility, corrective justice and distributive justice, and fault and strict liability. He then adopts Bohr's theory of complementarity, discussed *supra* note 83, to justify the basic nature of tort law.

Two observations about Englard's effort are in order. First, his three sets of principles are not in complete opposition. Fault and strict liability are not always opposed, *see generally* Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV 963 (1981); often tort doctrines can simultaneously meet moral and utility concerns; and they frequently lead to results that are just from both distributional and corrective perspectives. Thus, Englard is closer to the position of other scholars who see overlapping rather than mutually exclusive tendencies in tort, *see infra* note 106 and accompanying text, and has less need of his principle of complementarity than he appreciates.

Second, whatever its merits in the physical sciences, the principle of complementarity is poorly suited to the legal enterprise. For the reasons given in the text, describing creations of the human mind (such as tort law) in "A" and "not-A" terms creates little value. Bohr's hypothesis was responding to experimental data, some of which pointed to light being a wave and some of which pointed to light being a particle. No middle ground was possible. Legal outcomes are usually more ambiguous and are capable of being understood in many different ways. To force the case to be either "A" or "not-A" is to impose an order on tort cases that is not reflective of the large middle ground that most cases occupy. Moreover, complementarity becomes necessary only when no single explanation can describe all of the observed results. This Article demonstrates that a single explanation is possible, thus obviating the need to resort to complementarity.

For similar reasons, Balkin's approach, which seeks to explain torts in terms of the tension between models of individualism and communalism, fails. This opposition of principle to counter-principle, which is a basic methodology of critical scholars, *see* Unger, *supra* note 22, at 616-48, reveals nothing valuable about the nature of torts *qua* torts; at most, it tells us something about the proclivities of a specific tort system.

Interestingly, Englard critiques Balkin for employing the same type of effort to construct torts out of opposing tendencies that Englard does. ENGLARD, *supra* note 52, at 60-64. The strong impression that Englard's critique leaves is not that Balkin's approach is wrong, but only that the opposing categories that Balkin chooses are wrong. Englard's denomination of his set of choices (moral responsibility vs. social utility; corrective justice vs. distributive justice; and fault vs. strict liability) as correct and all others (e.g., individualism vs. communalism) as incorrect sounds merely like a particular author's opinion that his mutually opposing categories are superior to another author's mutually opposing categories. Again, the appeal to complementarity breaks down. Unlike Bohr, who knew that light was either a wave or a particle, torts scholars face innumerable ways of characterizing torts. How one author's set of choices emerges as victorious is entirely unclear.

Because the distinctive arguments favoring "Model A" and "Model Non-A" are opposing, a choice to adopt Model A reflects a judgment of both the correctness of "A" and the wrongness of "non-A." Change in torts is then possible only if we overturn our initial normative decision to credit A's distinctive arguments. When the meta-doctrinal parameters have an overlapping, concurrent claim to validity, however, the opposite is true. The overlapping parameters impose some limits on torts other than "process allocating loss," but they avoid definitive normative judgments about the correctness of specific doctrines. In short, overlapping parameters provide both more definition of the scope of tort law and less security about the correctness of any particular set of answers.¹⁰⁵

The second method of choosing meta-doctrinal parameters is simply to list the present doctrinal structure of tort law as the parameters: To say, for instance, that torts judges behavior according to models of intent, negligence, or strict liability or that torts involves losses from car accidents, slip and falls, product injuries, defamation, and so forth. This method has all of the flaws of the prior method, for it simply describes a universe without a sense of the irrepressible struggle. It also suffers from an important additional flaw. It might be underinclusive. New torts are continually recognized, and it is possible that new levels of scienter, unforeseeable today, might be important in 500 years. Describing the outer boundaries of torts by assuming that it can go no farther is myopic.

A third approach to choosing parameters is to identify the various theories or policies that have driven aspects of tort law to posit, for instance, the overlap of a corrective justice model, a utilitarian model, and a distributive justice model; or perhaps to describe competing models of loss spreading, deterrence, compensation, and fairness.¹⁰⁶ Although it has

105. This does not mean that torts is free to change its doctrinal mind on a daily basis. As we shall see, there are significant structural constraints to the frequent change of doctrine. See *infra* notes 150-58, 275-84 and accompanying text. My only point is that our choice of meta-doctrinal parameters need not reinforce those constraints. Because this is an admittedly debatable proposition for many, it is perhaps enough to fall back on my other point—that opposing parameters limit nothing—as a criticism of their use.

106. For examples of similar efforts, albeit with different academic projects in mind, see, e.g., COLEMAN, *supra* note 14, at 303 (describing torts as mixture of markets and morals); Fletcher, *supra* note 37, at 1672-78 (contending that torts arises in borderland between criminal and contractual liability). See generally STEINER, *supra* note 32 (arguing that torts is combination of moral justifications, both utilitarian and natural rights, and social vision);

some merit, this approach must also be rejected. First, it risks underinclusiveness; torts must allow room for the infusion of new theories and policies that redirect torts in ways not now imaginable to us. Second, the approach is unfaithful to the history of torts. Tort theorizing is of relatively recent origin;¹⁰⁷ *ex post* rationalizations of doctrines that predated those theories create a great risk of failing to appreciate what tort law was attempting to accomplish in its own time.¹⁰⁸ Third, the use of theoretical or policy models to set the boundaries of torts suggests that the conceptualists are correct, at least in matters of doctrine, about how torts should be done. Having already disproved that suggestion in a related context,¹⁰⁹ it would be odd to accept conceptualism here.

Although it has not always had its present fascination with theory and policy, torts has always had, and will always have, concern for doctrines and rules.¹¹⁰ Hence, the only sensible way to find the meta-doctrinal parameters on the tort process for allocating loss is a fourth approach: to find the common denominators among the myriad, often conflicting rules themselves. In order to avoid falling victim to describing only the latter twentieth-century status quo *and* so that we have something of value to study, however, we must also assure that we find denominators that explain the broadest possible range of rules. Because one denominator cannot encompass all rules, it would be best if two, or perhaps three,

Fletcher, *supra* note 28 (finding two paradigms of fairness and utility in tort law); Martin A. Kotler, *Competing Conceptions of Autonomy: A Reappraisal of the Basis of Tort Law*, 67 TUL. L. REV 347 (1992) (finding torts to be comprised of efficiency and changing autonomy paradigms); Owen, *supra* note 24 (describing torts as combination of autonomy and community models); Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV 1163 (1992) (describing Libertarian, Conservative, Liberal, Collective, and Socialist models operative in torts).

107. See HOLMES, *supra* note 2, at 78 (arguing that judges "should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago"); WHITE, *supra* note 1, at 3-19.

108. Cf. Schwartz, *Tort Law*, *supra* note 2 (using nineteenth century cases to refute *ex post* thesis that negligence rules were created to subsidize industry).

109. See *supra* notes 32-46 and accompanying text.

110. For much of the early history of torts, the fascination lay with procedural rather than substantive rules. See MILSOM, *supra* note 2, at 285-313. But even in those forms of action we can discern certain doctrinal rules—like causation—that were so fundamental that they were taken for granted as the lawyers performed their procedural dance. See, e.g., *The Thorns Case*, Y.B. Mich. 6 Edw. 4, fo. 7, pl. 18 (1466); *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616).

parameters did so. In this way, this fourth approach combines a focus on the reality of tort rules, which was the strength of the second methodology, and the abstraction into broad overlapping parameters that facilitate the eternal struggle of torts, which was the strength of the third methodology

With this methodology in mind, I have identified two meta-doctrinal parameters that constrict the manner in which tort adjudication allocates loss. The parameters operate in the disjunctive; although it is possible that both will be satisfied, it is necessary that only one of the two parameters be satisfied in order for a reallocation to occur through the tort process.¹¹¹ The parameters are these: the tort process can (not "must" or "should," but "can") reallocate loss when (a) the defendant causes the plaintiff's loss, or (b) when the community's values demand reallocation.¹¹²

Stated differently, and combining the prior two limits within the third, there are two distinct sets of boundaries on torts. The first set of boundaries, which I will call the "causal model," defines torts as being an adjudicatory process designed to reallocate loss to a defendant only when a defendant can be shown to have caused the loss suffered by a plaintiff. The second set of boundaries, which I will call the "community model," defines torts as an adjudicatory process designed to reallocate loss to a defendant only when the community's norms permit reallocation. The models are a ceiling and not a floor: any process that exceeds the combined scope of the two models cannot be a tort process, but torts need not swell to its fullest potential.

To a certain extent, the two models of torts are independent, but they are nonetheless confederated in two important ways. First, they share a single foundation: adjudicatory process allocating loss. Second, the two models have a potential for overlap. Indeed, if we posit a society in

111. In other words, my claim is that the only *necessary* condition in torts is an adjudicatory process designed to allocate loss. But that condition is not sufficient. In order for such a process to be *sufficient* as a torts process, it must also satisfy one of two additional elements.

112. Given the prior elements of loss allocation and adjudicatory process, a precise description of torts' boundaries allows us to invoke torts only when we (1) are involved in the allocation of loss, (2) adopt an adjudicatory process, and (3) limit our reallocation response to situations in which the defendant either (a) caused the loss or (b) violated community norms.

which community norms demand a causal connection before reallocation from a defendant is allowed,¹¹³ then the community model becomes a subset of the causal model.¹¹⁴

It also bears emphasis that the boundaries of these models are permeable not only between themselves, but also to other, nontort processes. For example, contract law, which operates as a private process of loss allocation through agreement, can enforce breaches of contract (i.e., loss allocation contrary to agreement) through adjudication. Because breaches are actionable when they cause loss, the outer parameters of the enforcement of contract and the causal model of torts overlap,¹¹⁵ either or both models can address problems of loss resulting from contractual breach.¹¹⁶ Once again, the operative word is "can." Neither system must swell its boundaries to their full potential. Contract may defer to a tort solution, torts may defer to a contract solution, both may assert suzerainty, or both may disavow any interest in the dispute.¹¹⁷

113. For the most part, ours is such a society. See generally H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW*, at lxxvii-lxxx1 (2d ed. 1985) (discussing centrality of causation to liability questions); Symposium, *Causation in the Law of Torts*, 63 CHI.-KENT L. REV. 397 (1987) (developing different views on proper analysis for causation); cf. Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990) (recognizing fundamental nature of causation in torts and attempting to craft argument against it). Exceptions, however, prevent the overlap from being complete. See *infra* notes 167-79 and accompanying text.

114. Conversely, of course, the models might not overlap at all. If the only community norm was "Rich defendants should pay poor plaintiffs when the defendant has not caused the plaintiff's loss," then the two models would share only their common heritage of both being adjudicatory processes to allocate loss.

115. The overlap is not complete, for torts can concern itself with reallocations of loss not resulting from breach of agreement, and contract can concern itself with nonadjudicatory processes of loss allocation and with loss resulting from nonaction. But the two systems intersect in the field of loss-causing breaches of agreement.

116. Indeed, in Roman law and in some civil law systems, breach of contract and torts are simply branches of a more general law of obligations. See ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 18, 566 (2d ed. 1977). Even in our own common law history, the modern law of contract largely developed out of the writ of trespass. When common lawyers were finally stymied in their efforts to bring cases of nonfeasance (promise without any overt acts of performance) within the writ of trespass, the common law created the writ of assumpsit. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 637-46 (5th ed. 1956). For further discussion of the relationship between torts and contract, see *infra* notes 298, 309-12 and accompanying text.

117. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873 n.8 (1986) ("We recognize, of course, that warranty and products liability are not static bodies of

The same analysis pertains to a host of other legal fields that overlap with aspects of the causal and community models. Other fields intersect the causal or community model in part, but all are ultimately distinguishable from torts. Many fields, like securities regulation or constitutional law, do not necessarily depend on loss allocation or adjudicatory process; others, like antitrust, have rules whose common denominators vary from the disjunctive combination of causation and community norms found only in tort.

Having now sketched the description of torts, the next step is to prove its validity. Before turning to that task, however, I will need to clarify some terms which, in the interest of setting out the descriptive model of torts as efficiently as possible, I passed over quickly.

The Meaning of "Loss Allocation." The statement that torts concerns the allocation of loss has all the qualities of a truism. Whether we read hundreds of cases in a single jurisdiction or spot-check the cases used in leading casebooks and treatises, we see that a common feature of disputes sounding in tort is a loss.¹¹⁸ Just as there can be no *damnum absque injuria*, there can be no *injuria absque damno*.

Beneath the truism, however, lie three situations that seem to rob loss allocation of its claim to universal stature: issuance of an injunction to prevent possible loss,¹¹⁹ compensation for future consequences of past injury,¹²⁰ and compensation for risk of future injury.¹²¹ These examples,

law and may overlap. Nonetheless, the main currents of tort law run in different directions from those of contract and warranty " (citations omitted). It is also possible that in areas of mutual interest, contracts and torts may vindicate only certain aspects of the loss, thus reducing the overlap further. *Id.* at 873 & n.9.

118. On this point, conceptualists and anti-conceptualists would seem to agree. See, e.g., GREEN, *supra* note 4, at 8; HOLMES, *supra* note 2, at 96; LANDES & POSNER, *supra* note 29, at 1; Weinrib, *supra* note 38, at 494; Wells, *supra* note 8, at 2350-51.

119. In some circumstances, torts has issued injunctions to prevent threatened loss rather than await the loss and award damages retrospectively. See RESTATEMENT, *supra* note 12, §§ 933-943.

120. When the repercussions of a plaintiff's past injury will continue into the future, damages may be awarded for future income loss, medical expenses, pain and suffering, and anguish. *Jones & Laughlin Steel Corp. v Pfeifer*, 462 U.S. 523 (1983); *In re Air Crash Disaster near Cerritos, Cal.* on Aug. 31, 1986, 982 F.2d 1271 (9th Cir. 1992); *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984).

121. American jurisdictions vary in the extent to which they are willing to reallocate the risks of future injury. The usual rule is that future injuries that might develop from present losses can be reallocated when there is a reasonable probability that they will develop. See,

in which the physical or emotional loss has not yet occurred, refine the precise scope of the "loss allocation" criterion. Just as the torts process has never insisted on absolute proof of an existing loss,¹²² it does not insist on certainty with respect to future losses. It is only necessary that a loss be possible; torts is not in the business of providing remedies for past risks with no chance of materialization in future injury.¹²³ But the degree of certainty upon which torts insists is entirely a positive matter. The choice of the appropriate standard—whether it be "possible," "more likely than not," or "beyond a reasonable doubt"—relies on notions of fairness, utility, policy, or administrative convenience and cannot be extracted from the element of "loss allocation" itself.¹²⁴

e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 412-13 (5th Cir.) (en banc), *cert. denied*, 478 U.S. 1022 (1986). When the chances are less than 50%, however, recovery is denied. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986). Some jurisdictions are reversing this rule, at least in the medical malpractice arena, to allow for the award of damages for "loss of a chance" of recovery of less than 50%; thus far, however, the rule has been invoked only when the risk materialized in the patient as a present (rather than future) harm. *See, e.g.*, *Waffen v. United States*, 799 F.2d 911 (4th Cir. 1986); *Herskovits v. Group Health Coop.*, 664 P.2d 474 (Wash. 1983). *But see Hurley v. United States*, 923 F.2d 1091 (4th Cir. 1991) (overruling *Waffen* and denying recovery for "loss of a chance"). *Cf. Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247 (Iowa 1993) (denying recovery for reduced life expectancy due to asbestos exposure, but holding open the possibility of recovery for increased risk of injury); *Mauro v. Raymark Indus., Inc.*, 561 A.2d 257 (N.J. 1989) (rejecting theory of increased risk for toxic exposures over adamant dissent). Even when recovery for increased risk has not been allowed, courts have been willing to allow recovery for losses closely associated with the risk, such as fear of the future risk and costs of medical monitoring. *See, e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Beeman*, 496 N.W.2d at 251-53; *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987); *Herber*, 785 F.2d at 83-85.

122. As with the other elements of the prima facie case, the plaintiff typically bears the burden of proving that, more likely than not, she sustained damage. *See, e.g.*, *Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1 (1st Cir. 1992). In some instances, the standard is less stringent, with damages being "presumed." *See, e.g.*, PROSSER & KEETON, *supra* note 30, §§ 112, 116A (discussing damages available at common law in defamation action); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV 782, 793 (1986) (justifying common law use of general damages in defamation cases "because it is quite often impossible to reconstruct the ever-expanding web of influence that false statements can spin"); *cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (holding that in absence of actual malice, First Amendment requires proof of "actual injury" in case of defamation against private individual speaking on matter of public concern).

123. *See GREEN, supra* note 4, at 8.

124. Subsequently, I suggest that the interaction of tort law's constitutive elements pushes

A skeptical student of torts would also point to a second necessary refinement of tort law's concern for loss allocation. Although reported decisions are impossible to find, it is inevitably true that in some cases, juries, motivated more by sympathy or vengeance than logic, have awarded damages to those who suffered no actual or potential loss, and judges have not overturned the verdict. Nonetheless, the occasional malingerer fails to disprove the claim that torts is a system designed to allocate loss. Torts cannot insist on absolute certainty with respect to present losses. Indeed, the acknowledged illegitimacy of faking loss strengthens the claim that the only appropriate function of torts is loss allocation.

Taken together, these refinements suggest that the concern of torts should more precisely be described as the allocation of "*actual or potential* loss."¹²⁵ The reality that torts, at least on occasion, awards punitive damages requires a third refinement.¹²⁶ Because the usual view is that punitive damages are intended to punish rather than to reallocate existing losses,¹²⁷ their availability may suggest that loss allocation is not a necessary element of torts. But that view is inaccurate for two reasons. First, the availability of punitive damages in torts is triggered by the existence of a loss; torts does not award punitive damages when a plaintiff has suffered no loss whatsoever.¹²⁸ But "loss allocation" does not necessarily require that the remedy for loss be precisely that which restores

naturally toward the adoption of a standard of proof somewhere around "more likely than not." See *infra* note 158. This standard is not, however, required; it is optimal, rather than necessary.

125. Although I will continue to use the phrase "loss allocation" as a shorthand throughout the remainder of this Article, the phrase should be read to encompass these refinements.

126. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981); cf. *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (discussing constitutional limitations on award of punitive damages).

127. See RESTATEMENT, *supra* note 12, § 908; DAN B. DOBBS, LAW OF REMEDIES § 3.11 (2d ed. 1993). In Michigan, however, the purpose of "exemplary damages" is to "make the plaintiff whole for damages, not readily calculated, which are caused by malicious, willful, or wanton conduct, such as 'feelings of humiliation, outrage and indignity.'" *Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1498-99 (8th Cir. 1992) (quoting *Veselenak v. Smith*, 327 N.W.2d 261, 264 (Mich. 1982)). Under this view, there is no difficulty with the allocation of these actual losses to defendant.

128. The loss needed to justify an award of punitive damages does not have to be a physical or pecuniary one. See RESTATEMENT, *supra* note 12, § 908 cmt. c (noting that "an award of nominal damages is enough to support a further award of punitive damages"). Nominal injury is sufficient to invoke the allocational concerns of torts. See *infra* note 132.

the plaintiff to his or her rightful position;¹²⁹ it could be more or less.¹³⁰ The extent of the loss allocated to the defendant, which is a positive matter, should be distinguished from the existence of loss, which is a constitutive element of torts. Second, one can view punitive damages as a dimension of criminal law that overlaps with either the causal or the community model. The same conduct can evoke both the loss allocation concerns of torts and the punitive concerns of criminal law. Rather than separating the conduct into two component suits, the tort and some of the criminal interests in the defendant's conduct are joined in a single adjudicatory process, much as overlapping tort and contract interests are joined in a single products liability action.¹³¹

This last refinement suggests a final point about loss allocation: The concept of "loss" is a matter of positive law. From the viewpoint of torts, any deprivation of any conceivable interest in body, mind, spirit, property, or community can constitute a "loss."¹³² As the examples of wrongful

129. On the relationship between a remedy and the rightful position, see DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 1-19 (2d ed. 1994).

130. Instances in which damages might be more or less than actual loss include defamation, which allows presumed damages, and trespass, which allows nominal damages. See *supra* note 122 and accompanying text; *infra* note 132. Moreover, our real-world experience suggests that we do not always compensate plaintiffs only in accordance with the extent of loss; other factors, like the fact finder's views about the relative culpability of the plaintiff and defendant, often influence the size of the award. Indeed, there is no other way to explain widely disparate awards given to a plaintiff whose case is, for some reason, heard twice. Compare, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974) (noting that plaintiff received \$50,000 verdict in defamation trial) with *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982) (affirming award of \$100,000 in compensatory and \$300,000 in punitive damages on retrial), *cert. denied*, 459 U.S. 1226 (1983).

131. Nothing in the nature of adjudication forces it to give effect to only one type of substantive interest at a time; hence, tort and criminal interests can be pressed in a single suit. See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1751-52 (1992).

132. See *Dunn v. Hess Oil V.I. Corp.*, 1992 WL 228875, at *5-11 (3d Cir. Sept. 18, 1992) (discussing whether asymptomatic pleural thickening of lungs can constitute compensable injury); PROSSER & KEETON, *supra* note 30, §§ 54, 111, 117 (discussing recovery for emotional distress, defamation, and privacy); see also sources cited *supra* note 121 (describing circumstances under which there can be recovery for increased risk of injury, fear of injury, and medical monitoring costs). Within this broad notion of loss should be included the concept of "nominal damages," which can be awarded when a plaintiff either cannot demonstrate actual physical or pecuniary harm from an invasion of an interest or fails to prove adequately the extent of that harm. See RESTATEMENT, *supra* note 12, § 907 cmts. b, c. Although there has been no "harm" in the sense in which American tort law has

death, consortium, and emotional distress claims have shown, our cultural notions of loss have varied through history¹³³ Such withdrawals from the full potential scope of torts depend again on notions of fairness, utility, policy, convenience, or precedent. Because the concept of loss is an outer boundary, nothing in the descriptive model of torts can definitively resolve whether torts should expand to the limits of that boundary or, if not, where it should draw the line within that boundary

The Meaning of "Adjudicatory Process." A definition for adjudicatory process takes us afield from the usual concerns of torts scholars and into the arena of procedural theory. A complete description of adjudicatory process, which is itself an outer shell that envelopes a never-ending internal struggle, would be largely tangential to our purposes here. In brief, however, an adjudicatory process requires the following: the existence of a dispute concerning the allocation of an obligation recognized under existing legal arrangements, a claim asserted against a person required to provide a remedy if the claim is justified, a state-provided decision maker that reaches a decision through the use of reasoned judgment, and like treatment of parties with factually and legally identical claims.¹³⁴ It is

traditionally conceived of the term, an invasion of an interest worthy of legal protection has occurred. This invasion constitutes a loss sufficient to invoke the torts process. *Id.* Because the notion of loss allocation does not require that the amount of reallocation be precisely that which the plaintiff lost, *see supra* notes 129-30 and accompanying text, the disparity between the actual amount of this loss and the nominal award does not defeat the assertion that torts is concerned only with loss allocation.

133. For discussion of the historical evolution of our willingness to recognize these injuries as losses, *see EPSTEIN, supra* note 2, at 789-98, 1003-63.

134. Tidmarsh, *supra* note 131, at 1735-54. For other treatments of the nature and bounds of adjudication, *see* COUNCIL ON THE ROLE OF COURTS, *THE ROLE OF COURTS IN AMERICAN SOCIETY* (Jethro K. Lieberman ed., 1984); MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986); POSNER, *supra* note 29, § 21.1, RAWLS, *supra* note 37, at 235-39; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fuller, *supra* note 100; Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172-77

It should be noted that "reasoned judgment" does not demand the application of heartless logic to the liability issue; a certain amount of sympathy and bias is built into the term. Tidmarsh, *supra* note 131, at 1736 n.246; *see also* William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 70 (1974) ("In adjudication, outcomes may be sensitive to a wide range of extrinsic factors including class membership, political alliances, economic consequences and corruption, but in the main the behavior of the disputants is evaluated by reference to generalized rules of conduct."). Hence, the requirement of reasoned judgment is not hopelessly at odds with the community model, which

enough to describe these outer boundaries and to leave to later parts of the article the ways in which specific dimensions of those boundaries influence tort law

The Meaning of "Causation." Because liability within the causal model hinges on the existence of causation, it is necessary to define a term whose many permutations in its "factual" and "proximate" branches make it one of the most slippery legal concepts.¹³⁵ The nature of the descriptive enterprise, which seeks to develop outer limits that validate rather than exclude, requires a broad meaning of causation.

In describing the type of causation needed to trigger the causal model, I use "cause" in the sense of an act that is necessary to the loss suffered by the plaintiff. More precisely, given the inherent inability of an adjudicatory process to make accurate causal judgments in each case, "causation" requires evidence that (1) the defendant's act increased the risk of a loss to plaintiff to a level above that associated with the "background risk" (i.e., the risk of a particular loss created by actions other than the defendant's), and (2) the plaintiff's loss is associated with the risk posed by the defendant's act.¹³⁶ This definition of causation, which avoids some of the conundrums of "but for" causation,¹³⁷ does not require that the evidence of

is often influenced by sympathies and biases; but these two elements generate a friction with which torts must constantly be occupied.

135. For important efforts to describe the boundaries of cause-in-fact and proximate cause, see, e.g., *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), cert. denied, 380 U.S. 944 (1965); *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound)*, 1961 App. Cas. 388 (P.C. Austl.); *In re Polemis & Furness, Withy & Co.*, 3 K.B. 560 (1921); RESTATEMENT, *supra* note 12, §§ 430-461, HART & HONORE, *supra* note 113; ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963); Calabresi, *supra* note 33; Symposium, *Causation in the Law of Torts*, *supra* note 113.

136. To take a simple example of a pedestrian whose leg is broken by a negligent motorist, the causal model is satisfied once there is evidence that (1) the motorist's driving increased the risk of injuring the pedestrian's leg above the pedestrian's background risk of a broken leg from sources such as an open sewer cover or a crack in the sidewalk and (2) the plaintiff was walking with no difficulty just prior to the accident, the car struck the leg, and an X-ray taken shortly afterwards revealed a broken bone. Other evidence might also suffice.

137. "But-for" causation requires a fact finder to engage in a problematic counterfactual prediction about how events would have turned out had the defendant not acted. See, e.g., HART & HONORE, *supra* note 113, at 110-14; PROSSER & KEETON, *supra* note 30, § 41. The approach suggested in the text focuses instead on the risks created by the defendant and the evidence tending to show that this risk materialized in the plaintiff's loss. The definition also avoids some of the difficulty that "but-for" causation faces in addressing "sufficient cause"

causation be of a particular quality (e.g., "more likely than not," "clear and convincing," or "possibly")¹³⁸ or in a particular form (eyewitness vs. expert, written vs. oral). Nor does this definition involve notions of proximate cause such as "directness," "foreseeability," "substantial factor," "legal cause," "intervening" and "superseding" causes, or causal paradigms.¹³⁹

Although we recognize with near unanimity that the responsibility for our causal conduct must end at some point,¹⁴⁰ the causal model cannot choose a definitive method for accomplishing the result.¹⁴¹ The reason is that a valid description of torts must seek the least common denominators;

cases, i.e., cases in that two or more independent causes (one associated with the defendant and one not) which are each capable of causing injury simultaneously occur. See, e.g., *Summers v. Tice*, 199 P.2d 1 (Cal. 1948); *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927). Because this definition of causation does not require a particular level of proof (e.g., "more likely than not") that the plaintiff's injury is associated with the defendant's risk, see *infra* notes 158, 176 and accompanying text, it is possible to find that a defendant caused the loss even though another, independent event would also have done so.

Of course, it remains available to a tort system to adopt a more restrictive "but-for" standard for causation; the definition given in the text is the outermost boundary of the causal model. It is equally true that this definition cannot explain all tort decisions and commentary about sufficient cause cases and thus cannot avoid all of the "but-for" conundrums. For discussion of those instances, see *infra* notes 173-79, 183-86 and accompanying text.

138. In the rare instances in which torts allows presumed damages, see *supra* note 132, this burden of proof issue, the issue of loss *vel non*, and the community model become intertwined. Thus, the common law's award of presumed damages for certain types of defamation can be understood either as a recognition that potential harm to reputation is itself a loss requiring reallocation, as a reduction in the level of proof necessary to show actual harm to reputation to a "mere possibility" standard, or as an instance in which the community model imposes liability without regard to causation. It is not especially important to our present task to decide the precise etiology of presumed damages.

139. Directness, foreseeability, substantial factor, legal cause, and intervening and superseding cause are the usual methods that courts and commentators use to preclude responsibility for remote (or nonproximate) causes. See, e.g., HART & HONORE, *supra* note 113, at 1-8; sources cited *supra* note 135. Causal paradigms were created by Richard Epstein to serve the same function of cutting off responsibility. See Epstein, *supra* note 24. But see Epstein, *supra* note 34, at 657 (disavowing some of his earlier theory).

140. See PROSSER & KEETON, *supra* note 30, § 41, at 266 ("It should be obvious that, once events are set in motion, there is, in terms of causation, no place to stop. The event without millions of causes is simply inconceivable").

141. As we shall see, the causal model has some optimal or preferred approaches, but they cannot be deduced as a matter of ineluctable logic from the model itself. See *infra* notes 161-70 and accompanying text; see also Weinrib, *Causation*, *supra* note 72, at 417-18 (describing problems associated with "causation's excessive generality").

it cannot take sides. We cannot exclude the possibility that some tort system might desire, hundreds of years after the fact, to hold the estate of Christopher Columbus liable for all the causal consequences of his conduct. The appropriate limits of proximate cause have always been, and are likely always to be, a battleground of tort law. The goal of the causal model is to provide the boundaries within which that struggle can occur, not to attempt the impossible feat of predetermining an inherently indeterminate conflict.

The Meaning of "Community Values." In the community model, the torts process gives effect to the community's values about when a defendant should make good a plaintiff's loss. Consequently, this model requires that we develop an understanding of two terms: "community" and "values." A "community" is the set of people who lie within the juridical reach of the particular tort process that establishes the terms of loss allocation.¹⁴² Its "values" are the principles or standards of fairness and propriety with which the community operates. These values are not necessarily based on any normative theories of justice or morality; they are culturally determined through the community's practices and shared beliefs.¹⁴³ These values might well be viewed as unfair or misguided in other contemporaneous communities and are capable of evolution (or even repudiation) within a community over time. Thus, a particular community can vault the principle of economic efficiency to a primordial position; fifty years later, the same community can legitimately jettison that value in favor of widespread wealth redistribution or Kantian imperatives.

In any juridical community, of course, there will be those who dissent from the general standards of fairness. In order that it not be rendered a nullity by the lone dissenter, the community model does not insist on consensus of opinion. It is enough that the community shares the value widely and that the value can be fairly described as a highly dominant perspective.¹⁴⁴ Such values are most likely to be a part of hierarchical,

142. It is therefore possible that a single person might belong to more than one community. I assume here that only one community's values will decide the issue of loss allocation. Should two or more communities with interests in having their values applied agree on a compromise or third approach, *cf. In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (adopting "national consensus" products liability law), the relevant community would then encompass all subcommunities agreeing on the compromise.

143. *Cf. Abel, supra* note 9, at 791-92 (noting that "moral intuitions of judges and juries lack a principled basis").

144. F.S.C. Northrop used to emphasize the lessons from sociological jurisprudence,

monolithic, and moralistic communities,¹⁴⁵ but they can also occur in diverse communities with nearly universal experience of and agreement about the proper ways of conducting certain activities.¹⁴⁶ Community values can also be created in two other ways. First, the different senses of fairness of the various nondominant subgroups within a community might all agree on a particular loss allocation.¹⁴⁷ Second, community values can be created when various subgroups, none of whom is dominant, agree to be bound by the values of a particular subgroup.¹⁴⁸

Even with this broadened understanding of community values, however, it may be difficult for a diverse community to come to agreement about the appropriate allocational consequences for important categories of defendants' conduct. When community values are inapposite, torts must rely on the causal model to allocate loss; and if that model too is inapposite, then it must defer to "nontort" responses to the loss. The boundaries of torts are broad, but they are not limitless.

which descended from the belief that a critical distinction exists between the positive law and the "living law" of a community. The "living law," which is the set of postulates "shown to enjoy the acceptance and support of most, but never all, of the people," equates with the notion of community values I describe here. See NORTHROP, *supra* note 19, at 93-94; see also *id.* at 115 ("[I]t is only common beliefs that are community beliefs and hence effective living and positive legal principles.").

145. An example of such a community might be a hamlet in medieval England, in which persons shared a common heritage, a common religion, and common life experiences. The jurors were the witnesses, and the lack of legal doctrine and appellate processes often assured a loss allocation that accorded with community norms. See MILSOM, *supra* note 2, at 48-50, 295-300, 311-13; see also WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 36-45, 87-88 (1975) (describing similar experience in colonial Massachusetts).

146. For instance, even in our less homogenous American culture, we still widely share certain experiences, such as automobile driving, and we can generally agree that loss reallocation is proper when a defendant runs a red light or drives at 70 miles per hour through a school zone.

147. Catharine Wells has called this agreement on result among nondominant groups "local objectivity." Wells, *supra* note 8, at 2409.

148. For instance, peasants and artisans whose values diverge from the aristocracy's values might nonetheless acquiesce in the aristocracy's codal principles for tort; women might accept tort principles propounded by men; or a community of persons not schooled in legal principles might defer to the values of the attorney elite. Although this deference raises issues of false consciousness, the community model cares not about the propriety of the community's values, but only about the fact of their existence.

*B. The Causal Model and the Community Model:
Basic Features and Optimal Conditions*

The two models described in the last section do not operate independently; in some ways they reinforce, and in some ways they clash with each other. Before we can appreciate the ways in which that interaction shapes the actual practice, doctrine, and theory of tort law, however, we must examine more closely the features of each model. Although the three elements of each model¹⁴⁹ cannot dictate all dimensions of tort practice, doctrine, and theory within its bounds, they do establish certain optimal parameters for the operation of each model and also suggest certain areas of tension within the model. This section identifies the optimal parameters and irresolvable tensions of each model in theory and then compares the predicted results with our actual experience of torts.

*1. The Causal Model: Joining Allocational Process
with Causal Act*

The outer boundaries of the causal model stake out far more territory than any tort system has ever occupied. The reason that actual tort systems have never reached their theoretical potential is that the interplay of loss allocation, adjudicatory process, and causal act do suggest certain optimal conditions that effectively rein in the causal model's territorial ambitions.

There are four optimal conditions associated with a causal model. The first is a relatively high degree of formal analysis. By its nature, the causal model is formal: It focuses on two "objective" facts (loss and causal act) and a process that is norm-bound and deductive. Although the intuitive dimensions of law-finding and fact-finding admittedly temper the model's formalism,¹⁵⁰ a system built around objective facts and norms is uncomfortable with intuitive, relativistic, policy-oriented solutions to loss allocation. In order to avoid this potential misfortune, the model is likely to turn within itself and attempt to tease out from facts that are objective and unchanging—loss and causal act—norms that are equally neutral and immutable.¹⁵¹ From those norms, further norms can be developed and

149. The three elements of the causal model are loss allocation, adjudicatory process, and causal act. The three elements of the community model are loss allocation, adjudicatory process, and community values. See *supra* notes 111-12 and accompanying text.

150. See *supra* note 134.

151. For a more general, normative defense of this methodology, see Weinrib, *supra* note

hardened. Through this process of repetition and refinement, the model controls and marginalizes the intuitive, experiential dimensions of the adjudicatory process.

Second, the formal limits that are likely to arise in the causal model will ideally be manifested in the terms "loss," "causation," and "act." These are the objective, knowable dimensions of a model that attempt to solve problems through application of an inner consistency rather than through appeals to belief or intuition. Furthermore, the limits imposed on these terms should optimally avoid moral judgments, for a moral methodology threatens the neutrality and immutability of the model's limits by including dimensions external to the objective parameters of the model.¹⁵² Thus, the model should couch itself in neutral, "black-and-white" propositions such as "Torts does not recognize economic loss" or "A defendant is liable for injuries directly caused."¹⁵³ Rules are clearly stated and easily applied.¹⁵⁴ Factual determinations are kept to a minimum. When facts are needed to determine liability issues, they should be historical and objective rather than predictive and judgmental; after all, the model is geared to retroactive analysis of an historical event ("Did A cause B's loss?"), rather than prospective estimation of future consequences

34.

152. This statement may seem counterintuitive, since moral judgments often partake of the same formal quality that I ascribe to the causal model. Indeed, in a society that is highly moralistic in tone and generally sympathetic with the causal model's view that loss allocation follows causal action, people might observe no difference between the neutral rules of law and their moral beliefs. As people pull away from a monolithic moral compass, however, the gap between qualitative moral judgments for loss reallocation and flat neutral rules that cause an occasionally unjust allocation of loss becomes visible. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 1 (1987) (noting distinction between "formal" and "substantive" reasoning in law and describing use of moral considerations as type of substantive, rather than formal, reasoning). If the causal model chooses to hold onto its formal rules, as its elements naturally encourage it to do, the model cannot stake its rules on the shifting sands of morality. For the classic argument that torts must stake itself on neutral principles rather than on individual moral justice, see HOLMES, *supra* note 2, at 107-11.

153. Simple and natural methods of control would be to impose objective, direct limitations on causation, as Epstein's causal paradigms attempted to do, see Epstein, *supra* note 24, or to specify the acts for which liability attaches and those which can be done with impunity, as Fletcher's model of reciprocity attempted to do, see Fletcher, *supra* note 28.

154. Thus, the model prefers the statement "When a defendant runs a red light, she is liable for injuries caused" to the statement "When a defendant fails to drive with reasonable care, she is liable for injuries caused." See HOLMES, *supra* note 2, at 111-13, 121-29.

("What is the effect of this rule on social interactions?"). Likewise, the loss that the defendant actually caused correlates precisely with the damage award. Little room remains for contentions that tort liability should depend on the faulty quality of the defendant's action, on notions of good policy, or on a factfinder's particularistic assessment of appropriate loss allocation under the totality of the circumstances.

Third, the causal model works best in conjunction with a highly structured codal system, in which the legal consequences of action are well described in advance of the defendant's act. The obvious advantage of such an approach is that it best assures fidelity to norm and discourages resort to intuition. Although the development of specific codes may be a desirable method of achieving this result,¹⁵⁵ a common law method of case-by-case adjudication with a high degree of adherence to precedent adequately satisfies this aspect of the causal model.¹⁵⁶

Fourth, the model works optimally with certain procedural protections that protect the neutrality and immutability of its principles. In order to prevent the unaccountability of ad hoc case-by-case determinations, the model prefers that the pronouncement of norms be controlled by a relatively small cadre of individuals rather than by widely dispersed decision makers.¹⁵⁷ The same cadre would ideally find the facts and apply the proper norms to the facts, although entrusting the fact-finding and law-applying functions to other entities would be acceptable as long as strict review assured conformity with established norms. The critical importance of accurate findings on loss, causation, and act also suggests that factual determinations regarding these elements be made by those with personal experience of them. For instance, questions of causation in a medical context would ideally be made by dispassionate and objective physicians; the use of lawyers or lay persons inevitably risks the introduction of noncausal notions of responsibility into a clinical inquiry. When experi-

155. Codal principles for loss reallocation are typical in civil law countries. The level of generality of the principles, and hence the need for subsequent interstitial interpretation, vary greatly among codes. See VON MEHREN & GORDLEY, *supra* note 116, at 555-66.

156. For the argument that common law adjudication is not necessarily impermissible as a means of developing and applying norms, see Fuller, *supra* note 100, at 372-81. Indeed, even those jurisdictions that adopt codes cannot provide for every circumstance of loss allocation (at least if that code is not to proceed in a meat-ax fashion), so that a certain amount of case-by-case "working out" of the codal principles for loss allocation can be anticipated.

157. See WHITE, *supra* note 1, at 58 (noting that legal scientists of late nineteenth century saw "the subversive effect of jury determinations on the theoretical integrity of Torts").

enced observers are unavailable, the causal model would prefer that the model not act at all rather than risk a verdict that exceeds the objective facts.¹⁵⁸

Of course, the causal model will never attain every detail of its optimal features. The intuitive nature of law-finding and fact-finding and the need to strike a balance between the plaintiff's right to loss reallocation and the defendant's right to act brake the free-fall into formal analysis. So does the inability to tease many concrete norms out of "loss" and "causal act," which are the only foundational elements of the model.¹⁵⁹ Nonetheless, these optimal features are important. They seek to set the model on a course toward a hierarchically controlled, highly deductive, and substantively and procedurally strait-jacketed system of torts in which values, situational judgments, and discretionary standards are eliminated.

158. This statement implies that a causal model would insist on a very high burden of proof on the objective facts of loss, cause, and act. Counteracting that tendency would be an adjudicatory system's broad preference (in our society at least) for a "more likely than not" standard and the due process concerns that a higher standard would entail. In addition, the desire not to allow defendants to escape the consequences of their actions and the model's balance between the defendant's act and the plaintiff's loss, *see* Weinrib, *supra* note 38, at 511, also pull the model back from an unduly stringent burden of proof. A possible, albeit not necessary, compromise is the use of lay decision makers assisted by expert testimony when expert experience is important. That result, of course, conforms to the American experience. *See, e.g.,* Boburka v. Adcock, 979 F.2d 424 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2933 (1993).

159. Ernest Weinrib has attempted to construct the essential structure of a negligence system from these two elements. *See* Weinrib, *supra* note 38, at 511-24. Although a complete critique of Weinrib's important effort is beyond the scope of this Article, a short example might suggest the flaw in Weinrib's theory. Consider a hypothetical tort system in which plaintiffs recovered for torts committed in odd months and defendants escaped liability for torts committed in even months. That system would also provide an accommodation of the interests of plaintiffs in recovery and of defendants in action. So, for that matter, does a strict liability system with severely constricted notions of proximate cause. Neither of these alternatives can be excluded by the objective facts of loss and causal act. *See* Epstein, *supra* note 34, at 663-64 (suggesting similar critique).

Moreover, negligence partakes of a certain moral quality; it is in essence a judgment of fault. But formal analysis resists the appeal to concepts external to itself. *See* Weinrib, *supra* note 34, at 953-57; *supra* notes 150-54 and accompanying text. Far more consistent with the tension between causal act and loss are the models of Epstein and Fletcher, both of whom avoid uncertain judgments of the *quality* of an act by establishing certain acts for which there is absolute liability and certain acts for which there is no liability; these latter approaches more easily lead to the pigeonholing of claims and reduce the discretion of factfinders. Hence, Weinrib's claim that negligence is an element logically derivable from the accommodation between plaintiff's loss and defendant's right to act is dubious at best.

In its broad essence, the model validates nearly all of our experience of torts, for in all but a few instances, tort theory, doctrine, and practice concern situations in which causation provides the basis on which to reallocate loss. The strongest, most resonant claim in any plaintiff's case is "Defendant hurt me"; the strongest defense, outstripping even "It was not my fault," is "I did not do it." Proof of causation—of increased risk and the defendant's association with that risk—is not only necessary to satisfy theorists and doctrinally attentive judges, but is also a critical tool of practical persuasion.

Nonetheless, the immediate problem of this model, in both its essential and its optimal features, is its failure to reflect accurately our entire experience of torts. As we shall soon see, there are a few instances in which a causal act is not an essential criterion of tort liability.¹⁶⁰ Furthermore, when the optimal is teased out from the essential, the dissonance between the causal model and our experience of torts becomes patent. Although torts has historically had and continues to enjoy a certain formal flair in theory,¹⁶¹ doctrine,¹⁶² and even practice,¹⁶³ torts also deviates from

160. See *infra* notes 167-79 and accompanying text.

161. For an historical treatment of formal thought in torts, see WHITE, *supra* note 1, at 4-8, 37-41, 56-62. For more modern formal theorists, see, e.g., Epstein, *supra* note 24; Fletcher, *supra* note 28; Weinrib, *supra* note 38.

162. Many tort decisions simply purport to apply existing doctrinal principles without either questioning the continued validity of those principles or asking what policy justifications or goals are served by the extension of the principles to new circumstances. Admittedly, we find few of these cases discussed in leading casebooks and treatises, which often select cases precisely because of their nonformal insights and then edit out whatever formal (and often lengthy) discussion of precedent they contain. Nonetheless, anyone who reads the mine run of tort decisions cannot help but notice the rote application of precedent that occurs in most cases. See Jay Tidmarsh, *Tort Law: The Languages of Duty*, 25 IND. L. REV. 1419 (1992) (noting unwillingness of Indiana state courts to change pat duty analysis in light of Indiana Supreme Court's development of new test for duty).

163. Here, I must rely primarily on my own observations in years of tort practice. In their briefs and arguments, practitioners often avoid any discussion of policy, preferring instead to recite the formal doctrinal lessons of precedent and to dissemble any strategic or policy objectives. Whatever the precise cause of the practitioner's attempt to reduce everything to rule, formal analysis in legal thought is endemic. See, e.g., *Martin v United States*, 984 F.2d 1033, 1038 (9th Cir. 1993) (noting that "[n]either party addresses the public policy considerations which inform the court's analysis of whether to impose liability for negligently caused emotional distress"; court itself then ducked issue). The same formalism is evident among jurors who conscientiously attempt to apply jury instructions to the facts of the case without questioning the instructions' wisdom or the biases that prevent objective assessment of facts.

the model's optimal features in significant ways. Some—indeed, most—tort theorists reject a strictly formal methodology.¹⁶⁴ Tort doctrine, especially in the areas of negligence and proximate cause, embraces discretionary, situational judgments; even its duty analysis often engages in efforts to fashion appropriate prospective behavior.¹⁶⁵ Tort practice, with its appeals to the factfinder's sympathy and occasionally to the lawfinder's sense of good policy, often runs counter to the causal model's direction.

Faced with the reality that the outer boundaries of the causal model capture nearly all of torts, it is tempting to do what Holmes, Posner, and Weinrib have also done in similar circumstances: to ignore the few real-world deviations.¹⁶⁶ Alternatively, we could pass the exceptions off as specific, limited models that appear like warts on the outer bubble of the causal model. Adopting either approach, however, loses sight of the strong resistance in torts, even among cases that fit within the outer boundaries of the causal model, to the model's implications for an optimal tort system. That resistance suggests that something else must compete with the causal model—and not merely at the margins. Rather, it must wrestle with the causal model for tort law's very soul.

I have already identified that "something else" as the community model. In order for my claim to be correct, the community model must explain two issues left unanswered by the causal approach: Its outer boundaries must envelope the exceptions in tort law and practice to the causal model, and its optimal features must justify tort law's resistance to the causal model's hierarchical, formal nature.

2. *The Community Model. Joining Allocational Process with Societal Norms*

Two recurring problems in torts fall outside of the boundaries of the causal model. The first is the situation—notably the failure to effect some easy rescues,¹⁶⁷ the failure to make natural conditions on the property safe

164. See, e.g., sources cited *supra* notes 7-10, 30-31; sources cited *infra* notes 218-22.

165. See, e.g., *Bily v. Arthur Young & Co.*, 834 P.2d 745, 761 (Cal. 1992); PROSSER & KEETON, *supra* note 30, § 53, at 358 (recognizing that "'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

166. See *supra* notes 74-82 and accompanying text.

167. See PROSSER & KEETON, *supra* note 30, § 56, at 375-77 (discussing traditional duty

for others,¹⁶⁸ the failure to remove defamatory material,¹⁶⁹ and the failure to disclose certain information in business transactions¹⁷⁰—in which a plaintiff's loss is allocated to a defendant even though the defendant has done no act that increased plaintiff's risk of injury.¹⁷¹ The second is the situation in which the defendant is forced to bear the loss even though the evidence fails to prove that the plaintiff's injury is associated with the defendant's conduct.¹⁷² For instance, the decisions in "sufficient cause" cases like *Kingston v Chicago & North West Railway*,¹⁷³ *Summers v Tice*,¹⁷⁴ and *Sindell v Abbot Laboratories*¹⁷⁵ could, in theory at least, be interpreted to allow recovery even in the absence of an association with defendant's risky conduct. In reality, however, these cases merely shifted the burden of proof to the defendant to disprove the association between the defendant's risky conduct and the plaintiff's injury, which is a permissible,

of rescue imposed on carriers, innkeepers, and ships). The circle of these actionable relationships continues to expand. *Id.* (discussing extension of duty to property owners, jailers, schools, and perhaps family members). See also Weinrib, *supra* note 26 (advocating general duty of easy rescue).

168. See, e.g., *Husovsky v. United States*, 590 F.2d 944 (D.C. Cir. 1978); *Valinet v Eskew*, 574 N.E.2d 283 (Ind. 1991); *Taylor v. Olsen*, 578 P.2d 779 (Or. 1978); RESTATEMENT, *supra* note 12, § 363; see also *id.* § 364(c) (imposing duty on landowner to remove dangerous conditions placed on property without landowner's consent).

169. See *Heller v. Bianco*, 244 P.2d 757 (Cal. Ct. App. 1952); RESTATEMENT, *supra* note 12, § 577(2).

170. See *Ollerman v O'Rourke Co.*, 288 N.W.2d 95 (Wis. 1980); RESTATEMENT, *supra* note 12, §§ 353, 358, 551.

171. Some, but not all, of these obligations can be justified as contract actions masquerading as tort claims. In other cases, however, there is no pre-existing contractual relationship. If these claims are to be subsumed by torts, there must be a model other than the causal one.

172. Admittedly, some cases have also gone the plaintiff's way on thin evidence of increased risk. See, e.g., *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); *Oxendine v Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986); *Daly v. Bergstedt*, 126 N.W.2d 242 (Minn. 1964). Nevertheless, that issue, on which the burden and quantum of proof become the critical questions, see *supra* note 158, is distinct from the issue presented here: the allowance of recovery when there is no evidence that the defendant's actions increased the risk.

173. 211 N.W. 913 (Wis. 1927).

174. 199 P.2d 1 (Cal. 1948).

175. 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980). For reasons discussed *infra* notes 290, 331, 348 and accompanying text, I do not believe that *Sindell* itself lies within the community model. I include it here because its approach is consistent with the community model's focus on wrongdoing, even if its facts are not.

albeit disfavored, tactic of the causal model;¹⁷⁶ thus, their results are consistent with the broad parameters of the causal model.¹⁷⁷ Nonetheless, some commentators¹⁷⁸ and at least one case¹⁷⁹ have gone well beyond the causal model to permit the imposition of liability against defendants who, having so increased the risk that they can be deemed a sufficient cause, can nonetheless demonstrate conclusively that their conduct did not materialize in harm to this plaintiff (i.e., that they were not a necessary cause).

Both groups of circumstances can be explained within a community model. Although other social communities might disagree,¹⁸⁰ our own

176. Although the necessary elements of the causal model do not determine the level of proof required for a causal association, *see supra* note 158, the causal model's optimal preference for a fairly high standard of proof, as well as its disfavor of particularistic and nonneutral rules, *see supra* notes 150-58 and accompanying text, makes the causal model clearly uncomfortable with the burden-shifting approach.

177. *See supra* note 137

178. *See* Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV L. REV. 851 (1984); Schroeder, *supra* note 113.

179. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y.), *cert. denied*, 493 U.S. 944 (1989). The problems of *Hymowitz* are considered further *infra* notes 336-43, 348 and accompanying text.

Unlike a market share case such as *Hymowitz*, "enterprise liability" cases pose no explanatory problems for the causal model. These cases, best represented by *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), permit loss reallocation to defendants that developed industry-wide standards for their products through a trade association. Although there may be no evidence that a particular defendant's product caused the injury, the act of participation in designing the standards for the product is a sufficient causal act to satisfy the terms of the causal model. Moreover, *Hall's* use of a burden-shifting device, which allows a defendant's individual exculpation on a showing of lack of causal association, brings the case easily within the causal model. *See supra* note 176 and accompanying text.

180. Some communities might so value the right of individual liberty that they would impose no duty to rescue. *Cf.* Epstein, *supra* note 24, at 198-200 (justifying no duty to rescue rule on libertarian grounds). Others might find a failure to rescue so abhorrent that they would demand loss reallocation on terms even broader than those of the common law. *See* Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW* 91, 111-15 (James M. Ratcliffe ed., 1966) (discussing European civil codes that arguably impose civil liability for failure to rescue); *cf. id.* at 91-110 (discussing criminal liability in European codes for failure to rescue). *See generally* F.J.M. Feldbrugge, *A Comparative Study of Criminal Law Provisions Concerning the Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966) (comparing criminal codes of 22 European, Asian, and African countries regarding duty to rescue).

communal norms recoil at the idea that a defendant in a close relationship with a plaintiff and with the easy power to prevent injury would walk away from the plaintiff's peril.¹⁸¹ As a community, we have not yet adopted the view that we owe an obligation of rescue to strangers,¹⁸² but we are willing to condemn the failure of those who have control of and opportunity to use the means of rescue to aid a hapless victim whom they know. Parents must rescue children and ships must rescue sailors because, in our view, the bonds of family or employment demand a rescue. The duty to correct certain natural conditions on the land reflects our evolving sense of appropriate behavior as we shift from an agrarian society largely powerless to correct nature's defects to an urban environment in which cherry pickers and chainsaws make correction an easy task and home insurance washes away whatever lingering doubts we might have about forcing property owners to act. Although they may change again tomorrow, our sensibilities today tell us that these types of defendants deserve to pay.

The same intuitive sense of a wrong demanding correction inhabits the sufficient cause cases. Two of the paradigmatic sufficient cause cases—*Kingston* and *Summers*—justify their results largely in the language of fault; the burden shifts to the negligent fire-setter in *Kingston* because an opposite conclusion "would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer"¹⁸³ and to the trigger-happy hunters in *Summers* because "[t]hey are both wrongdoers—both negligent toward plaintiff."¹⁸⁴ The same is true of enterprise and market share theories of

181. See, e.g., *Hutchinson v. Dickie*, 162 F.2d 103, 106 (6th Cir. 1947) (holding that failure of host to attempt to rescue guest who had fallen off yacht was "shocking to humanitarian considerations and the commonly accepted code of social conduct"); Ames, *supra* note 26, at 110-13; Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 316 (1908). See generally Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972); Warren A. Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960); Weinrib, *supra* note 26.

182. Cf. Antony M. Honore, *Law, Morals and Rescue*, in *THE GOOD SAMARITAN AND THE LAW*, *supra* note 180, at 225, 227-28 (questioning whether society has shared community values on matters of rescue); Hans Zeisel, *An International Experiment on the Effects of a Good Samaritan Law*, in *THE GOOD SAMARITAN AND THE LAW*, *supra* note 180, at 209, 210 (describing survey in which 92% of Americans believed law should not require non-rescuer to pay for stranger's damage); 37 *Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964, at 1 (describing failure of three dozen neighbors to call police during murder of Catherine Genovese).

183. *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913, 915 (Wis. 1927).

184. *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948). *Summers* also offers as a reason the

recovery of *Hall v. E.I. DuPont de Nemours & Co.*¹⁸⁵ and *Sindell*, which similarly allocate the burden of loss "as between an innocent plaintiff and a negligent defendant."¹⁸⁶

Of course, the community model has the power to explain far more than the odd cases left out of the causal model. On the level of theory, it explains the policy-oriented, often pragmatic approaches of a wide variety of scholars who, for all their differences, share the view that torts should establish rules and practices that best advance the community's interests.¹⁸⁷ On the level of doctrine, the community model readily explains the long endurance and widespread existence of negligent and intentional (i.e., fault-based) torts, as well as the use of open-ended, value-infused concepts like "the reasonable person" to determine liability.¹⁸⁸ It explains the historical contractions and expansions of defendants' duties of care¹⁸⁹ and justifies culturally disparate doctrines and outcomes for similar occurrences of loss. It can even explain certain instances of strict liability, once we understand that the typical form of a strict liability rule ("When you do Act X, you are strictly liable") can simply be a generalized expression of the community's

defendants' better position to offer evidence, *see id.*, which implicitly suggests that defendants would otherwise have an incentive to conspire among themselves to suppress information. Because we view perjury and suppression of truth in legal proceedings to be contrary to our social norms, this independent form of wrongdoing confirms the appropriateness of the *Summers* rule.

185. 345 F Supp. 353 (E.D.N.Y. 1972). For a discussion of *Hall v. E.I. DuPont de Nemours & Co.*, 345 F Supp. 353 (E.D.N.Y. 1972), *see supra* note 179.

186. *Sindell v. Abbot Lab.*, 607 P.2d 924, 936 (Cal.), *cert. denied*, 449 U.S. 912 (1980); *see also Hall*, 345 F Supp. at 371 (developing theory of enterprise liability in part in order "to avoid denying recovery to an innocent injured plaintiff because proof of causation may be within defendants' control or entirely unavailable").

187. *See Smith*, *supra* note 38, at 420-23 (describing pragmatism as effort to promote greatest social good). *See generally Smith*, *supra* note 8 (arguing that torts should be seen as system that resolves disputes in accord with social norms). Some of these scholars work within the already accepted social norms; others attempt to influence and sometimes reshape those norms. *Compare PROSSER & KEETON*, *supra* note 30, § 4 (describing generally accepted goals of tort system) with *Abel*, *supra* note 9 (seeking to reorient tort system away from protection of present distribution of wealth and property). But all begin with the assumption that we should start with the community's true interests and build toward their realization.

188. *Cf. sources cited supra* note 2 (discussing long-standing use of negligence principles in Anglo-American and other cultures).

189. *See, e.g., Robert L. Rabin, The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) (discussing gradual expansion of fault principles and decreased emphasis on duty analysis during last century).

judgment that Act X is so inherently wrong that merely performing the act is grounds for loss reallocation.¹⁹⁰ Finally, the community model justifies our usual insistence on proof of causation, for our society, in most instances, recoils at the notion of loss reallocation in the absence of a causal link between plaintiff and defendant.

The descriptive power of the community model is even greater in the area of tort practice. The community model validates the use of lay decision makers who may lack knowledge of the specific conduct at issue, but bring the community's values to the courtroom. It explains the trial lawyer's strong emphasis on fault, or lack thereof, even when available theories of strict liability obviate the need for proof of fault. The model further accounts for lawyers' anecdotal claims that juries do not always decide strictly in accordance with the "law,"¹⁹¹ that theoretically separate issues of causation and amount of damage are often influenced by the defendant's fault (or lack thereof),¹⁹² and that appeals to shared values, emotion, and intuition are critical persuasive tools.¹⁹³ Rather than finding

190. See COLEMAN, *supra* note 14, at 368-69. This may have been the import of Lord Cairns's famous statement that strict liability is appropriate when a defendant makes a "non-natural use" of his or her land. *Rylands v Fletcher*, 3 L.R.-E. & I. App. 330, 339 (1868). Although the meaning of the term is not entirely clear, a "non-natural use" could be understood as an activity whose injurious consequences the community refuses to tolerate under any circumstances. See RESTATEMENT, *supra* note 12, § 520(e), (f) (stating that two factors in classifying activity as abnormally dangerous are "inappropriateness of the activity to the place where it is carried on" and "extent to which [the activity's] value to the community is outweighed by its dangerous attributes"). But not all strict liability rules can be justified on the basis of the community's hostility to opprobrious conduct. For instance, the community might be so unfamiliar with the defendant's activity that it has not yet formed a communal judgment about its appropriateness. Similarly, strict liability can be used when the community, although having had sufficient opportunity to observe an activity, has failed to develop a consensus about its propriety. Both possibilities suggest quite a different meaning for the term "non-natural use." For further consideration of these forms of strict liability and of the meaning of "non-natural use," see *infra* notes 317-30 and accompanying text.

191. See *Simblest v. Maynard*, 427 F.2d 1, 2 (2d Cir. 1970) (calling jury's verdict for elderly plaintiff instance of "Vermont justice" that was not justified under existing law).

192. See *In re Bendectin Litig.*, 857 F.2d 290, 306-20 (6th Cir. 1988) (recognizing but rejecting plaintiff's claim that trial limited to factual causation but not fault issues violated due process because of its sterile trial atmosphere), *cert. denied*, 488 U.S. 1006 (1989); Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989) (finding that bifurcation of liability and damages phases of trial resulted in significant increase in defense verdicts, while aggregation of claims resulted in more plaintiffs' verdicts).

193. See JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY* 29-83 (1979).

the adjudicatory process a necessary evil fraught with possibility for error and thus in need of tight regulation, the community model embraces a process that avoids obeisance to slavish rule.

Indeed, the community model is as pragmatic as the causal model is formal. Like the causal model, however, the community model has certain features that optimally advance its nature. First, loosely textured, discretionary rules that impose liability based upon violations of community norms can be expected. The existence of any duty (other than the tautological duty not to violate community norms) is problematic,¹⁹⁴ and the relevance of causation hinges entirely on the extent to which the community is willing to accept liability without causation. The community's sense of fairness provides the basis from which to measure damages, so that identical injuries are not necessarily expected to receive identical compensation; supercompensatory or undercompensatory damages can be anticipated.

Second, although necessarily—indeed, gleefully—indeterminate in most of its specifics, legal analysis under the model possesses both pragmatic and moralistic qualities at various times. Often the debate is pragmatic because the nature of most communities' reaction to loss is to judge wrongdoing situationally and experientially and to weigh the perceived risks of conduct against the expected utility.¹⁹⁵ Yet the debate can be moralistic because communities—especially traditional communities—often clothe their particular sense of wrongdoing with the aura of a universal code of conduct.¹⁹⁶ In reality, of course, the community cannot hold to its code for long, for each generation of the community must remain free to re-examine pragmatically the lessons of the past and apply them to the problems of the present and future. Thus, at any given moment, the arguments about wrongdoing may project moral certitude and outrage. Two generations later, the moralistic tone of legal analysis may not have changed, but the theories, rules, and practices may well have changed.

194. Cf. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (rejecting old invitee-licensee-trespasser classifications in favor of generalized duty of due care under circumstances); *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883) (Brett, M.R.) (contending that defendants should have universal duty of due care); Rabin, *supra* note 189 (describing twentieth-century retreat of "no duty" rules in favor of duty of due care).

195. See Smith, *supra* note 38, at 423; Wells, *supra* note 8, at 2353-54.

196. This tendency to universal norms is reinforced by the norm-bound nature of the adjudicatory process. See *supra* note 134 and accompanying text.

A third optimal feature of the community model is the existence of a highly cohesive society in which few disagreements about the values that inform loss allocation arise. Obviously, when the community has insufficient experience of a defendant's conduct or else its views about that conduct are in a state of flux, the community model functions poorly, if at all. Although a "consensus" outcome can sometimes be forged among "nondominant" groups,¹⁹⁷ that result will not always occur. Therefore, the community should optimally enjoy a homogeneity of background and experience, and the society should be relatively stable in the sense that new experiences and ideological challenges to dominant modes of thought should either be kept to a minimum or at least be capable of immediate comprehension for a quick, communal decision about their assimilation or rejection.¹⁹⁸

Fourth, certain procedural features best advance the aims of the community model. The lawfinder and the factfinder should be members of the community whose values inform the allocational decision. In a democracy, in which the entire community participates in the community's direction, the lawfinder and factfinder should be chosen from the community's dominant group;¹⁹⁹ in an aristocracy, in which the community has agreed to defer to the values of an elite,²⁰⁰ the decision maker should come from the elite. The role of postverdict or appellate review should be insubstantial, limiting itself to a check that the decision maker gave effect to the community's norms. Finally, we should expect an ambivalent attitude about precedent. The pragmatism inherent in the community model cannot discard the accumulated wisdom (or folly)

197 On the ability of divergent subgroups nonetheless to form cohesive community values on some issues, see *supra* notes 147-48 and accompanying text.

198. This optimal feature reinforces the moralistic quality of tort discussion and simultaneously reduces the need to resort to constant reexamination of established principles and practices.

199. It is, of course, possible to draw the decision maker from a nondominant group on the understanding that she will represent the values of the dominant community group. But the risks of such an approach are obvious and thus nonoptimal.

At this point it should be evident that the use of the values of the dominant group raises serious problems of underrepresentation and even repression of minority value systems. The normative dimensions of the problem are considered *infra* note 391 and accompanying text. For now it is enough to note that the model's strong preference for a cohesive community modulates these concerns to some extent.

200. On the legitimacy of this choice, see *supra* note 148 and accompanying text.

reflected in precedent. On the other hand, precedent threatens to transform open-textured standards into increasingly rigid rules of conduct out of touch with the sensibilities that initially motivated them. Hence, there is an acceptance of precedent for the lessons that it provides, but a distrust of its power to maintain outmoded judgments of appropriate behavior.²⁰¹

Just as it reflects some elements of the causal model, the American tort system partially reflects the broad essence and the optimal features of the community model. For the types of injuries that comprise the bulk of tort practice—car accidents and premises liability—there is widespread knowledge of and opportunity to form opinions about the proper (and improper) methods of driving and of keeping property reasonably safe.²⁰² In these areas, the view that improper conduct causing injuries requires compensation and that proper conduct causing injuries does not is also widespread. An amorphous negligence standard, the movement toward a generalized duty of care, and the limited nature of appellate review into and precedential effect of a negligence finding also reflect optimal features of the community model. Moreover, because our country professes to determine community values by referring to the will of all citizens rather than to the values of a ruling elite, the community model supports the American use of lay juries.

Like the causal model, however, the community model cannot justify significant aspects of tort law and practice. To the extent that duty rules

201. Perhaps the best demonstration of this ambivalence is a pair of opinions by Holmes and Cardozo. In *Baltimore & O. R.R. v Goodman*, 275 U.S. 66 (1927), Holmes held that a plaintiff who failed to stop, look, and listen at a railroad crossing was guilty of contributory negligence as a matter of law. Apparently confident that "[a] judge who has long sat at *in prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury," HOLMES, *supra* note 2, at 124, Holmes thought that the standard of appropriate conduct was sufficiently "clear [that] it should be laid down once and for all by the Courts." *Goodman*, 275 U.S. at 70.

A scant seven years later, *Goodman* was gone. In *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934), Cardozo cautioned against the use of legal standards that are "not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without." *Id.* at 105. The issue of contributory negligence at the crossing was returned to the jury.

202. The same sense of wrongfulness operates for other, albeit less frequent, types of conduct, such as supplying chattels to a neighbor, warning of dangers associated with everyday activities, punching people in the nose, and taking another's property

conflict with the community's norms, the persistence of the duty issue is problematic.²⁰³ The movement to turn fault into an efficiency inquiry finds little justification in a society in which efficiency has not been demonstrated to be a primordial value.²⁰⁴ The nearly universal insistence on causation and the limitation of damages to those which recompense actual losses are not always compatible with the desires of the community model, and the reversal of verdicts against faulty actors on the grounds of no duty, no causation, or excessive damages suggests that these rules have a permanence that resists notions of community justice. Similarly, the community model has significant difficulty explaining tort law's adherence to, and even expansion of, strict liability concepts in recent years.²⁰⁵

A more telling critique of the community model is the failure of community values in significant and volatile areas of torts. The community simply lacks the widespread knowledge of (and thus ability to form opinions about) conduct such as proper medical treatment, appropriate

203. It is so problematic, in fact, that there have been occasional calls for its elimination or drastic overhaul. *See, e.g.,* Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326 (Or. 1987); RESTATEMENT, *supra* note 12, § 281 (not listing duty as element of negligence claim); GREEN, *supra* note 4, at 150-52. Although torts has expanded the scope of actionable duties in response to these concerns, *see* Rabin, *supra* note 189, torts has for the most part resisted the effort to eliminate or streamline the duty question. *See* Tidmarsh, *supra* note 162.

204. My claim here is minimal. First, there is little doubt that tort theory and doctrine have been influenced to a considerable degree by the efficiency analysis of the law and economics movement. *See generally* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 53-54 (1992) (discussing influence of law and economics movement on legal academy). Second, I am unpersuaded that the community's norms value efficiency as highly as the adherents of law and economics do. *See, e.g.,* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. 1981) (allowing assessment of significant compensatory and punitive damages against product manufacturer whose Hand Formula calculation led it not to provide additional safety precautions). To the extent that the law and economics literature is an attempt to reshape community norms, the dissonance between theory and reality can be expected. *See infra* note 346 and accompanying text. At the same time, however, its prominence in doctrinal analysis and its consequent effect on legal rules is out of proportion to the community's sensibilities, for which efficiency is merely one value among several in making loss allocation decisions. Consequently, the recent popularity of economic analysis in American tort law cannot be entirely explained by the community model.

In making this claim, I do not suggest that the community model is necessarily inconsistent with efficiency. In a society of rational wealth maximizers, the two would correlate perfectly.

205. *See* RESTATEMENT, *supra* note 12, §§ 519-520 (prescribing strict liability for abnormally dangerous activities); PROSSER & KEETON, *supra* note 30, § 78, at 548-56 (describing increasing acceptance of *Rylands's* strict liability rule in American jurisdictions).

product design, or the handling of novel dangers. Even in more routine cases in which a significant opportunity exists to form opinions about conduct, the community's values may not have galvanized around a single position; consider, for instance, the widely divergent views toward trespassers on land,²⁰⁶ the duty to effect an easy rescue of a stranger,²⁰⁷ the obligation to compensate the sufferer of a foreseeable and statistically expectable injury,²⁰⁸ and the need to repay a property owner for damage caused by circumstances beyond the injurer's control.²⁰⁹

The community model lacks the power to prescribe the results in areas of doctrine or practice in which community values do not provide the rule for decision. Like the causal model, therefore, it is a useful model upon which a system of tort law could be built and upon which much of our system has been built. Like the causal model, however, it does not describe all of our present experience of torts.

3. Summary

Two points about the community model and the causal model should now be apparent. The first is that at their broadest boundaries, they can, between them, capture the full breadth of tort theory, doctrine, practice, and history. The second is that each model is not entirely neutral about the way in which it prefers to "do torts."

The causal model ultimately descends from formal theory. The causal showing is foundational; it admits of no exception and it refuses to bend

206. Compare *DiGildo v. Caponi*, 247 N.E.2d 732 (Ohio 1969) (retaining separate categories of duties owed to trespassers, licensees, and invitees) with *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972) (retaining common law rule of limited liability only for trespassers) and *Prigden v. Boston Hous. Auth.*, 308 N.E.2d 467 (Mass. 1974) (extending general duty of care to trespassers).

207. Compare *Epstein*, *supra* note 24, at 198-200 (arguing against duty of easy rescue) with *Weinrib*, *supra* note 26 (arguing for duty of easy rescue) and *Ames*, *supra* note 26, at 110-13 (same).

208. Compare *Stone v. Bolton*, 1 K.B. 201 (C.A. 1950) (Jenkins, L.J.) (imposing liability on the basis of foreseeable, albeit unlikely, injury) with *Bolton v. Stone*, 1951 App. Cas. 850 (Reid, L.J.) (appeal taken from C.A.) (rejecting foreseeability as test of negligence in favor of standard of substantial risk) and *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (suggesting that there should be no liability for foreseeable, and perhaps even likely, injuries when benefit of conduct outweighs risk of injury).

209. See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). For further discussion of *Vincent*, see *infra* notes 266-70 and accompanying text.

before the demands of utility or community sensibilities. The community model is precisely the opposite. It is political in the sense that it derives justification from the power of the community to insist on obedience to its norms of conduct. Nothing—other than the existence of a sense of communal fairness—is absolute. No rule of loss allocation is illegitimate, as long as the community can agree to it.²¹⁰

These differences play themselves out in the optimal conditions associated with each model. As a formal theory, the causal model prefers clear rules, logically derived from first principles in a neutral, objective fashion. It accepts the uncertainties of adjudication as a necessary evil that should be subject to strict, hierarchical controls and checks. On the other hand, the community model is more comfortable with indeterminacy, for adherence to rule and hierarchical control of decision-making suffocate each generation's power to reflect its sense of fairness in the tort process. If the decision makers are chosen well, the process will, by definition, yield the right result.

The dichotomy between the formal causal model and the pragmatic community model reflects itself again in the principal weaknesses of each model. For the causal model, the primary weakness is the fact that no society could countenance liability that extended to the model's outer boundaries. Because the sparse essence of the model itself cannot create, as a formal matter, any limits on causation, the causal model must resort to positive notions of restraint. Although the inherent indeterminacy of this enterprise does not necessarily offend the causal model itself, it sits poorly with the formal theory of law on which the model rests. On the other hand, indeterminacy presents no obstacle to the community model. Its immediate weakness is its inability to address the problem of loss whenever the community lacks—either because of a lack of experience or because of a lack of consensus—a sense of whether particular conduct is unfair.

The emphasis in this section, and thus far in this summary, has been on the distinctions between the two models. Nonetheless, it would be an enormous mistake to dwell too long on that issue. The two models are not

210. It would be inaccurate to associate all conceptualists with the causal model and all anti-conceptualists with the community model. Nonetheless, the optimal features of the causal model are likely to appeal more to conceptualists—especially those whose theories of liability make essentially retrospective inquiries like reciprocity, *see* Fletcher, *supra* note 28, or causal responsibility, *see* Epstein, *supra* note 24, and Weinrib, *supra* note 38. Conversely, the community model is more likely to find support among anti-conceptualists.

mutually exclusive by their nature; for instance, a car accident at the corner comfortably fits within both. The overlapping potential of the models suggests that actual tort theories, doctrines, and practices will arise from the interaction of the two models—in other words, from the models' ceaseless tug-of-war for supremacy

Hence, the initial effort at description justifies further study of the models' relationship in practice. This final step, which I undertake in the next section, is ultimately the test of the models' validity: whether the interrelationship of the two models accurately describes the basic structures and the sources of continued debate in torts.

C. Merging the Models: The Irresolvable Tensions in Torts

Because the causal model and the community model have the potential to overlap,²¹¹ the most useful way to consider the formation of actual tort systems through the interrelationship of the two models is to divide the world of torts into four areas. The first area involves the cases in which the models overlap; here, we can expect the greatest conflict between the models' contrary tendencies. The second and third areas are the places in which, respectively, only the community model operates and only the causal model operates; here, the issue is the extent to which the efforts to reconcile the conflicts in the first area spill over to areas which need not necessarily be influenced by that reconciliation. The final area lies beyond the boundaries of either model; here, tort principles are inoperative.

1 The Consequences for a Tort System with Both Models Functioning: Intentional Torts and "Classic" Negligence

When both the causal and the community models are operative, they will overlap in their coverage as long as the community views factual causation as an important norm in some cases in which the community's values require loss reallocation. In this circumstance, when neither model

211. The overlap is not necessary. First, we could conceive of a tort system in which community norms dictated that causal responsibility not only was irrelevant to loss allocation decisions, but was actually antithetical to those decisions. *See supra* note 114. Second, neither model needs to expand to its full boundaries, and each can even lie dormant. *See supra* notes 112, 115-17 and accompanying text. In both situations, no overlap would occur. The potential for overlap nonetheless suggests that the two models will influence each other even when there is no actual overlap. *See infra* notes 280, 334-35 and accompanying text.

defers to the claim of the other model to handle the issue, the overlap results in a conflict between the models' divergent approaches to loss allocation. Some accommodation of the models at all three levels of torts—theory, doctrine, and practice—is manifestly required.

A wide array of possible accommodations is possible. Because neither model has deferred, torts cannot accept all of the features of one model and reject all of the features of the other. But whether torts will look mostly like a causal model with a bit of the community model's preferences, mostly like a community model with a bit of the causal model's preferences, or like a mongrel mix of both models cannot be definitively resolved from the collision of models. Because both models are entitled to equal weight, it seems likely that they will try to reach some mid-range compromise in which each model sacrifices equally. Even this outcome leaves the field of choices wide open. Given the number of preferences associated with each model, myriad permutations of permissible accommodations remain open.

It is impossible to describe in a few pages all of the possible reconciliations at which the models might arrive. Rather, this section will focus on the critical elements of tension between the models and on the types of mid-range solutions that a tort system with two operative models is likely to reach.²¹² The section also demonstrates that the experience of American tort law mirrors the expected tensions and accommodations.

(a) *Theory* Finding middle ground at the level of theory appears impossible. The causal model is formal; the community model is pragmatic. The causal model looks backward to historical events; the community model looks forward and attempts to realize the values of society. Outcomes are determined through the application of cold logic and deduction from uncontested premises; outcomes are intuited from experi-

212. For the sake of simplicity, I have divided the discussion of the tensions and likely accommodations into the separate components of theory, doctrine, and practice. However, the models need not engage each other in conflict at all three levels. For instance, a causal model could let the community model utterly have its way on matters of practice in return for the causal model being permitted to implement its optimal features in matters of theory and doctrine. Because of the interrelationship of theory, doctrine, and practice, however, such a compromise would be unlikely, and it is not the one chosen by our own tort system.

On the other hand, more subtle compromises—such as allowing the causal model a bit of an upper hand on one aspect of theory in return for a bit more deference to the community model on a close question of practice—are likely to occur. The possibility of these trade-offs should be considered as the nature of the trade-offs in the separate areas of theory, doctrine, and practice is examined.

ence and situational judgments. Certain rules are immutable; no rule is immutable.

Although it is admittedly impossible to embrace simultaneously both the formal and the pragmatic, it is possible to find middle ground that is not entirely faithful (or entirely disloyal) to either.²¹³ For instance, different dimensions of the reasoning process in torts—particularly factfinding and lawfinding—could become associated with different theories; thus, lawfinding could become a more formal process, while factfinding could become a more intuitive process.²¹⁴ Similarly, formal theory might require adjudicatory norms more precise than "Don't do things the community believes to be wrong," but pragmatic theory could demand as compensation that the norms be chosen with at least some eye to the prospective effect of those norms on the community. Another likely accommodation is that the norms will have an apparent specificity and precision, but they will also possess an open-textured undercurrent that belies their seeming certainty. Next, the clash in models could result in legal reasoning that is inclusive of both models: It checks its outcomes both against established, formal legal principles and against the community's values.

As a final compromise, essential values of the community could be isolated and exalted to a formal status, with the result that the community values of Year X become the limiting forces on the causal model. For example, if we posit that the community generally holds dear the values of compensation, loss spreading, deterrence, and punishment, we might be able to abstract those principles from the contextual judgments that gave them life and then use them to deduce the rules under which a causal act requires loss reallocation. Obviously, resort to these prospective, policy-

213. Oh, East is East, and West is West, and never the twain shall meet,
Till Earth and Sky stand presently at God's great Judgment Seat;
But there is neither East nor West, Border, nor Breed, nor Birth,
When two strong men stand face to face, though they come from the ends
of the earth!

RUDYARD KIPLING, *The Ballad of East and West*, in RUDYARD KIPLING'S VERSE DEFINITIVE EDITION 233 (1945).

214. The converse would also be possible, but the nature of our procedural system's division of responsibilities between judges (who are professionally trained in law and accountable to the system) and juries (who are neither) suggests that it would be easier to entrust judges with a more formal role and juries with a more intuitive role. Hence, lawgiving, which is the judge's role in our system, is more formal, while factfinding, which is the jury's role, is more intuitive.

oriented concepts is somewhat disconcerting to the causal model, but the model must acknowledge that the indeterminacy of retroactive notions like "cause" and "act" ultimately requires resort to other sources.²¹⁵ As long as the causal model can harden these community predispositions into principles with the precedential power to outlast the community's fondness for them,²¹⁶ this approach, although second-best from the perspective of both models, is a fair compromise of competing concerns.

These hypothetical compromises predict with remarkable accuracy the state of American tort theory. Among American scholars, almost no one is entirely formal or entirely pragmatic. Holmes, who sought to construct the formal dimensions of a tort system from the concept of "act,"²¹⁷ also justified his structure with heavy doses of policy.²¹⁸ Epstein has injected utilitarian strains into his formal theory;²¹⁹ Posner has developed a formal theory from a utilitarian, pragmatic methodology.²²⁰ The dean of American torts, William Prosser, was fond of attempting to shape torts by distilling vast quantities of unruly cases into concrete doctrines with the texture of

215. See *supra* notes 140-41, 159 and accompanying text.

216. The reason that the values must have staying power is that if the values freely changed as the community changed, the needs of the causal model for immutable principles would receive insufficient respect. On the other hand, the needs of the community model dictate that principles truly at odds with communal norms be disposable. Hence, it is likely that the principles can be changed, but only after considerable lag time between the community's rejection of the principle and the tort system's more reluctant abandonment. Indeed, it might even take a legislative act that reflects the community's concerns to force the common law's hand.

In an optimal world, it is unlikely that the fight to replace or retain outmoded values will occur with any frequency. After all, the community model operates best in a homogenous society with little internal conflict. See *supra* notes 196-97 and accompanying text. Once selected, therefore, the fundamental principles should serve the tort system for a very long time. In this regard at least, the causal and community models share common ground.

217. See *supra* note 70 and accompanying text.

218. See HOLMES, *supra* note 2, at 78, 95-96.

219. See Epstein, *supra* note 34, at 656-57. See generally RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

220. Compare Posner, *supra* note 48, at 1667-69 (defending his theory of economic efficiency in pragmatic terms) with Smith, *supra* note 38, at 425-26 (highlighting formalist nature of Posner's work). But cf. Hayes, *supra* note 68, at 754 (criticizing Posner for his misunderstanding of scientific method).

formal rules, yet he was acutely aware of the policy orientation of the tort process.²²¹ Most scholarship and most precedent-setting judicial opinions follow in Prosser's footsteps.²²² Those of us who work in torts are, for the most part, eclectic—deducing results from precedent when the law supports us and appealing to policy when it does not.

The other predictable consequences of the theoretical clash also flower in American tort law. We have a division of function between judges and juries, with judges performing the more formal task of lawfinding and juries assigned the more intuitive task of factfinding. The law has a surface consistency—duty, breach, causation, and damage—and a set of precedents that make this structure increasingly crystalline. Yet any first-year law student knows the horrible conundrums of "duty" and the open-textured nature of terms like "intent," "negligence," and "proximate cause." Cases and pattern jury instructions ring with hierarchical absolutes, yet leave great latitude for intuition and hunch. There are rules, and there is discretion. There is *Baltimore & Ohio Rail Road v Goodman*²²³ and there is *Pokora v Wabash Railway*,²²⁴ and both are valid.

Most telling, however, is the manner in which much of the modern tort discourse is accomplished. There operates in tort law a series of principles to which many of us return to decide specific doctrinal and

221. See WHITE, *supra* note 1, at 153-63. See generally WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

222. For a few examples of scholarship that seeks to deduce rules from policy-oriented principles or else to justify the validity of the methodology, see Wells, *supra* note 8, at 2353-54 (recognizing place for legal rules within pragmatic vision of torts). See generally David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980); Joseph A. Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853 (1983); Smith, *supra* note 8. For examples of cases that attempt to deduce rules from fundamental policy premises, see *Brown v Superior Court (Abbott Lab.)*, 751 P.2d 470 (Cal. 1988); *Halphen v Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Beshada v Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982). As with any theoretical enterprise, there are some who stand outside the mainstream. Ernest Weinrib, for one, is an unapologetic formalist. See Weinrib, *supra* note 34; Weinrib, *supra* note 38.

223. 275 U.S. 66 (1927) (agreeing with railroad that driver involved in collision with train at crossing was contributorily negligent).

224. 292 U.S. 98 (1934) (rejecting railroad's contributory negligence defense); see *supra* note 201.

procedural issues; they are, in no particular order, cheapest cost avoider, compensation, deterrence (utility), fairness, loss spreading, and punishment.²²⁵ Our methodology is, in a sense, formal and deductive; we accept these principles as given absolutes and attempt to extract from them specific rules and results. But the principles themselves are largely policy-oriented, and, as the relatively recent rise of the loss-spreading rationale shows,²²⁶ our notions of good policy can change. Nonetheless, once identified and elevated to a judicially cognizable level, these policies have enjoyed a staying power independent of the community's sense of their relevance to a particular issue. They become our sacred irrefutable principles of tort law. And this is exactly what the conflict between models would predict.

The operation of such a system in modern American society is likely to result in a heavy theoretical emphasis on two concepts: justice and efficiency. The reason is that both bridge the gap between the formalism of a causal model and the pragmatism of a community model in ways intuitively appealing to us. The concept of "justice" reverberates with formal notions of natural law and inalienable rights. On the other hand, "justice" can be understood in terms of community norms. Indeed, in a community that develops a natural law theory of justice to support its norms, the causal and the community components can become indistinguishable.

In a society more conscious of the relativism of its own norms, however, the difference between "justice" in the causal model's sense and "justice" in the community model's sense cannot be overlooked. Under certain circumstances, "efficiency" can then step in to fill the breach.²²⁷ The causal model can accept "efficiency" because, whatever its flaws in

225. See sources cited *supra* note 30.

226. The loss-spreading (or insurance) rationale, which inhabits much of our tort discourse today, was once considered illegitimate. See *Ryan v. New York Cent. R.R.*, 35 N.Y. 210 (1866); HOLMES, *supra* note 2, at 96. Its present popularity owes a great deal to Justice Traynor's forceful concurrence in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944), and to the pioneering work of Fleming James and others, see Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); see also WHITE, *supra* note 1, at 147-52 (describing rise of loss spreading rationale); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (same).

227 See Abel, *supra* note 9, at 794 (noting that efficiency will supplant moral arguments in liberal state).

terms of its prospective policy orientation, "efficiency" is a principle capable (in theory at least) of piercing the indeterminacy inherent in formal analysis and providing specific, scientific, demonstrably correct answers to doctrinal questions.²²⁸ The community model can also accept "efficiency" as long as the community holds wealth maximization as a central value—and as long as we are not too rigorous in its application.²²⁹ Thus, efficiency can be shared as a norm by both models, although it is likely to be embraced more at the level of theory than at the level of result.

Our recent history of tort theory, with its emphasis on justice and, to a greater extent, efficiency, again confirms the predicted consequences of the merged models. But neither justice nor efficiency is a permanent feature of the tort enterprise. Torts functioned for centuries without well-described notions of justice or efficiency, and it might well be that in the future, neither notion will bridge the gap between the causal and community models as well as some other principle that permits a degree of formal deduction, but also corresponds to widely shared sensibilities. Justice and efficiency may then slowly fade away in the same way that the distinction between trespass and case, for all its influence on the present structure of tort doctrine, has receded from memory. On the other hand, because of their influence on the present (and therefore future) shape of torts, justice and efficiency will always remain a dimension of torts subject to renewal and reinvigoration over time. The fate of justice and efficiency lies in the hands of the future, and neither notion can do anything to predetermine it.

(b) *Doctrine.* The competing methods that each model uses to place limits on its loss allocation decisions are likely to lead to a rather muddled doctrinal picture. The causal model prefers to work out those limits through its fundamental elements of "cause" and "act."²³⁰ In contrast, the community model uses the defendant's fault as the touchstone of liability.²³¹ As with theory, however, there is a middle ground on which the models can compromise.

228. Of course, the causal model must abandon efficiency if efficiency's logic suggests that causation is dispensable. See LANDES & POSNER, *supra* note 29, at 228-55 (discussing role of causation in economic theory of torts).

229. The community always reserves the right to reject the efficient result when, for sufficient reasons, it is willing to tolerate inefficiency. See *supra* note 204 and accompanying text.

230. See *supra* notes 152-54 and accompanying text.

231. See *supra* notes 180-90 and accompanying text.

We can begin with the element of causation, on which both models agree.²³² Next, the causal model is forced to accept fault (i.e., a violation of community norms) as a doctrinal limit on responsibility; to do otherwise would violate a fundamental dimension of the community model for a reason not required by a fundamental dimension of the causal model. But the causal model would obviously be displeased with this lopsided result, for the community model would have had its way entirely at some considerable expense to the optimal desires of the causal model.²³³ Hence, the causal model can be expected to demand that its preferred doctrinal limits on causal responsibility—duty and proximate causation—also operate. Because the community model cannot resist the inclusion of these limitations on fundamental grounds,²³⁴ they too are likely to become a part of the *prima facie* case. But both models can be expected to fight a rearguard action—the causal model by trying to harden communal notions of fault into clear rules and the community model by infusing the concepts of duty and proximate causation with communal notions of "fairness" and "policy."²³⁵

The same dynamic informs matters of damages and defenses. With damages, we can expect to see tension between the actual damage preference of the causal model and the sliding scale approach of the community model;²³⁶ our present system, which formally compensates for actual loss, but permits jurors (subject only to minimal judicial review) to

232. Although causation is not always an essential component of the community's norms, it is present in those areas in which the two models overlap. *See supra* notes 111-12.

233. Here, the distinction between necessary and optimal features is important. Although it prefers as an optimal matter not to rely on community values because such reliance is incompatible with its more formal nature, the causal model cannot as a logical matter exclude reliance on these values. Nonetheless, such a system deviates from the system that the causal model optimally prefers.

234. It is important to remember that just as it need not expand to the full dimensions of the causal model, torts need not expand to the full dimensions of the community model. Rather, it may choose not to permit recovery for some conduct that violates community norms.

235. More than 60 years ago, Leon Green recognized this timeless battle by suggesting that "fault" could be determined either with reference to "very accurate and precise rules" or with an instruction to the jury of "Give us your judgment." GREEN, *supra* note 4, at 161. We now can recognize in Green's choice the competing approaches of the causal and community models. As Green accurately reported, torts has for the time being steered a middle course by adopting the "reasonable person" standard. *Id.* at 161-63.

236. *See supra* text accompanying notes 154, 192.

set the precise amount of loss, is a middle-of-the-road compromise that deftly gives something to both sides. The same tension between rigid rules of duty and situational judgments of fault occurs when considering defenses and creates the same indeterminacy of outcome. Consent and assumption-of-the-risk principles partake of a more formal quality;²³⁷ contributory negligence is community-based.²³⁸ The idea that defenses should absolutely bar recovery is consistent with the hard-and-fast approach of the causal model;²³⁹ the idea that recovery is only reduced proportionally according to our sense of relative wrongdoing is consistent with the community model;²⁴⁰ the middle ground of reducing recovery until a particular point (for example, fifty percent of fault) and barring recovery thereafter is a nice, although not a necessary, compromise.²⁴¹

Through this process, the doctrinal struggle is cast. The causal model will push for more formality and more control through particularized rules on duty and proximate cause; whereas, the community model will attempt to insist on communal fault and simultaneously to subvert duty and proximate cause. The struggle is necessarily indeterminate; an infinite variety of combinations is possible.²⁴² In a system locked in perpetual struggle, the

237 These defenses are the equivalent of plaintiff-side strict liability: If you agree to the injury (or its risk), you must bear the loss. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1065 (1972). In recent years, however, assumption of the risk has increasingly tended to blend into either no duty or comparative negligence rules. See, e.g., *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992); *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90 (N.J. 1959); COLO. REV. STAT. ANN. § 13-21-111.7 (West 1989); DAN B. DOBBS, *TORTS AND COMPENSATION* 294 (2d ed. 1993). The former approach of "no duty" remains consistent with a causal model; the latter approach represents a victory of the community model.

238. Other defenses—especially self-defense, defense of person or property, and necessity—seem at present to be especially in tune with the community's accepted norms as to when one person can legitimately inflict injury on another. See also *infra* notes 269-70 and accompanying text (discussing communal grounding of necessity defense). On the other hand, insanity is a matter on which the community lacks general knowledge and thus must be resolved within the causal model. See *infra* part II.C.3. On the general parameters of these defenses, see EPSTEIN, *supra* note 2, at 28-60; PROSSER & KEETON, *supra* note 30, §§ 19-24.

239. See *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). An approach in which the plaintiff's fault was irrelevant would be equally consistent.

240. See *Brotherhood Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323 (7th Cir. 1993); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975).

241. See *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W Va. 1979); WIS. STAT. ANN. § 895.045 (West 1983).

242. One expected manifestation of the struggle would be a bit of a sliding scale among

apparent victory of one model on a particular issue is interesting primarily as a cultural and historical artifact. The losing model cannot be suppressed forever. It will carry the fight to other issues and, with sufficient analogical support on those issues, return eventually to the original battleground. The losing views may prevail the second time around, they may lose again, or some middle ground might be reached. It is all the same. With an eternity of struggle ahead, the patience to endure setbacks comes easily

Even in the midst of struggle, however, interludes of doctrinal harmony are possible. First, in a community with a highly refined code of obligations that admits of few situational exceptions, community norms will be indistinguishable from the optimally functioning causal approach. Next, even in less structured communities, both models might agree on a single principle around which to unite the disparate notions of duty, fault, and causation. As long as the principle roughly conforms to social sensibilities and also provides some ability to guide the specifics of the doctrinal inquiry, the models might compromise on the principle and bring torts into a state of apparent harmony

Although a highly structured community has not been the recent American experience, students of twentieth-century tort law will recognize two ways in which the latter approach has been used to create a state of relative peace. Both involve the effort to adopt an overarching principle to give consistency to unruly doctrine. The first principle, fashioned by Holmes and given judicial life by Cardozo, is "foreseeability"²⁴³ In recent

the elements. For instance, as our sense of defendant's wrongdoing increased, the need for a strong causal showing would weaken; as our sense of wrongdoing decreased, a stronger, more immediate causal link might be required. Our system's more expansive view of causation in the context of intentional wrongdoing, *see Vosberg v. Putney*, 50 N.W. 403, 404 (Wis. 1891), confirms this expectation. So does the widely shared belief that the defendant's wrongdoing influences the amount of damages.

243. In Holmes's view, foreseeability was the fundamental principle that could be derived from tort law's insistence on "act." HOLMES, *supra* note 2, at 90-95. Cardozo used the notion in his landmark decisions in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), and *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). *But see Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (refusing to use foreseeability principles to fashion tort of negligent misrepresentation); *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928) (in absence of privity of contract, declining to impose duty on water works whose negligence foreseeably resulted in fire damage to plaintiff's building). Following their lead, significant decisions of the latter half of our century have invoked foreseeability to abolish doctrinal limitations on recovery *See, e.g., Dillon v. Legg*, 441 P.2d 912 (Cal.

years, foreseeability has become a thread that neatly ties together the forces of duty, breach, and proximate cause: the issue of breach (negligence or intent) asks whether a defendant could foresee any injury from his or her conduct, duty asks whether the defendant could foresee injury *to this plaintiff*, and proximate cause asks whether the defendant could foresee injury *of this type*.²⁴⁴ This reconciliation is satisfying, at least to some degree, to both models. Foreseeability corresponds roughly to community norms; in abstract terms, we would generally agree with the proposition that defendants should pay for injuries they can foreseeably prevent. At the same time, it is an essentially retrospective inquiry to distinguish between causal acts for which responsibility attaches and those for which it does not.

The second principle is efficiency. As we have seen in the context of tort theory,²⁴⁵ efficiency is appealing to both models. Like foreseeability, efficiency can keep the opposing doctrinal forces of torts harnessed. In some instances, efficiency requires flat rules (hence, "duty"), and in other instances, it requires more particularistic assessments of conduct (hence, "negligence" or "intent").²⁴⁶ Efficiency has the general support of our pragmatic and capitalistic society; although it is not as "backward-looking" as the causal model would like, it can produce the doctrinal certainty that the causal model prefers.

In a system of perpetual conflict, however, neither foreseeability nor efficiency will quell the ferment in tort doctrine forever, and neither has. Foreseeability of harm cannot always capture the community's sense of fault,²⁴⁷ nor does foreseeability always accord with the formal demands of

1968); *Rowland v. Christian*, 433 P.2d 561 (Cal. 1968); *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983).

244. See, e.g., *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107, 115-16 (N.J. 1985); *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326 (Or. 1987); *MORRIS & MORRIS*, *supra* note 31, at 172-74, 179-85; *PROSSER & KEETON*, *supra* note 30, § 43.

245. See *supra* notes 227-29 and accompanying text.

246. See generally *POLINSKY*, *supra* note 35, at 113-17 (describing instances in which flat rules establishing or precluding liability might be more efficient than case-by-case adjudication).

247. The classic case is *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871), in which the plaintiff's decedent died while pushing a four-year-old boy out of the path of an oncoming tram. The jury refused to find that the decedent was contributorily negligent, and the New York Court of Appeals refused to overturn that finding. Such a heroic effort was clearly worthy of community approbation in spite of the foreseeability of death. See also *Bily v.*

the causal model.²⁴⁸ Thus, in spite of occasional claims to the contrary,²⁴⁹ foreseeability has never been the sole measure of duty,²⁵⁰ negligence,²⁵¹ proximate causation,²⁵² or damage.²⁵³ Likewise, an efficiency analysis can miss the mark on both the community's sensibilities and the causal model's preference for a retrospective focus;²⁵⁴ it too is incapable of explaining the

Arthur Young & Co., 834 P.2d 745, 762 (Cal. 1992) (stating that with respect to intangible injuries stemming from emotional distress or negligent misrepresentation, foreseeability permits liability "out of proportion to fault").

248. There are two problems. The first is that foreseeability sets no "bright-line" limits—in fact, virtually no limits at all—on the causal principle. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 874 (1986) ("In products liability law, where there is a duty to the public generally, foreseeability is an inadequate brake."); *Thing v. La Chusa*, 771 P.2d 814, 823 (Cal. 1989) ("[F]oreseeability is endless because foreseeability, like light, travels indefinitely in a vacuum." (quoting *Newton v. Kaiser Found. Hosp.*, 228 Cal. Rptr. 890, 893 (Cal. Ct. App. 1986))). Indeed, even Holmes, whose work gave life to the foreseeability principle, hedged on its actual breadth by redefining it sub silentio to mean likelihood of harm. See HOLMES, *supra* note 2, at 93-94. Second, to the extent that the causal model has settled on principles such as deterrence, compensation, loss spreading, and fairness to determine doctrinal structures, see *supra* notes 215-16 and accompanying text, those policy goals often cut against the answer suggested by foreseeability alone. See *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988) ("[P]olicy considerations may dictate [that] a cause of action should not be sanctioned no matter how foreseeable the risk").

249. See, e.g., *Havard v. Palmer & Baker Eng'rs, Inc.*, 302 So. 2d 228, 232 (Ala. 1974) ("The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if care is not exercised."), *overruled by Ex parte Insurance Co. of North America*, 523 So. 2d 1064 (Ala. 1988).

250. See, e.g., *Berkel & Co. Contractors v. Providence Hosp.*, 454 So. 2d 496, 503 (Ala. 1984) (listing six factors, of which foreseeability is only one); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (listing seven factors for assessing duty, of which foreseeability is only one); *Ward v. K Mart Corp.*, 554 N.E.2d 223 (Ill. 1990) (listing factors of probability of harm, magnitude of harm, and burden of precautions); *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991) (listing three factors for assessing duty: relationship, foreseeability, and public policy); PROSSER & KEETON, *supra* note 30, § 54, at 359 ("No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.").

251. For other approaches, see sources cited *supra* note 11.

252. For other approaches, see, e.g., *Coffey v. City of Milwaukee*, 247 N.W.2d 132 (Wis. 1976); *In re Polemis v. Furness, Withy & Co.*, 3 K.B. 560 (C.A. 1921); RESTATEMENT, *supra* note 12, §§ 430-461.

253. A defendant in tort remains liable for the full extent of damage, even though the "eggshell skull" of the plaintiff was not foreseeable. See generally *Steinhauser v. Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970); *Vosberg v. Putney*, 50 N.W. 403 (Wis. 1891).

254. See *supra* notes 228-29 and accompanying text.

breadth of doctrinal approaches to duty, negligence, proximate causation, and damage.²⁵⁵

(c) *Procedure*. The disparate visions of the causal and the community models on procedure also suggest a need to compromise on matters like the nature and functions of the decision maker and the use of precedent. The primary concern involves balancing the causal model's need for a high degree of centrality against the community model's desire to locate decision-making in the community. One possible solution is a division of responsibility between central authority (the judge) and community (the jury, at least in a democratic society). Another is to assign functions to each decision maker that are generally compatible with their nature; thus, judges will be assigned the law-finding function and juries the fact-finding function.²⁵⁶ Each decision maker can exercise considerable discretion in areas associated with their respective functions. Thus, duty questions will be determined by the judge, and fault questions will, in general, be left to the jury. Because both models insist on causation, the division of decision-making responsibility on this issue is likely to be more ambiguous.²⁵⁷

Nonetheless, the tensions between the models are likely to subvert such neat divisions in important ways. The community model might want the jury to decide the issue of duty, whereas the causal model might agree that the judge should make findings of fault. Likewise, the judge might claim the right to review and reverse factual findings with which she does not agree, whereas the jury might insist on the right to decide what the relevant law should be. Obviously, this conflict can give rise to a number

255. On the inability of the efficiency hypothesis to justify all of tort doctrine, see Weinrib, *supra* note 38, at 506-09 (demonstrating that efficiency approach cannot justify present damage rules); *supra* notes 79-80 and accompanying text.

256. For the reasons that this division of responsibilities between judge and jury best advances their respective functions in a democratic society, see *supra* note 214 and accompanying text.

257. Indeed, the division of decision-making responsibility on the issue of causation is ambiguous. The professed position of most courts is that the issue of proximate cause is a factual one for the jury. See, e.g., *Healy v. Hoy*, 132 N.W. 208 (Minn. 1911); *Pfeifer v. Standard Gateway Theater*, 55 N.W.2d 29 (Wis. 1952); cf. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting) (discussing practical nature of proximate cause finding). At the same time, there is no shortage of cases deciding the issue of proximate cause as a matter of law. See generally PROSSER & KEETON, *supra* note 30, § 45 (while advocating greater use of jury, noting that present division of responsibility is confused); Green, *supra* note 44 (discussing confusion surrounding—and consequent judicial control over—proximate cause issue).

of interesting judge/jury relationships, of which the middle-of-the-road American solution is just one.²⁵⁸

The use of precedent also makes conflict likely. The causal model treats precedent (at least that which is rightly reasoned from accepted principles) as a precious truth; the community model treats precedent as data that is relevant to, but not conclusive of, the present case. If the conflict is to be resolved in the middle range, we can expect a tort system to select rules largely on the basis of precedent or analogy from precedent, but also to depart from precedent when the community's sensibilities demand it. Once again, that approach describes the American tort system with striking accuracy.²⁵⁹

(d) *Final Reflections on the Combined Models.* In the effort to describe the general workings and tension points of tort cases that fall within the area of the models' overlap, I have avoided any attempt to catalogue the types of cases that lie within that intersection. Now that the more general description is complete, it is possible to do so. In American tort law, the relevant cases are most intentional torts, some strict liability torts, and all "classic" negligence cases—if we understand by the term "classic" two things: (1) A causal link exists between plaintiff and defendant, and (2) the community has sufficient experience with the type of conduct at stake that it can, and has, formed communal judgments about the conduct's propriety.

258. The judge's right to review factual determinations (through devices like summary judgment, judgment as a matter of law (both before and after verdict), an order for new trial, and appeal) provides some check on the jury's fact-finding power, and the jury's right to nullify legal principles behind closed doors, *see, e.g.*, sources cited *supra* notes 4, 11, check the judge's law-giving power. Although these checks and balances are in no sense the only means of accommodation, they do reconcile competing interests in a way that accords roughly equal respect to the desires of each model.

259. *See supra* notes 161-65, 217-22 and accompanying text. It can also be expected that some jurisdictions will err on the side of precedent-bound formalism, and the others on the side of pragmatism unencumbered by precedent. *Compare* *Fuller v Buhrow*, 292 N.W.2d 672 (Iowa 1980) (leaving issue of comparative fault to legislature and upholding contributory negligence bar) *with* *Li v Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975) (adopting comparative fault judicially). In the event of a dead tie (precedent clearly counseling one thing, and the sense of the community counseling another), one model or the other must be credited. Such a presumption may either be a part of a jurisdiction's general decision to favor one model on close issues or else a *quid pro quo* for favoring the opposite model on a different point.

Intentional torts are, for the most part, the easiest. "[E]veryone can understand a punch in the nose;"²⁶⁰ everyone has had some experience (often as both perpetrator and victim) of interferences with land and personal property. We have intuitive feelings about lying (fraud) and the purposeful infliction of emotional distress.²⁶¹ The same is generally true of intentional tort defenses, for which we have a fairly consistent communal ethic, formed through experience, about matters such as self-defense, defense of property, and necessity. At the same time, however, some intentional torts escape the model; our experiences with contract law may not take us very far in determining the proper limits on the torts of intentional interference with contract or prospective economic advantage.²⁶²

With respect to unintentional injuries, some strict liability and many negligence claims fall within the intersection. Some strict liability claims, such as snakebites that result after you allow two or three dozen pet rattlesnakes to roam your property, are merely statements of the community's opprobrium toward conduct that the community, with full knowledge of and opportunity to judge its nature, finds unacceptably dangerous.²⁶³ Landowner liability claims and car accidents are the two largest categories of "classic" negligence,²⁶⁴ but other discrete types of conduct—such as negligently discontinued rescue operations, negligent infliction of some types of emotional distress, some failures to warn, and even clear instances of malpractice—would also involve matters of common experience and common sense.

Because the combined effect of these models cuts across doctrinal lines, this descriptive theory of torts has the power to explain the outcomes

260. EPSTEIN, *supra* note 2, at 3.

261. In order for an intentional infliction of emotional distress to be recoverable, "the conduct [must be] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT, *supra* note 12, § 46 cmt. d.

262. *See id.* §§ 766-774. An exception may be the tort of wrongful discharge, in which our common experience of holding a job may give us sufficient opportunity to decide whether certain interferences with employment are legitimate. *See, e.g.,* Frampton v Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973); Brockmeyer v Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983); PROSSER & KEETON, *supra* note 30, § 130, at 1027-30.

263. *See supra* note 190 and accompanying text.

264. The exception is the failure to protect passers-by from natural conditions on the land. Here, the causal model cannot explain liability. *See supra* note 168 and accompanying text.

of cases that fit uneasily within the typical tripartite structure of intentional, negligent, and strict liability torts.²⁶⁵ An excellent example is one of the grand chestnuts of tort law, *Vincent v Lake Erie Transportation Co.*²⁶⁶ In *Vincent*, a shipowner that removed its ship to an unloading dock during an unexpected squall was ordered to pay the dock owner for damages caused when the ship crashed against the dock. Although intentional tort, negligence, and strict liability were all candidates as the theory of recovery,²⁶⁷ the court ultimately seized on the captain's conscious decision to remove the ship as sufficient intent to make out the tort of trespass. The court's line of reasoning has been largely ignored by *Vincent's* many commentators.²⁶⁸

From the perspective of the causal and the community models, *Vincent* is an easy case. The facts fulfill the causal model: The ship's captain performed an act that increased the risk of damage to the dock, and the risk materialized. The facts also fit within the community model: We share the experiences of natural disasters, we can visualize easily the taking of (or having taken from us) property in an emergency, and we widely share the value that when I consciously take and destroy your property in order to save my own, I should pay for the damage.²⁶⁹ In this respect, the single

265. Casebooks, treatises, and torts courses typically divide the study of torts into sections on intentional, negligent, and strict harms. Although that approach may be necessary pedagogically, I do not find it to be especially helpful as a method of thinking critically about torts—partly because intent, negligence, and strict liability often blur in the effort to work out constant themes.

266. 124 N.W. 221 (Minn. 1910). *Vincent* does not lack for critical commentary, partly because its wonderful facts are considered something of a proving ground for any theory of torts. A slice of this commentary includes COLEMAN, *supra* note 14, at 371-72; LANDES & POSNER, *supra* note 29, at 178-80; MORRIS & MORRIS, *supra* note 31, at 40-42; Fletcher, *supra* note 28, at 546-47; Weinrib, *Causation*, *supra* note 72, at 420-22. For a treatment of *Vincent* as a case of restitution rather than tort, see LAYCOCK, *supra* note 129, at 532-33.

267. The plaintiff obtained a verdict on the theory that the ship captain was negligent in not casting off and taking his chances in the open harbor, but the Minnesota Supreme Court rejected that theory. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221 (Minn. 1910). Alternatively, the case could be understood as a strict liability claim (the defendant is liable for any damage that its actions cause) or an intentional tort (the defendant imposed on another's property with the substantial certainty that plaintiff would be injured).

268. See RESTATEMENT, *supra* note 12, § 263; PROSSER & KEETON, *supra* note 30, § 24, at 147-48; sources cited *supra* note 266.

269. My belief in this common value comes from anecdotal information. In the first place, the jury found the shipowner liable, even though it used a clearly inappropriate

most important fact that justifies *Vincent* is the one that the court itself seized upon: the remooring of the ship. The act of remooring is critical to the causal model. If we postulate (as the facts apparently suggest) that the dock suffered no damage before the new lines were tied, then it is only the risk of remooring that materializes in harm; had the lines not been tied again, the ship would have floated into the harbor and the dock would have been spared. Similarly, remooring is essential to the community model; I suspect that we do not have widely shared norms about whether the ship should pay when it was initially moored in fair weather and a great, unforeseeable gust of wind suddenly threw the ship against the dock.²⁷⁰ Therefore, *Vincent*'s intuitive sense about the centrality of tying new lines is correct. That act keeps *Vincent* from floating beyond the boundaries of both the causal and the community models into the sea of "nontorts." Doctrinally, the case remains a puzzle, but from the viewpoint of the models that define the boundaries of tort law, the outcome is correct.

Having now seen the theoretical, doctrinal, and practical portrait that the two models are capable of painting, we might wonder whether the result is worth the effort. At most, the models can develop the theoretical, doctrinal, and practical structures within which specific manifestations of tort can occur. The models cannot help us decide whether Arizona should recognize the tort of sexual harassment²⁷¹ or Missouri should adopt the

doctrinal theory to do so. Second, the commentary on *Vincent* almost always seeks to justify its result. Third, each year when I teach *Vincent* to 75 to 90 first-year students, I ask for a show of hands on the result in *Vincent*. With virtually no exceptions, the students find the case rightly decided.

270. Some of us will feel the obligation of repair, but some will seek to avoid the obligation by saying "It's not my fault." Cf. *Vincent*, 124 N.W. at 222 (stating that there would have been no recovery if ship "had entered the harbor, and while there had become disabled and been thrown against the dock"); *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198, 202 (N.Y. 1941) (finding cab driver who bailed out of moving cab in order to escape from felon not negligent); *Smith v. Stone*, 82 Eng. Rep. 533 (K.B. 1647) (holding that defendant who had been forcibly carried onto plaintiff's property was not liable for trespass); THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. II-I, Q. 105, Art. 2, Reply Obj. 1, at 1095 (Dominican trans. 1947) ("[I]t should be lawful for a man, entering on his neighbor's vineyard, to eat of the fruit there for among well-behaved people, the taking of a little does not disturb the peace; in fact, it rather strengthens friendship and accustoms men to give things to one another."); COLEMAN, *supra* note 14, at 387 ("Being innocent of blame, indeed, being worthy of praise, is not a bar to liability in morality."). On this issue, our community does not have a sufficiently high degree of cohesion.

271. It did. See *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987).

consumer-expectation or the risk-utility test for defective products.²⁷² On the contrary, the methodology suggests that within very liberal parameters, virtually any position is legitimate.

My answer to the charges is guilty in part and innocent in part, with a plea for an extension of time to answer further. The criticism is essentially a normative one. But the nature of this enterprise thus far has been descriptive; I have tried to describe what tort law is. In Part III, I will come to the normative lessons that the description might hold.

At another level, however, it should be obvious by now that the descriptive theory that I have developed will not be particularly useful in rendering specific answers to tort problems. The theory is inclusive rather than exclusive; it accepts torts—inconsistencies and all—rather than prunes those aspects that are disconcerting. I have said that it is impossible to reconcile torts at the level of outcome;²⁷³ the consistency in torts must be found instead at the level of structure and process. This does not mean that precise answers are unavailable; each society need look no further than the principles that it has selected to give effect to the notions of "act" and "causation," the values which that society desires to promote through law, and the methodology that it has selected to resolve tensions between these principles and values. But it does mean that the nature of torts cannot provide those solutions and that torts cannot be counted on to defend any given solution against the barbarians at the gate.

Simply put, the overlap between the causal and community models possesses the remarkable ability to predict the theoretical debate, the doctrinal structure, and the practical consequences of large areas of intentional, negligence, and strict liability claims.²⁷⁴ Nonetheless, an important descriptive problem remains. Although many intentional,

272. The jury, so to speak, is still out. See, e.g., *Fink v Foley-Belsaw Co.*, 983 F.2d 111 (8th Cir. 1993).

273. See *supra* text accompanying note 23.

274. Indeed, even granting that generally opposing positions can justify most solutions in the middle, I know of no other models with the power to predict the actual theoretical, doctrinal, and procedural compromises that torts has developed to deal with causal conduct that has violated communal norms. For instance, Balkin's opposing models of individualism and communalism would have difficulty explaining why torts has generally insisted on a duty-breach-causation-damage formula, why juries and judges split functions, why we care about precedent, and why we might choose to revisit the selected precedent 30 years later. See Balkin, *supra* note 9. The same inability to predict various structures or doctrines infects England's opposing models of strict liability and fault, corrective and distributive justice, and morality and utility. See ENGLARD, *supra* note 52, at 7-27

negligent, and strict liability torts fit within the intersection of the models, many others do not. The question remains whether the theory that I have proposed accurately describes the theoretical, doctrinal, and procedural features of those tort cases that lie within the ambit of one model, but not both.

2. *The Consequences for a Tort System When Only the Community Model Functions: Duty to Act and Sufficient Cause Cases*

Although the community model must seek an accommodation of its optimal features with those of the causal model when the models overlap, it would appear to have no similar constraints in the duty to act and sufficient cause cases, in which only the community model operates. In these cases, we might anticipate a system of loss allocation in which there were no judges, no duty or proximate cause limits, and no patience for formal analysis.²⁷⁵ When we examine these cases, however, we find that the opposite is true. No dramatic theoretical, doctrinal, or practical shifts result.

On the surface, this fact suggests that the descriptive theory that I have developed lacks validity. That impression, however, is wrong for two reasons. The first, and weaker, reason is that we should not confuse the essential with the optimal. In order for the theory to be valid, it is necessary only that the duty to act and sufficient cause cases comport with the community's values; it is not necessary that the cases adopt the features that best advance those values.

But that reason sounds like the last resort of the damned. A second, stronger reason is that a series of real-world constraints, which keep these cases close to the path already hewn by the cases lying in the intersection of the causal and community models, provides the descriptive theory that I have proposed with its validity. The first of these constraints is the low number of cases in which the community's values demand reallocation without a causal link. The incidence of negligently maintained trees falling on passersby or ships failing to rescue sailors is so low that, in most jurisdictions, years pass between reported decisions.²⁷⁶ Similarly, the

275. For a fuller discussion of the optimal features of a community model, see *supra* part II.B.2.

276. Indeed, Prosser's hornbook is only able to surmise that the common law would now require a parent to effect an easy rescue of a child; it cites no reported cases to support the thesis. PROSSER & KEETON, *supra* note 30, § 56, at 377; see *Chastain v. Fuqua Indus., Inc.*,

notoriety of *Kingston*, *Summers*, and *Sindell* make us forget that the simultaneous occurrence of two sufficient causes is so freakish that their rules get a sparse workout in practice.²⁷⁷ Such a low incidence makes the development of entirely different doctrines and practices to cover these cases impractical. It is more administratively convenient (convenience, we must remember, is a widely shared value in our community) to borrow the framework already established for the more numerous claims that lie outside of the community model.

A second constraint is the fact that causal notions, albeit weakened, still play a role in the duty to act and sufficient cause cases. Remember that factual causation consists of two elements: increased risk and association of defendant's conduct with that risk.²⁷⁸ In rescue cases, the community permits loss reallocation only when the counterfactual rescue effort would have been successful.²⁷⁹ In sufficient cause cases, the defendant's act must at least have increased the risk of injury. Thus, in rescue cases, the inaction must have been necessary to the injury (the second element of factual causation), and in sufficient cause cases, the action must have increased the risk of injury (the first element of factual causation). Because causal notions are not completely irrelevant to our

275 S.E.2d 679, 681 (Ga. Ct. App. 1980) (refusing to impose duty to act on aunt who failed to warn son of her twin sister about latent danger of which she knew, but did not create).

277 For instance, the appendices to the *Restatement* list approximately sixty cases (or about two a year) that have discussed § 433B(3), the section that codifies the burden-shifting solution of *Kingston* and *Summers*. Only a handful of that number actually adopt and apply the rule; most either reject § 433B(3) on the facts or cite it as tangential support for other propositions. See *RESTATEMENT (SECOND) OF TORTS, APPENDIX VOLUME THROUGH DECEMBER, 1975*, §§ 403-503, at 217-25 (1986); *RESTATEMENT (SECOND) OF TORTS, APPENDIX VOLUME THROUGH JUNE, 1984*, §§ 403-503, at 322-42 (1986); *TORTS SECOND CUMULATIVE ANNUAL SUPPLEMENT* [§§ 403-503], 191-215 (1992); see also *Maldonado v State*, 618 So. 2d 537 (La. Ct. App. 1993) (granting summary judgment when prisoner was unable to prove which of two manufacturers, both of whom were joined in case, made handcuffs that injured him; citing neither *Summers* nor § 433B(3)). Likewise, *Sindell* has received limited attention, and even more limited acceptance, in practice. See *City of Philadelphia v Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 124-25 (3d Cir. 1993) (rejecting market share approach); *210 E. 86th St. Corp. v. Combustion Eng'g, Inc.*, 821 F. Supp. 125 (S.D.N.Y. 1993) (same); *Smith v Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990) (same); *Mulcahy v Eli Lilly & Co.*, 386 N.W.2d 67, 75 (Iowa 1986) (same).

278. See *supra* note 136 and accompanying text.

279. See sources cited *infra* notes 286-88. As those sources reflect, the quantum of proof on the association between the counterfactual rescue attempt and the plaintiff's injury may often be weak, but proof is nonetheless required.

present sense of proper loss allocation, the tensions that informed the structure of torts at the intersection of the models also affect (albeit more weakly) the structure of those cases that lie beyond the intersection.²⁸⁰

Finally, the use of a single set of tort structures and methods appeals to a different communal sense of fairness that derives from the adjudicatory nature of torts: the belief that similarly situated people should be treated similarly.²⁸¹ Both the claimant whose case falls in the intersection of the models and the claimant whose claim does not are asserting a legal theory that shares common bonds of loss, adjudicatory process, and effectuating community values. Although the lack of causation in the latter cases absolves adjudication of the absolute obligation to give the cases identical treatment, our American procedural system strongly prefers identical treatment whenever possible.²⁸² Moreover, our constitutional structure, which has somewhat rigidly defined roles for judges and juries as well as a concern for due process and equal protection,²⁸³ hampers efforts to distance cases within the community model from their cousins which lie in the intersection of the models.

Thus, the adjudicatory nature of torts propels duty to act and sufficient cause cases to adhere to the structures and methods developed to handle the cases that intersect both models.²⁸⁴ Because acquiescence to these

280. If the community's values departed entirely from causal notions (for instance, with a norm that the defendant, if rich, must pay the plaintiff, if poor, regardless of causation), this point would have less force. But the other real-world constraints would still prevent wholesale abandonment of the structures and methods developed in the intersection of the models.

281. For fuller treatments of the idea that adjudication implies like treatment of like people, see RAWLS, *supra* note 37, at 237; Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV L. REV 1, 51 (1980); Tidmarsh, *supra* note 131, at 1746-54.

282. See Tidmarsh, *supra* note 131, at 1752-54.

283. See U.S. CONST. art. III; *id.* amends. V, VII, XIV

284. I recognize that this statement has something of a "chicken and egg" quality. We could assume, for instance, that a society initially based tort decisions exclusively on community values. The optimal features of such a system would be quite different than the likely features of cases that lie in the intersection of the models. Compare *supra* part II.B.2 with *supra* part II.C.1. If the tort system later expanded to rely on causal notions, then the "like treated alike" principle would apparently demand that those cases adopt the procedures previously adopted for purely "community value" cases.

Whatever the theoretical answer, this problem is not important in reality. At our tort system's inception and continually since, causal notions have been an important dimension of our understanding of the circumstances under which loss reallocation should occur. See 3 WILLIAM BLACKSTONE, COMMENTARIES *119-28; FIFOOT, *supra* note 2 (collecting ancient common law cases, all of which involve causal link between defendant's conduct and

structures and methods is more a matter of convenience and choice than obligation, however, some theoretical, doctrinal, and procedural shifts can be expected at the margin.

(a) *Theory* At the level of theory, we can expect more explicit reliance on notions of morality, utility, public policy, and distributive justice and less concern for departure from precedent and harm to established principles. That expectation is correct. Appeals to the community's sense of fairness rather than to precedent are the mainstay of advocates for duty to act and sufficient cause principles.²⁸⁵

(b) *Doctrine*. A second shift should occur at the level of doctrine. Although causal notions still play some role in "community model" cases, the chafing of these cases against causal principles could result in a relaxation of proof for any remaining causal concerns. For example, in *Reyes v Vantage Steamship Co.*,²⁸⁶ a sailor overboard case, the court shifted to the shipowner the burden of showing that a counterfactual rescue would have been unsuccessful.²⁸⁷ Likewise, the measure of damages might turn on a sense of fairness rather than on precisely corrective compensation. In *Reyes*, for instance, the ship ultimately paid 15% of the sailor's

plaintiff's injury); see also *supra* note 116 (discussing inability of writ of trespass to deal with nonfeasance cases that later developed into writ of assumpsit). Hence, the "like treated alike" principle would require community model cases to defer the structures established for cases lying in the intersection of the models rather than the other way around.

285. See *supra* notes 180-86 and accompanying text.

286. 609 F.2d 140 (5th Cir. 1980).

287. *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 144-46 (5th Cir. 1980). Other duty to act cases also weaken the quantum of causal proof. See *Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284, 288 (4th Cir.) (imposing liability when ship acts in total disregard of duty to rescue, even though there was no significant evidence that attempt to rescue would have been effective), *cert. denied*, 372 U.S. 913 (1962), *Kirincich v Standard Dredging Co.*, 112 F.2d 163, 164 (3d Cir. 1940) (allowing recovery as long as sailor "might [the appropriate grammatical mood] have saved himself"); *Zinnel v United States Shipping Bd. Emergency Fleet Corp.*, 10 F.2d 47 (2d Cir. 1925); cf. *Hurley v. United States*, 923 F.2d 1091, 1095 (4th Cir. 1991) (interpreting *Gardner* to impose liability for breach of "specialized duty" by "highly culpable ship master" through "'watered-down' causation requirement"). Because the failure in *Zinnel* and *Kirincich* was the failure to provide better life-saving equipment, there was arguably an act (the provision of some, albeit insufficient, equipment) that would bring the case within the causal model. The analysis would be the same, however, even if no equipment had been provided. Cf. *Haft v Lone Palm Hotel*, 478 P.2d 465 (Cal. 1970) (shifting burden of proof to motel owner to show that hypothetical lifeguard would have been unable to save guests who drowned in unguarded pool).

damages;²⁸⁸ in *Kingston* and *Summers*, the operation of joint and several liability effectively resulted in a division of damages equal to the degree of risk that each defendant created.²⁸⁹ The use of several liability, which ties damages to the precise level of risk created, remains available to avoid even the occasional unfairness of joint and several liability²⁹⁰

(c) *Procedure*. Finally, on a practical level, cases located only within the community model are likely to see greater entrustment of issues to the jury, with exceedingly light appellate review. That prediction also has proved to be at least partially true.²⁹¹

3. *The Consequences for a Tort System When Only the Causal Model Functions: Contract, Custom, Plaintiff's Expectations, Legislative and Judicial Surrogacy, Strict Liability, and No Duty*

It should come as no surprise that cases lying only within the causal model will accept the received structure and methods generated by the cases in the remaining areas of torts. The reasons for this acquiescence parallel those which led "community model" cases to accept the structure of cases lying in the intersection of the causal and community model; adjudication's preference that similarly situated parties receive similar treatment²⁹² is especially powerful in a model that prides itself on devotion

288. *Reyes v. Vantage S.S. Co.*, 672 F.2d 556, 557 (5th Cir. 1982).

289. *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948); *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913, 915 (Wis. 1927). Although *Kingston* and *Summers* can technically be seen as cases that fit within the causal model, *see supra* notes 137, 176 and accompanying text, they have relevance for those cases that are truly sufficient cause cases, for a similar division of liability among sufficient causes can be expected there.

290. Joint and several liability, which was imposed in *Kingston* and *Summers*, imposes liability in excess of risk when one or more of the defendants is judgment-proof or unavailable. Because the community model pegs damages to wrongdoing rather than to precise compensation, *see supra* text accompanying note 194, the community model regards compensation in excess of risk as inappropriate and several liability as more fair. *See Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988) (imposing several liability in "market share" case). Although *Brown* was technically located within the causal model because the community's values were powerless to judge the propriety of the defendant's conduct (the manufacture of a drug), its choice of several liability was influenced by the same notions of fairness that inform the community model. Reliance on its outcome in community model cases can be expected.

291. *See EPSTEIN, supra* note 2, at 366 ("The modern cases are explicit in conferring upon the jury broad powers of decision in cases of rescue at sea.").

292. *See supra* note 281 and accompanying text.

to formal analysis from received precedent. Moreover, courts in a causal model must find limits on the naked notions of "act" and "cause" somewhere, and reliance on extant structures avoids the need to develop entirely new structures and methods.

At the same time, adoption of the structures and methods of the other cases presents an immediate problem. For cases in the intersection of the models, the tension created by placing causal act in opposition to communal responsibility resulted in a duty-fault-causation-damage structure.²⁹³ By definition, however, there can be no "fault" (in the sense of violation of community norms) associated with cases that lie beyond the community model. How, then, can a causal model respect the fault element of the merged causal-community structure? Finding the answer to this question is the central puzzle of the causal model.²⁹⁴

Faced with the dilemma of needing to accept "fault," but being unable to do so, the causal model has three options: choose not to adjudicate cases in which a fault determination is impossible, eliminate fault and adjudicate cases purely on duty and causation principles, or select a standard external to community norms that can act as a surrogate for fault. Neither the first choice (a "no duty in tort" approach) nor the second (a strict liability approach) is especially appealing. The "no duty" approach concedes the battlefield to the community model; only cases in which fault determinations can be made will concern torts.²⁹⁵ Conversely, the strict liability approach denigrates the community model, for it blithely pretends that that model and the perpetual friction that it generates have no effect on the shape of the causal model. This approach also suffers from the reality that unless the causal model is to expand to its full and nearly limitless boundaries, it must draw lines beyond which strict liability will not be imposed. Drawing lines, however, puts great pressure on duty and proximate cause, neither of which can be supplied an immanent meaning by the causal model itself.²⁹⁶

293. See *supra* notes 230-35 and accompanying text.

294. Rather than separating the ways in which theory, doctrine, and procedure bear on this problem, as I have for the two prior subsections, this section will marshal the theoretical, doctrinal, and procedural issues in a single discussion intended to solve this puzzle.

295. Of course, causal principles will continue to operate in the subset of community model cases in which a causal connection is an important community norm. Because the community already insists on causation, however, the broader implications of the causal approach can be minimized. That is a result which the causal model is unlikely to accept peacefully

296. See *supra* notes 140-41, 159 and accompanying text.

Hence, the causal model funnels most of its cases through the last option: the use of surrogate fault principles.²⁹⁷ This result is a happy one for torts, for it keeps the structure in all three areas of torts parallel. But it also leads to a conundrum: What should be the source of these "quasi-fault" norms? Necessarily the norms must be either internal to the parties or external to them. An internal fault norm would ask whether the conduct at issue violated the norms of the actor, the victim, or both. An external fault norm would compare the conduct of the defendant to the conduct of similarly situated actors, to the standards of relevant private organizations, or to public standards established by legislation, regulation, or judicial fiat.

The American tort system evidences adoption of each of these positions. In some cases, torts defers to the principles expressly agreed upon by the parties themselves; using the rubric of "no duty," they are handled through breach of contract claims or arbitration.²⁹⁸ In some cases, torts defers to the standards of the defendant or the community to which that defendant belongs; best represented by the instance of professional malpractice, these cases fall under the general heading of custom.²⁹⁹

297 For an explanation of the circumstances in which the former two options (no-duty and strict liability) remain valid, see *infra* notes 309-30 and accompanying text.

298. See, e.g., *Redgrave v Boston Symphony Orchestra, Inc.*, 557 F Supp. 230, 238 (D. Mass. 1983) ("[A] breach of contract is not, standing alone, a tort as well."); *Madden v Kaiser Found. Hosps.*, 552 P.2d 1178 (Cal. 1976); PROSSER & KEETON, *supra* note 30, § 92. Cases that defer to contractual standards should be distinguished from "no privity" cases in which the tort claims of plaintiffs with no contractual relationship to defendants are barred. See *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 897 (N.Y. 1928); *Winterbottom v Wright*, 152 Eng. Rep. 402 (Ex. 1842). Viewed from the perspective of contract, both pose a similar issue: The enforcement of existing agreements and the nonenforcement of non-existent agreements both protect the freedom to bargain. Viewed from the perspective of torts, however, there is a great difference between deferring to contract law when mutually agreed upon standards of conduct are present and deferring to contract law when such standards are absent. Although the use of a single "no duty" label has a tendency to conflate these distinct circumstances, it can be expected that torts will demonstrate far greater reluctance to defer to contract law for "no agreement" cases than actual agreement cases. That expectation has been fulfilled. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (rejecting *Winterbottom's* privity rule); RESTATEMENT, *supra* note 12, § 402A cmt.b (same); EPSTEIN, *supra* note 2, at 508-11 (discussing dissatisfaction with and departures from *Moch*); see also *infra* notes 309-12 and accompanying text.

299. See, e.g., *Ellis v Louisville & N.W. R.R.*, 251 S.W.2d 577, 579 (Ky. 1952); *Brune v. Belinkoff*, 235 N.E.2d 793 (Mass. 1968); *Titus v. Bradford, Bordell & Kinzua R.R.*, 20 A. 517 (Pa. 1890). Torts has ambivalent feelings about deference to the defendant's custom, see *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932), except in the instance of malpractice. Even in malpractice cases, however, custom may not

Somewhat rarer is deference to the plaintiff's expectations, but there are some examples in doctrine³⁰⁰ and undoubtedly more instances in practice³⁰¹ in which the plaintiff's expectations establish the standard of "quasi-fault." Likewise, in instances in which statutory or regulatory pronouncements set a standard of conduct, torts can borrow those standards to provide a ready-made structure for liability³⁰²

be absolute. See *Quintal v Laurel Grove Hosp.*, 397 P.2d 161, 174 (Cal. 1964) (Traynor, C.J., concurring) (noting that "expert testimony is not required when scientific enlightenment is not necessary to show that failure to make such preparations is unreasonable"); *Helling v Carey*, 519 P.2d 981, 983 (Wash. 1974). See generally Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992) (discussing positive and normative dimensions of custom).

300. The most famous example is the "consumer expectation" test of products liability, in which the test for defect is whether the product is more dangerous than the ordinary consumer expects. See RESTATEMENT, *supra* note 12, § 402A, cmts. g-1; see also Henderson & Twerski, *supra* note 45, at 1532-34 (noting movement away from consumer expectation test for design defects). See generally *Delvaux v. Ford Motor Co.*, 764 F.2d 469 (7th Cir. 1985). Informed consent provides another example, at least in those jurisdictions in which physicians must disclose the information which the reasonable patient would need to know in order to make an informed choice. See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). Finally, pockets of tort law in which the plaintiff's reliance forms a critical element of the tort also honor the plaintiff's expectation. See, e.g., RESTATEMENT, *supra* note 12, §§ 323, 324A, 402B, 525.

301. In the absence of clear communal standards of fault, it can be expected that a jury will often attempt to answer the quasi-fault question in terms that its members understand: What would I expect this defendant to do if I was in the plaintiff's shoes? See Peter Perlman, *Trial Strategy in Coal Mining Machine Cases*, 1 PRODUCTS LIABILITY L.J. 67, 70-71 (1988) (reprinting closing argument in which arguments about risk-utility, which was legal standard, were skillfully interwoven with arguments regarding plaintiff's expectation).

302. Hence, the negligence per se doctrine. See FOWLER V HARPER ET AL., THE LAW OF TORTS, § 17.6 (2d ed. 1986); PROSSER & KEETON, *supra* note 30, § 36; RESTATEMENT, *supra* note 12, §§ 286-288C. In order to ensure that the legislative or administrative standard actually is a measure of fault with respect to defendant's injury toward plaintiff, some narrowing of the doctrine (through questions about the purpose of the statute, the types of risk the statute is designed to prevent, and the types of persons protected) can be expected. On the other hand, an escape valve to permit nonliability in those circumstances in which community norms override the "technical" statutory violation should also be expected. See *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939) (excusing plaintiff from statutory violation); RESTATEMENT, *supra* note 12, § 288A.

As with contract, see *supra* note 298, two issues with the potential to conflate should be kept separate. The first is the extent to which torts should borrow statutes to measure liability in tort. The second is the extent to which torts should shrink its outer boundaries and defer to an alternative legal scheme (for example, securities law) to set the terms of loss allocation. For further consideration of the latter problem, see *infra* notes 309-12 and accompanying text.

Each of these "quasi-fault" approaches, however, is handicapped by its narrowness.³⁰³ The first approach requires a preinjury agreement, the middle two require pre-established customs or expectations, and the last requires a preexisting legislative or regulatory scheme. None of these approaches can cover situations in which no *ex ante* standard encompasses the defendant's act. Thus, a default position—a judicially created standard of "quasi-fault" that catches cases that slip through the cracks—is necessary

Because of the desire to keep the causal model as closely aligned to the intersection of the causal and community models as possible, the judge (who, in the causal model, is the preferred person to set standards) is likely to choose as the standard of "quasi-fault" those variables that most closely mirror the factors that the community uses to assess fault. In our society, those factors appear to include foreseeability of injury, likelihood of injury, magnitude of injury, and the relative burden of taking precautions.³⁰⁴ Therefore, the judge can be expected to export those concepts from the contextual settings that gave birth to them and abstract them into general principles of quasi-fault.

In doing so, however, torts generates standards that are internally inconsistent and often work at cross-purposes.³⁰⁵ Compounding this problem is the impossibility of neutrality; because the community's norms are inapplicable, the judge is sorely tempted to select the principle that achieves a result conducive to her world view. The net effect is a system in which numerous and conflicting standards for "quasi-fault" are expressed, available, and used.³⁰⁶ The internal logic of the causal model

303. It is interesting to note the rules-oriented nature of all but the consumer expectation approach. Deference to contract leads to a flat rule of no duty in tort; deference to custom involves a world of precise, expert, and well-established codes of right and wrong behavior; and the use of statutes or regulations brings into play codes that are often highly refined and detailed. Thus, each of these approaches is consistent with the duty-oriented preferences of the causal model and somewhat at odds with the more loosely textured preferences of the community model. It is hardly surprising that the plaintiff expectation approach, which is most akin to the loose texture of the community model, is also the least favored.

304. See sources cited *supra* note 11.

305. For instance, a foreseeability approach and the Hand Formula approach do not always lead to the same conclusion about the existence of negligence, nor do they advance policies like compensation and deterrence equally.

306. This prediction correlates perfectly with the reality of our present tort system. See, e.g., EPSTEIN, *supra* note 2, at 150-69 (describing different approaches used to determine negligence); Stephen Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1015-19

is simply incapable of excluding any of the options. At the same time, the highly irregular pastiche of principles is an embarrassment. One solution, which is generally consistent with the procedural aims of the combined causal-community model, is to cover the inherent ambiguities with a general principle (the "reasonable person," who exercises "ordinary care"³⁰⁷) that masks the critical tensions among the various "quasi-fault" principles³⁰⁸ and then to let the jury give the term meaning. As long as the jury's decision does not deviate substantially from the judge's sensibilities, the difficult problem of selecting a "quasi-fault" principle can be forgotten; when the jury goes too far, the judge retains a wealth of "quasi-fault" standards to void the jury's choice.

These predicted features of a causal model operating in the shadows of a combined causal-community model find their affirmation in our experience of torts. But the causal model cannot be validated entirely unless some explanation can be given for the no duty and strict liability cases that spill out of the funnel of "quasi-fault." Both phenomena can be easily explained. For cases in which torts chooses not to adjudicate in the absence of fault (i.e., "no duty" cases),³⁰⁹ it is important to recall two facts:

(1994) (stating that cases use both Hand Formula and reasonable person definitions of negligence). For a wonderfully confused jury instruction that blends notions of foreseeability and likelihood in its definition of negligence, see CALIFORNIA JURY INSTRUCTIONS CIVIL §§ 3.10-.11 (Charles A. Loring ed., 7th ed. 1986 & Supp. 1993).

307 See, e.g., 1 NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2.10 (2d ed. 1974); 1 VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL I-77 (1993).

308. It also masks the difference between the meaning of the "reasonable person" in the community and combined causal-community models and its meaning in the pure causal model. In the community and combined causal-community world, the "reasonable person" is the person who obeys social norms; any more specific description of his or her characteristics is unnecessary. The causal model dissociates the reasonable person standard from the defendant's social fault (which, by definition, cannot be determined) and from the moral judgments so antithetical to the causal model. Thus, for rather different reasons, the community model, the combined model, and the causal model all favor an objective standard for negligence.

309 To be clear, I am not suggesting that every case in which a court says "No duty" fits within this category. For instance, some courts would hold that a landowner-defendant owed no duty of care to a trespasser-plaintiff because, on the facts, the landowner did not intend to harm the trespasser. This "no duty" holding is merely a statement that community norms (as translated and hardened into rule by the causal model) were not violated under the facts. Likewise, in *Palsgraf*-like cases that hold that there is no duty because the plaintiff is unforeseeable, the "no duty" holding merely describes the failure of an individual plaintiff to provide sufficient evidence on the dispositive "quasi-fault" element of foreseeability.

that the causal model does not need to expand to the full scope of its potential boundaries and that the interests of other bodies of law can overlap the causal model's interest in reallocating loss.³¹⁰ When the causal model overlaps with other bodies of law, the same type of indeterminate struggle that occurred between the causal and the community models will occur at a heightened level; each field of law, with its own preferences and optimal conditions, will jockey for superiority. At any given moment, the claim of another body of law to supremacy might be compelling, but eventually that can be expected to change. As it does, torts might reclaim (at least for a time) the right to apply quasi-fault principles to judge the conduct. For example, as our century has seen growing skepticism about the value of unfettered bargain,³¹¹ we have also seen less willingness on the part of torts to defer to contract solutions for loss allocation.³¹² Con-

Rather, the "no duty" cases to which I refer here involve injurious conduct that torts chooses not to address at all. Leaving to one side issues of federal preemption, in which a federal statutory or regulatory scheme may preclude the expansion of the causal model into some areas, *see* *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the incidence of this type of "no duty" holding has tended to decline in the past century. *See generally* Rabin, *supra* note 189 (tracing decline of "no duty" rules during this century). *But see* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 659-63 (1992) (observing that few inroads have been made on remaining "no duty" pockets during last decade). But some examples still remain, particularly in the uncertain borderland between contract and tort, and in the areas of psychic and economic harms. *See generally* *East River S.S. Co. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *Hoard v. Shawnee Mission Medical Ctr.*, 662 P.2d 1214 (Kan. 1983) (no recovery for negligent infliction of emotional distress unaccompanied by physical injury); *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (no recovery for negligent misrepresentation); *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928); *United Textile Workers v. Lear Siegler Seating Corp.*, 825 S.W.2d 83, 87 (Tenn. Ct. App. 1990) (no recovery for negligently caused economic loss); *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (no recovery for negligent infliction of emotional distress without breach of independent tort); *see also* *Wilber v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982) (rejecting claim of wrongful birth).

310. *See supra* notes 111-17 and accompanying text.

311. *See Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

312. *See supra* note 298; *see also* *Bily v. Arthur Young & Co.*, 834 P.2d 745, 752-54 (Cal. 1992) (discussing fate of *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931)). The contract-oriented result in *East River Steamship Co. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) confirms rather than disproves the general statement. In *East River*, the plaintiff and defendant were commercially strong entities, and there was little reason to believe that the plaintiff was incapable of protecting its economic interests in a world of unfettered bargain. *East River*, 476 U.S. at 873, 875. The opposite is true for consumers who are physically injured; *East River's* lineal ancestor, *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), has long since departed from the American tort scene.

versely, our skepticism about the efficacy and scope of other areas like securities or antitrust has led us, so far at least, to retain torts such as misrepresentation and unfair competition. In the next century, the relationship of torts to these other areas could well be different, with a different pattern of "no duty" rules.

But it is also true that torts has refused to regulate loss-causing conduct even in areas not of concern to other fields of law. For instance, claims of wrongful birth, wrongful life, and infliction of emotional distress have been addressed only recently and with little consensus. The reason that these cases also involve "no duty" rules are related to, but distinct from, the prior "no duty" rules. Recall that the term "loss" is defined as a positive matter by society³¹³ For a number of reasons, torts traditionally professed a reluctance to recognize purely psychic peace as a compensable loss.³¹⁴ Similarly, until recent advances in medical technology, we were never confronted with the "loss" of an unwanted pregnancy or an imperfect child that we could attribute to the causal actions of a third person.

In both cases, torts must decide whether this injury is a cognizable "loss." The dual pulls of the causal model are obvious. On the one hand, its formal nature resists the creation of new rules not logically derivable from first principles, and it has an especially strong dislike for new rules clearly rejected by prior precedent. On the other hand, it must be internally consistent, and if the consistency on which it has settled is foreseeability or efficiency,³¹⁵ it must follow where those principles lead.³¹⁶

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

314. For discussion of some of the reasons, see HARPER ET AL., *supra* note 302, § 9.1, PROSSER & KEETON, *supra* note 30, § 54. The exceptions were assault and defamation because both types of conduct were likely to cause the sort of breach of the king's peace with which torts initially concerned itself. See RESTATEMENT, *supra* note 12, § 568 cmt. b; PROSSER & KEETON, *supra* note 30, §§ 10, 14.

315. See *supra* notes 243-55 and accompanying text.

316. To promote greater certainty, the causal model would obviously prefer to pour new torts into old doctrinal vessels, at least until there is sufficient precedent that the "new" tort can be declared an entity distinct from the old doctrine. This approach can be seen best in the torts of intentional and negligent infliction of emotional distress. Compare *Wilkinson v Downton*, 2 Q.B. 57 (1897) (allowing recovery for emotional distress on very generous understanding of battery) and *Bouillon v. Laclede Gaslight Co.*, 129 S.W. 401 (Mo. Ct. App. 1910) (allowing emotional distress claim with arguable assault and trespass overtones) with RESTATEMENT, *supra* note 12, § 46 (recognizing tort of intentional infliction of emotional distress) and *id.* cmt. b (discussing evolution of intentional infliction tort). See *Kerans v Porter Paint Co.*, 575 N.E.2d 428, 435 (Ohio 1991) (adopting tort of sexual harassment);

Hence, with new types of loss or old "non-losses" subject to modern reconsideration, a lengthy start-up time, many false starts, and considerable confusion along the way to a solution can be anticipated.

In order to complete the portrait, the causal model must also be capable of explaining the position that opposes "no duty"· strict liability³¹⁷ This part of the portrait requires us to recall the reasons that community norms are sometimes inoperative: either a lack of knowledge about the defendant's conduct or a lack of community consensus about that conduct. When the community lacks consensus, the causal model's use of a quasi-fault standard, which is likely to reflect the norms of a fair segment of the community, seems appropriate. When the problem is a lack of experience with the defendant's conduct, however, none of the community's quasi-fault standards is particularly apposite.

Our present rules of strict liability reflect this dichotomy. Many of our famous pockets of strict liability actually involve the application of quasi-fault principles to conduct with which we are familiar generally, but incapable of judging specifically. For instance, blasting, which is an activity about which we have a general understanding, warrants strict liability because of the foreseeability and magnitude of risk associated with that conduct.³¹⁸ But the result of the blasting cases would be no different if the court required a showing of negligence and read a jury instruction defining "negligence" to be "conduct which foreseeably poses a high degree of harm to others." Indeed, half of the six "strict liability" factors mentioned in the *Restatement (Second) of Torts* as relevant to a strict liability determination—likelihood of injury, magnitude of injury, and cost-

EPSTEIN, *supra* note 2, at 1037-63 (discussing evolution of negligent infliction of emotional distress); Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 356-62 (1988) (advocating recognition of tort of sexual harassment as distinct from tort of infliction of emotional distress).

317 I have already placed some strict liability claims in the intersection of the causal and community models. See *supra* note 263 and accompanying text. Here, I refer to the remainder of strict liability claims: those in which the statement "When you do 'X,' you pay" does not reflect the community's norm that doing "X" is faulty under all circumstances.

318. See, e.g., *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969); see also *Siegler v. Kuhlman*, 502 P.2d 1181, 1184-86 (Wash. 1972) (finding strict liability for transportation of gasoline because of magnitude of possible harm and likelihood of destruction of evidence of cause of injury), *cert. denied*, 411 U.S. 983 (1973); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (holding asbestos manufacturer strictly liable when magnitude of harm from exposure to asbestos products was great).

benefit analysis³¹⁹— are simply expressions of three standard "quasi-fault" principles transplanted into "quasi-strict" liability³²⁰

Only a single (albeit important) difference separates quasi-fault and quasi-strict liability. In quasi-fault cases, the jury selects the relevant principles,³²¹ whereas in quasi-strict liability cases, the judge selects those principles.³²² Two other features, however, minimize even that difference: the power of the judge in quasi-fault cases to review and reverse the jury's verdict when convinced that the wrong approach to quasi-fault has been taken³²³ and the power of the jury in quasi-strict cases to reject strict liability through the subterfuge of finding a lack of proximate causation.³²⁴ Thus, the difference between quasi-fault and quasi-strict cases is quite subtle. With a judge declaring rules and a jury left with a more ministerial fact-finding role, quasi-strict cases are somewhat more aligned with the optimal features of a causal model—a result which suggests that there is a relatively weaker attraction of the community model in quasi-strict cases. That suggestion appears to be true. As a society, we have a greater opportunity to enter into contracts, seek medical services, and buy products than we have to experience blasting; hence, our communal sense of the utility and trustworthiness of the blasting industry is less refined, and our need to give the blasting industry the benefit of a jury's justice is less compelling. But the shadings here are rather refined. In spite of all the attention paid to the critical differences between negligence and strict liability systems, it would be a mistake to emphasize unduly the difference between quasi-fault and quasi-strict principles as they actually operate in tort law³²⁵

319 RESTATEMENT, *supra* note 12, § 520(a), (b), (f).

320. See PROSSER & KEETON, *supra* note 30, § 78, at 555 ("When a court applies all of the factors suggested in the Second Restatement it is doing virtually the same thing as is done with the negligence concept, except for the fact that it is the function of the court to apply the abnormally dangerous concept to the facts as found by the jury").

321. They do so under the guise of the "reasonable person" instruction. See *supra* note 307 and accompanying text.

322. See RESTATEMENT, *supra* note 12, § 520 cmt. 1.

323. See *supra* text accompanying note 308.

324. Defendants are liable in strict liability cases only for foreseeable types of harm. See *Madsen v. East Jordan Irrig. Co.*, 125 P.2d 794 (Utah 1942); RESTATEMENT, *supra* note 12, §§ 522, 524.

325. See Schwartz, *supra* note 104, at 1003-05 (suggesting that most strict liability cases rely on negligence concepts and would have same result in negligence regime).

The other head of strict liability, which derives from the community's lack of sufficient knowledge to form a judgment about the defendant's conduct, rests on quite a different footing. In these cases, the society does not know how likely or foreseeable an injury is and whether its risks are greater than its costs. It lacks a sense of the defendant's trustworthiness. The natural human reactions are fear of the unknown and intolerance toward any damage that the unknown produces. It is equally natural to force the defendant who engages in an unknown activity to bear the burden of its damages, at least until the defendant educates us about the utility of the activity and demonstrates sufficient trustworthiness.³²⁶ Captured in the fourth factor of the *Restatement's* strict liability formula—the "extent to which the activity is not a matter of common usage"³²⁷—this fear of the unknown constitutes the only "true" form of strict liability, i.e., the only type of strict liability in which community norms or quasi-fault principles derived from those norms do not inform our judgment to impose liability.

The difference between "quasi-strict" and "true strict" liability, which hinges on the level of general community experience with an activity, is best captured in the famous dichotomy between Blackburn and Cairns in *Rylands v Fletcher*. We now can recognize in Blackburn's rule—"that the

326. The overlap between this human reaction and the "cheapest cost avoider" principle so frequently invoked in the law and economics literature is apparent. As between a community that is ignorant of the damages of an activity and a defendant who wishes to perform that activity, the defendant is the one in the best position to decide whether to engage in that activity, see, e.g., CALABRESI, *supra* note 29; Calabresi & Hirschhoff, *supra* note 237, and the defendant is also the one whom the community will wish to hold responsible. Nevertheless, it would be inaccurate to assume that the "cheapest cost avoider" has applicability only in cases of "true" strict liability. Rather, some of the community's norms may be based on, or at least influenced by, cheapest cost avoider notions, so that it is a principle which can cut across the models and be useful in cases involving the community model, the causal model, and the hybrid causal-community model. See *supra* note 225 and accompanying text.

327. RESTATEMENT, *supra* note 12, § 520(d). For discussion of three of the *Restatement's* six factors, see *supra* notes 319-20 and accompanying text. The remaining two factors of § 520 serve different interests. The fifth factor—the "inappropriateness of the activity to the place where it is carried on," *id.* § 520(e)—reflects the type of strict liability that is in fact an aspect of the combined causal-community model. See *supra* note 190 and accompanying text. The third factor—the "inability to eliminate the risk by the exercise of reasonable care," RESTATEMENT, *supra* note 12, § 520(c)—is either a refinement of the likelihood and magnitude principles discussed in § 520(a) and (b) or else an unintelligible makeweight. See PROSSER & KEETON, *supra* note 30, § 78, at 555-56 (criticizing *Restatement's* use of multiple factors to determine strict liability).

person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril"³²⁸—a statement of "quasi-strict" liability in which Blackburn blends "quasi-fault" principles of likelihood and magnitude to judge conduct that the community understands, but about which it has developed no consensus. Cairns's rule—that defendants act at their peril when they use land "for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it"³²⁹—is arguably a rule of "true strict" liability, which finds liability to inhere in the lack of community knowledge (i.e., "non-naturalness") about an activity³³⁰

In choosing among "true strict," "quasi-strict," and "quasi-fault" approaches, three factors seem significant: the community's familiarity with the nature of the defendant's enterprise, the perceived utility of that enterprise to the community, and the perceived trustworthiness of the defendant in keeping the community's safety in mind.³³¹ In general terms,

328. *Fletcher v Rylands*, 1 L.R.-Ex. 265, 279 (1866).

329. *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330, 339 (1868).

330. It is not clear what Cairns himself meant by the term "non-natural use," but it is subject to other interpretations than the one given in the text. The most obvious interpretation is that "natural" should be distinguished from "artificial," but this would mean that homeowners are strictly liable for damages that their "artificial" homes might cause. A second interpretation is to explain "non-natural use" in terms of quasi-fault principles of likelihood and risk-utility. See RESTATEMENT, *supra* note 12, § 520 cmts. 1-j; COLEMAN, *supra* note 14, at 368; PROSSER & KEETON, *supra* note 30, § 78; *supra* note 190. But the interpretation suggested in the text—liability in the absence of community knowledge about an activity—also has support. See FIRST RESTATEMENT, *supra* note 12, § 520; EPSTEIN, *supra* note 2, at 95.

331. These concerns can explain the apparently puzzling dichotomy between cases like *Beshada v Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982), in which an asbestos manufacturer was found to have a duty to warn even about dangers of which it was unavoidably unaware, and *Feldman v Lederle Lab.*, 479 A.2d 374 (N.J. 1984), in which a drug company was allowed a defense that it was unavoidably unaware of its product's dangers. If we were a robust and healthy species that lived on the edge of Hell, I suspect that our perception of the relative merits of asbestos and drugs, and hence the results in the cases, would be reversed.

A fourth concern may also be relevant in some cases: the strength of the causal showing. As the strength of the causal evidence weakens, there may be a greater need for the use of a stringent standard of quasi-fault in order to prevent the case from escaping into the nether reaches of the causal model. Hence, the causal model might insist that *Sindell*, which fits poorly within the causal model because of its relaxed views on causal proof, see *supra* note 176 and accompanying text, be coupled with a quasi-fault rather than a quasi-strict or true strict standard. That expectation has proven correct. *Brown v Superior Court*, 751 P.2d 470

the issue of familiarity with defendant's conduct divides true strict from quasi-strict and quasi-fault, and utility and trustworthiness then guide the choice between quasi-strict and quasi-fault, as well as the specific principle (likelihood, magnitude, plaintiff's expectation, defendant's custom, and so on) that is used to judge the defendant's conduct. Application of these factors, however, is not an exact science yielding precise answers, so that some discord in approaches and principles is inevitable both over time and among communities. The amount of discord will be heightened by the filtering effect of the judge, who, consistent with the formal aspirations of the causal model, makes the initial choice of approach.³³² With different training and experiences, a judge's sense of familiarity, utility, and trustworthiness will not necessarily reflect the sense of the community at large.³³³ Adding to the distortion in common law jurisdictions is the judge's loyalty to precedent, with the consequent reluctance to revisit a declared rule in light of shifting senses of familiarity, utility, and trustworthiness.

These community-oriented factors show that the community model remains a brooding presence even in cases that lie only within the causal model. Although the community is unable to make precise judgments about the appropriateness of the defendant's conduct, it can nevertheless make categorical judgments that help the causal model to select an appropriate rule. Indeed, just as the community model is unable to shake off the influences of causation,³³⁴ so is the causal model unable to free itself

(Cal. 1988) (holding manufacturers of DES to negligence standard). Because the incidence of a relaxed burden of proof in a causal model is so low, however, this fourth factor will not typically come into play

332. See, e.g., RESTATEMENT, *supra* note 12, § 285 (describing range of quasi-fault standards from which judge is expected to choose in instructing jury); *id.* § 520 cmt. 1 (stating that it is function of judge to decide whether strict liability pertains to defendant's conduct).

333. The variance may be most evident in professional malpractice cases, in which the need to defer to the standards of the competent practitioner in the field is not necessarily obvious to the average member of the community. See *Helling v Carey*, 519 P.2d 981 (Wash. 1974) (rejecting standard of medical custom in case in which simple and inexpensive test would have prevented foreseeable injury). But the judge, as a professional, is familiar with the professional ethic to keep the interests of others foremost. Hence, the judge is willing to extend the greatest level of quasi-fault immunity—absolute deference to the defendant's custom—to professionals who, the judge believes, share this ethic. For other professionals (for example, plumbers) and in other areas, a judge's sensibilities are likely to deviate less from those of the community

334. See *supra* note 280 and accompanying text.

from the values of the community³³⁵ In theory, the causal model and the community model stand without the other. In reality, their relationship is symbiotic and, therefore, far more complex.

4. *Cases Outside the Scope of the Causal and Community Models: Beyond Torts*

The final test of my theory's descriptive validity is to determine whether the models fail to account for significant dimensions of tort theory, doctrine, and practice. As it turns out, I have not led everyone on a wild goose chase. In my view, the models do capture everything that we have accomplished in centuries of doing torts.

Or at least nearly everything. One possible exception, which is brand-new, arose in *Hymowitz v Eli Lilly & Co.*³³⁶ *Hymowitz* involved plaintiffs who were exposed to DES, but who were unable to prove which manufacturer of DES had made the DES to which they were exposed; put in the terms that we have considered, the plaintiffs demonstrated that the defendants increased the risk of injury, but failed to offer any evidence which associated that risk with their loss.³³⁷ As we have seen, communal notions of wrongfulness have influenced cases like *Kingston*, *Summers*, and *Sindell* to weaken the quantum of proof needed to prove the association between defendant's risk and plaintiff's injury, but in those cases the defendants always retained the ability to prove that their risk did not materialize in plaintiff's loss.³³⁸ Although the weakening of the evidentiary standards ran counter to the preferences of the causal model, the opportunity of the defendant to avoid responsibility for losses not associated with its risks kept the cases within the model's permissible boundaries.

Hymowitz is different. Unlike *Kingston*, *Summers*, or *Sindell*, it gives a defendant no opportunity to disprove causal responsibility. Rather, in *Hymowitz*, the New York Court of Appeals held that in DES cases, each manufacturer successfully sued by a plaintiff was to be held liable for that percentage of the plaintiff's damages which equalled the percentage of the

335. This reality presents a final reason that the causal model cannot depart too much from the structures established in the intersection of the causal and community models.

336. 539 N.E.2d 1069 (N.Y. 1989).

337. See *supra* notes 136, 173-75, 280 and accompanying text.

338. See *supra* notes 173-76 and accompanying text.

manufacturer's share of the national DES market.³³⁹ The court of appeals specifically forbade evidence that a defendant's New York market was substantially smaller than its national market, and it even forbade evidence that the plaintiff was not injured by the defendant's DES; hence, a defendant was liable for its share of the national market even though its smaller local market for DES meant that the defendant posed substantially less risk to these plaintiffs than its share of damages indicated, and even though the defendant was able to prove, with the ironclad evidence of twenty bishops, that a particular plaintiff never took that particular defendant's DES.³⁴⁰ Therefore, *Hymowitz* imposes liability without requiring some quantum of evidence that associates defendant's risk and plaintiff's injury. In other words, *Hymowitz* cannot be located within the causal model.

It is tempting to locate *Hymowitz* within the "pure" community model.³⁴¹ There is language to support that view; *Hymowitz* contends that its abandonment of a causal connection is necessary "to achieve the ends of justice in a more modern context"³⁴² and is consistent "with the reasonable expectations of a modern society [and] the ever-evolving dictates of justice and fairness, which are the heart of our common-law system."³⁴³ Nonetheless, I doubt that the community of New York possesses sufficient experience with the manufacture and distribution of DES so that it is capable of forming judgments about a DES manufacturer's responsibility for exposure to its product. Consequently, the wide consensus of appropriate behavior on which the community model depends is as absent in a case like *Hymowitz* as causation itself.

The problem represented by *Hymowitz* can be expanded to both theory and practice. A trickle of recent scholarly work has called for the abandonment of cause-in-fact and its replacement with other principles (such as risk creation, loss spreading, or deterrence) that better achieve

339. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1077-78 (N.Y.), *cert. denied*, 493 U.S. 944 (1989).

340. *Id.* at 1078. A manufacturer could escape liability only by showing that it did not enter the national market for the use of DES in pregnancy. *See id.* The dissent in *Hymowitz* urged that the burden-shifting approach of *Sindell* be used. *See id.* at 1083 (Mollen, J., dissenting).

341. *See supra* part II.C.2.

342. *Hymowitz*, 539 N.E.2d at 1075 (quoting *People v. Hobson*, 348 N.E.2d 894, 901 (N.Y. 1976)).

343. *Id.*

certain ideals of justice or efficiency³⁴⁴ When the community neither widely supports these replacement principles nor has sufficient experience and consensus to judge the appropriateness of the defendant's conduct, such proposals push torts beyond the present boundaries of the two models that I have described. Similarly, on the level of practice, we can easily imagine a jury that ignores the utter lack of causal evidence and decides a case purely on intuitions that they, but not the community at large, share.³⁴⁵ When the judge fails to check the jury's excess, we have a tort result that the models cannot accommodate.

With respect to theory and practice, however, the problem is actually nonexistent. Communities are not stagnant, and legal theory often reshapes communal norms. Hence, at least some legal theory, issuing its clarion call to the community model to catch up and embrace it, will invariably exceed the limits that tort doctrine must respect.³⁴⁶ The practical problems of juries ignoring both communal and causal principles can be accounted for in a similar way: as a challenge from a community's subgroup to push the community's norms in the subgroup's direction. Because most tort verdicts receive little publicity, however, a more realistic interpretation of the subgroup's action is that it is no longer "doing torts."³⁴⁷

The doctrinal solution of *Hymowitz* can likewise be seen in either of these lights. The first, and more charitable, light is that it stands as a clarion call from an influential subgroup of society (judges) to shift the community's norms toward the allowance of compensation for risk. The alternative view is that *Hymowitz* has simply exceeded the boundaries that tort law has at present established as its limits. It is no longer "doing torts"

344. The classic piece belongs to Guido Calabresi, *see* Calabresi, *supra* note 30, who argues that cause-in-fact principles should be interpreted in order to achieve a proper mix of loss spreading and accident avoidance. The past few years have seen the emergence of other proposals to compensate plaintiffs for risks that do not materialize in loss. *See, e.g.*, sources cited *supra* note 178. *See generally* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988) (criticizing other efforts to permit compensation for risk, but concluding that liability based on increased risk is consistent with corrective justice).

345. Consider the possibility of a jury of Klansmen sitting in judgment of a black defendant being sued by a white plaintiff.

346. *Cf.* Weinrib, *supra* note 34, at 967-68 ("Court decisions or legal scholarship may call any of [the central features of a body of law] into question.").

347. Here, it is useful to remember the slip between the nature of torts and any human (and therefore fallible) process to implement that nature. *See supra* text accompanying note 124.

in the way that tort cases for the past twenty centuries have gone about their business.

Although I wish that I could embrace the former interpretation, I fear that the latter view of *Hymowitz* is accurate. It is not the role of doctrine to reshape community norms. Occupying that tenuous middle ground between theory and practice, the role of doctrine is to reflect community principles rather than to instigate them—to follow rather than to lead. My conclusion, therefore, is that *Hymowitz* cannot be explained by the two models that have defined torts up to the present time.³⁴⁸ *Hymowitz* cannot be situated within the causal model, and the boundaries of the community model have not yet expanded to embrace it.

This conclusion does not necessarily suggest that *Hymowitz* is wrong. The nature of the descriptive enterprise that forms the basis of this Article is to describe torts as it is, not to make normative judgments about what torts should or should not be doing. Torts is not a lifeless form; it is alive, and as long as it remains alive, it is always subject to change. New forms can be injected into torts, just as old forms can be discarded. *Hymowitz*, which can arguably be incorporated within explanatory models such as contract, insurance, criminal law, or welfare, argues that torts should now add a third model. Whether *Hymowitz* in fact signals the rise of a new, third model in torts, or whether it is an aberration that, with time, will have no effect upon torts' basic two-model structure, is not at all clear. What is clear is this: *Hymowitz* stands outside the order of torts as presently constituted, and the present models of torts must therefore disavow it.

348. This may well account for the frosty reception that *Hymowitz* has received, both in New York and elsewhere. See *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 126-27 (3d Cir. 1993) (rejecting *Hymowitz* and other forms of market share liability under Pennsylvania law); *210 E. 86th St. Corp. v. Combustion Eng'g, Inc.*, 821 F. Supp. 125, 128 (S.D.N.Y. 1993) (refusing to apply *Hymowitz* to asbestos case).

I am not the only one to believe that *Hymowitz* is actually a distributive justice decision masquerading as a torts case. See COLEMAN, *supra* note 14, at 398-406. My disagreement with Coleman lies in his view that *Sindell* likewise cannot be properly understood as a tort case (or at least as a tort case that fits within the notion of corrective justice). *Id.* at 405-06. Although the fit is admittedly uncomfortable, see *supra* note 176 and accompanying text, I have no difficulty locating *Sindell* within the permissible outer boundaries of tort law's causal model. Nonetheless, the fact that it too has received a somewhat frosty reception, see *supra* note 277, demonstrates that *Sindell* owes its existence primarily to the penumbral influence exercised by the community model on the causal model. See *supra* notes 280, 335 and accompanying text.

III. *The Value of the Hypothesis*

Having spent a great deal of time validating the hypothesis that torts arises from the adjudicatory union of causal and community responses to the problem of loss, I turn briefly to a consideration of the value of the hypothesis. At one level, of course, a valid description of what torts is—which has never been accomplished successfully—has its own intrinsic value and perhaps needs no further justification. At another, normative level, however, the theory that I have proposed can be critiqued by all of the conceptualist and anti-conceptualist positions I surveyed before.³⁴⁹ In attempting to accommodate all, I have offended all as well.

Is it possible, then, to defend my hypothesis of torts other than in descriptive terms—to argue, in other words, that what tort law is also what it should be? The answer is yes. Unfortunately, a complete explanation would likely take a work comparable in length to that which has come before. Let me, therefore, skate quickly over the ice, acknowledging my obligation at some future point to plumb the deep water below³⁵⁰

I begin with the disclaimer, which should come as no surprise, that no normative theory can generate the precise descriptive theory that I have developed.³⁵¹ In other words, I know of no first principles from which torts as a confederation of causal and community models can be derived. Torts must be experienced and cannot be understood apart from its concrete manifestations.³⁵² The most that normative theory can do is to justify the understanding of torts as a system in perpetual conflict. The precise features which generate that conflict (the causal model and the community model) can be described only through reflection on the concrete manifestations of torts in history and culture.

It is, perhaps, surprising that the vision of torts in perpetual conflict should need any justification at all. Frankly, I know of no other way to understand torts properly. Torts is filled with contradictions: differing and plainly inconsistent theories and doctrines among cultures and throughout history, varying procedures, disparate treatment of like claims of loss and

349. See *supra* part I.A.

350. I have begun this task in Tidmarsh, *supra* note 84.

351. See *supra* part I.B.

352. See PROCESS AND REALITY, *supra* note 15, at 391 ("You cannot know what is red by merely thinking of redness. You can only find red things by adventuring amid physical experiences in *this* actual world.").

damage. If we begin with an attitude of equal respect—that a decision requiring proof of negligence in a case of blasting damages is as much a tort case as a decision imposing strict liability—we can denominate one of the decisions as the "right" decision only through some personal vision of corrective justice, efficiency, morality, or intuition. But we cannot deny that even the "wrong" decision (i.e., the decision that violates our preferred normative principles) must be accepted as a tort case—a constitutive aspect of what torts is.

These "wrong" decisions are simply one manifestation of an even larger phenomenon. First, consider more generally our life experiences. Each experience forces us to face decisions and choices. I can walk to work, ride my bike, or take a car. My choice is informed by a host of factors: the weather; the amount of time that I have; my need for exercise; my concerns for safety; the condition of my shoes, bike, and car. I bring back to memory the prior occasions on which I faced similar choices, and I recall their outcomes. I recollect that my choice yesterday to drive the long way home means that the car does not have enough gas to get to work. Then I make a choice. I am free to take the car, although that would be a bad choice. Or I can walk or take a bike, which are better choices.

Our lives are filled with series of experiences like these. Three aspects of each of these experiences should be evident. The first is that our past experiences help form our judgment about a present decision. The second is that our past decisions cannot entirely determine our present range of options. After having faced the same three transportation options for years, a new bus line may one day come near my house, or I may apprehend for the first time the always present but unknown possibility of taking a taxi. Indeed, past experiences and their untoward consequences sometimes spur us to discover or work toward previously unrealized possibilities. Third, our present choices influence our future possibilities. Having chosen to ride my bike to work, I cannot drive my car home. I still have options—walking, riding the bike, the bus, or a taxi—but the option of driving a car is not among them.

A moment's reflection proves that the law moves forward in precisely this way. A series of experiences and occasions of choice brings a person to an occasion of suffering loss. That loss opens new ranges of possibilities. A person can simply suffer a loss, or she can seek the aid of others. She can seek church-sponsored funding, government assistance, or insurance. She can perhaps seek recourse in legal forms such as tort,

contract, antitrust, and so forth. Then, guided by the "prehension"³⁵³ of past experience, she makes a choice. If the choice is to seek legal recourse, then those involved with the administration of law and those from whom recourse is sought are themselves called into an occasion of experience. Like the person suffering loss, they now have a range of possibilities from which they must choose.

Should the ensuing series of experiences and choices lead ultimately to the point at which a legal decision on the allocation of the loss is required, the decision maker (judge, jury, or both) must then choose an outcome. The decision maker marshals known possibilities and (perhaps) searches for unknown or forgotten solutions. Past experiences, which are prehended through lenses such as precedent, justice, efficiency, morality, intuition, bias, rhetoric, and sympathy,³⁵⁴ rush forward to screen the possibilities. Then, the decision maker chooses, and the present outcome recedes into the past to become one of the occasions prehended for future questions of loss allocation. In the moment of choice, however, a range of legitimate options is available, and nothing in the past can determine absolutely the present response.³⁵⁵

So understood, each experience of loss (and loss allocation) must be seen as unique, distinct, and conceivable primarily in terms of possibilities. Many of the possibilities may appear to us to be "wrong" (i.e., less just, less efficient, or less morally satisfying) on the basis of our prehensions shaped by past experiences and beliefs. Many will conflict with each other at the various levels of theory, doctrine, and practice. But it is their process of having been brought to life that is critical. Having been considered as a part of a present decision, possibilities gain a certain immortality both in the negative sense of having shaped an outcome adverse to their counsel and in the positive sense of being available for recall and use if the unfolding future reveals that the present decision was

353. I use the term "prehension" as Alfred North Whitehead did—the process of unifying past occasions of experience in a present experience. See *ADVENTURES OF IDEAS*, *supra* note 15, at 226-27; *MODES OF THOUGHT*, *supra* note 15, at 205-06; Emmett, *supra* note 15, at 293.

354. Some of these influences predate the injury-causing event or the trial; others are created by these events. In the creation of theory and doctrine, the preinjury influences are likely to be relatively greater than the trial influences. In the adjudication of concrete disputes, the opposite would be true.

355. See *ADVENTURES OF IDEAS*, *supra* note 15, at 328 ("This process of the synthesis of subjective forms derived conformally is not settled by the antecedent fact of the data.").

ill-conceived. The conflicting possibilities may be forgotten,³⁵⁶ but their existence cannot be denied.

Through the prehension of past experience and the continued existence of the range of possibilities, each unique and individual legal outcome is related to all others.³⁵⁷ Past outcomes are related to present choices both because they establish and legitimize certain modes of analyzing possible solutions and because they provide a sense of the untaken paths that may avoid the pitfalls of prior solutions.³⁵⁸ Present outcomes are united to the future in the same fashion: They set in motion events whose consequences help to form the law's prehension of future possibilities.

The existence of conflicting possibilities and their simultaneous interrelatedness has three further consequences with significance for the understanding of law generally and torts in particular. The first is a rejection of both determinism and unfettered free will. The law is at least partially determined. Past outcomes foreclose some present possibilities and also generate information that influences our prehension in a present experience; thus, a particularly bad choice of doctrine, like a particularly tiring bike ride on a hot day, inevitably will influence our choice about whether to make the same choice in a similar future circumstance. At the same time, however, free will remains. At the moment of choosing, we retain the power to make a bad choice (like developing a no-duty rule for careless motorists), a good choice, or perhaps a new choice just realized and acted upon for the first time.

The second point is that law must be seen as a process of conflict not only in the past and present, but also perpetually into the future. This notion of perpetual conflict derives necessarily from the existence of inconsistent past and present possibilities and the lack of any deterministic way in which those present conflicts must be resolved. Human agents are

356. Even when they are forgotten, they remain subject to recall when a later occasion "discovers" the possibility anew. Think, for instance, of *Carroll Towing*, an inconsequential decision until its reinvigoration decades later by law and economics adherents.

357. Each legal outcome is related to nonlegal outcomes as well.

358. Not all past influences necessarily have a conscious relationship to present outcomes. Whether due to lack of memory, lack of knowledge, or rhetorical simplicity, some past influences are inevitably not raised to a conscious level from which they have the possibility of being actualized either through acceptance or conscious rejection. Their influence on the past outcomes that do rise to a conscious level in the present and the possibility of their actualization in the future, however, make them actual even in the present. See ADVENTURES OF IDEAS, *supra* note 15, at 325-28, 334-35.

free at each moment of decision to choose a possibility for law that brings it sharply into conflict with the past. In other words, no end state of law, no idyllic world in which all principles are known and accepted, exists to be discovered.³⁵⁹ Indeed, we even lack assurance that law will move toward perfection or betterment because the power to choose freely includes the power to choose wrongly. And once a wrong choice is made, there is no guarantee that the law will correct itself. There is only the guarantee that the law has the capacity to change, and with that capacity comes perpetual conflict.

Third, each present occasion is experienced most fully when the possibilities for different options are greatest. This point requires greater discussion than I can devote to it here.³⁶⁰ Let me simply state that the self-creativity and free choice that inhere in each moment of present experience are retarded when choices are essentially determined because of a dearth of perceived available options; such retardation is relatively worse because it fails to actualize the full range of creativity and freedom that is an aspect of all objects in process, humans in particular.³⁶¹ Thus, it is important for the intensity of experiencing present occasions that we remain open to the novel possibilities that add zest and excitement.

These observations about human existence and law are vital to a defense of my vision of torts. First, it should be evident that no theory of torts can be adequate unless it accounts for past and present outcomes. Each tort case—each moment of choosing—is the critical unit of torts.³⁶²

359. This proposition, which I believe is nearly unassailable, has been advanced articulately by Roberto Unger, *see* Unger, *supra* note 22, at 583-86, 648-65, and distinguishes him from both Marxists and more traditional legal realists. But it is not a novel insight. *See* MODES OF THOUGHT, *supra* note 15, at 109-14, 136; NORTHROP, *supra* note 19, at 121.

360. For short discussions, see COBB & GRIFFIN, *supra* note 16, at 28; MODES OF THOUGHT, *supra* note 15, at 109, 119 ("Life degenerates when enclosed within the shackles of mere conformation. [I]t is the realization of vibrant novelty which elicits the excitement of life. The essence of life is to be found in the frustration of established order.").

361. It is the extraordinary ability to be less bound by instinct and other deterministic forces that distinguishes humans from other forms of being that also experience present occasions. *See* MODES OF THOUGHT, *supra* note 15, at 105-06, 169-71. Hence, resistance to deterministic impulses and living with openness to our unique opportunities for creativity and freedom better fulfill our humanity.

362. To this extent at least, my descriptive theory can be described as "realist" rather than "formalist." *See* WHITE, *supra* note 1, at 111 (noting that, for realist, tort case "overwhelmed any principle that it allegedly stood for"); Weinrib, *supra* note 34, at 1009-11 (describing formalism as being more concerned with generalized juridical relationships than with

Each case possesses the totality of past remembered experiences (theoretical, doctrinal, and practical), the actualization of previously unrealized possibilities, and the beginning of tort law's future. Theoretical work fails to begin with these experiences. As a result, theoretical work is an abstraction from torts and, as an abstraction, can never reach its essence.³⁶³ Hence, my claim in Part I that torts must first be understood on its own terms—which in turn led to the descriptive methodology employed in Part II—proves true.

Second, if torts is not to play itself out as a relevant response to the problem of loss, it must have the internal capacity—the *lebensraum*—to regenerate itself over time. Any effort to allocate loss that is one-dimensional or single-principled can survive for a time, as it works its own approach into a state of perfection. Yet no state of perfection can maintain itself forever; it inevitably will collapse before the onslaught of new data or events in discord with the perfected object.³⁶⁴ This lesson is especially relevant to civilizations and the legal institutions that support them: "[P]erfection will not bear the tedium of indefinite repetition. To sustain a civilization with the intensity of its first ardour requires more than learning. Adventure is essential, namely, the search for new perfections."³⁶⁵ It follows that discord and imperfection are not necessarily bad: "[T]here are in fact higher and lower perfections, and an imperfection

particular outcomes).

363. Judge Posner has attempted to argue that no theory can accurately describe all of law, but that theories that justify significant segments of law can nonetheless be useful. POSNER, *supra* note 29, § 1.3. In a certain sense he is correct; no "endstate" theory can accurately describe our experience, yet such a theory can suggest a range of possible approaches and thus have predictive power. See *MODES OF THOUGHT*, *supra* note 15, at 92-95, 135-36. But in a more important sense, Posner is wrong. Posner's view of "endstate" theory seems to be equivalent to a Platonic form of knowledge that is independent of (indeed, incapable of) the process of change. Once we understand that it is possible (indeed, essential) to introduce the element of perpetual process into tort theory, Posner's claim that no theory can describe torts is simply incorrect. In fact, the great danger of efforts such as Posner's, which seek to describe large segments of torts in terms of incomplete endstate theories, is that these theories systematically exclude a wide array of possibilities inconsistent with the abstract theory on which a theorist has myopically focused. Cf. *id.* at 132 (calling belief that individualities can be separated from process "falsehood[]").

364. This insight, which can be found throughout Whitehead's metaphysical work, is applied to human history, institutions, and civilizations in Parts I and IV of *Adventures of Ideas*. *ADVENTURES OF IDEAS*, *supra* note 15, at 1-127, 307-81.

365. *Id.* at 332.

aiming at a higher type stands above lower perfections."³⁶⁶ Therefore, legal fields whose forms contain the internal capacity to aim at higher perfections have the best prognosis for long-term survival.³⁶⁷

The fact that torts must either be open to change or else die has both a descriptive and a normative dimension. Descriptively, of course, torts has not yet died, despite the rise and fall of hundreds of civilizations and cultures that employed tort responses to loss allocation. This reality strongly suggests that torts has the internal capacity—indeed, even the drive—constantly to seek out new solutions and new forms of perfection. That fact in turn suggests that the core of torts must contain some irresolvable tensions that constantly spur it to seek new forms of perfection.

Normatively, the fact that all states of perfection will perish suggests that a tort system that wishes to survive must reject all conceptualist efforts to hitch the system to a particular natural law, corrective justice, or efficiency theory. In saying this, I am not suggesting that conceptualist thought, which aims for a particular type of perfection in legal rules, is inappropriate; nearly every civilization has aimed at, and many have achieved, a particular type of perfection.³⁶⁸ The conceptualist's first principles are useful to torts because they help us to see a range of possibilities that can be actualized in a present outcome, as well as provide us with a lens through which past experiences can be prehended. Moreover, conceptualist thought—the aim at a particular perfection—is an inherent part of tort law, and it cannot be wished away by the equally inherent destabilizing influence of anti-conceptualism.³⁶⁹ Rather, my point is this: If the concern is for the survival and evolution of a *particular* tort system, the system cannot fall entirely under the influence of any conceptual approach. Just as past experiences can only partially determine present outcomes, no first principle can forever demand tort law's (or humanity's) obedience in this and all other experiences. A world of immutable first principles gives us no freedom of choice—at least after the principles are known. Eventually (and probably sooner rather than later), such a tort

366. *Id.* at 330.

367. At a certain point, however, even these fields will die. The fields' forms will cease to speak to human experience, and the fields will fail to replace them with new forms. At that point, the fields will cease to live.

368. See ADVENTURES OF IDEAS, *supra* note 15, at 127, 331-32.

369. See *supra* notes 56-64 and accompanying text.

system will die.

These descriptive and prescriptive points confirm the appropriateness of a process theory that describes torts as the confederation of causal and community models. With differing methods of prehending past experience, each model provides a different lens through which to view problems of loss allocation. With their inconsistencies and their potential breadth of scope, the models leave room for a range of possibilities and for the free selection of novel, self-creative expressions. Torts can be both respectful of past experience and open to new influences; its causal and community models, respectively, put one foot of torts in a world largely determined by past events and one foot in a world that is unapologetically self-creative and free. Taking its meaning from the journey rather than the destination, torts denies the mirage of an idyllic end state by establishing structures (the causal and community models) that ensure conflict and thus provide room for perpetual regeneration.

Of course, the confederation's *consistency* with perpetual process does not necessarily demonstrate its *correctness*. Numerous theoretical models could guarantee that torts remained in perpetual conflict; as I have said, it is impossible to know whether any description is correct without the type of empirical work that formed the heart of this Article.³⁷⁰ The limited confirmation of my descriptive theory of torts is important nonetheless. What tort law is is also what it should be—at least if we assume that torts should accurately mirror our experiences in life and in law generally. That assumption seems particularly appropriate as applied to torts. Although a field of law (like torts) does not need to serve as a microcosm of life and law, it is desirable. Torts is a window on a universal dimension of the human condition: the experience of loss created by others' present occasions of choice. Therefore, its resonance with our more general understanding of law and life as perpetual process is particularly satisfying.

If all of this sounds like a defense of chaos over order, to some extent it is. I cannot ascribe to torts a future filled with unambiguous theories, unassailable doctrines, right practices, and certain answers. Nonetheless, at least two influences moderate the potential for chaos.³⁷¹ First, no culture

370. See *supra* notes 24-47, 83, 351 and accompanying text.

371. There is a third influence as well—optimism in the triumphant power of humanity to achieve its greater perfection. This influence suggests that torts need not be haphazard and disorganized, but rather can develop progressively within a society centered on the betterment of the human condition. Nonetheless, this influence is more a matter of faith than reality, for

can keep more than a limited range of possibilities active at one time. Some of the limitations on actualized possibilities are procedural; a culture is unlikely to regard favorably a possibility that was soundly rejected by the relevant supreme court in an identical situation last year. Other limitations inhere in the nature of intellectual thought. For a time at least, most cultures have dominant (one might say "faddish") methods of approaching problems. In our legal culture generally and in torts specifically, we have seen in the past century the parade of formalism, realism, doctrinalism, corrective justice, law and economics, critical studies, and pragmatism, with each enjoying its time in the sun.³⁷² These and other personal preferences tend to filter out most of the past experiences and novel present possibilities, leaving (at most) three or four choices to consider in detail.

A second tempering influence is the form of torts itself. Although torts is a process in perpetual conflict, the form of torts presently requires that the conflict occur within the boundaries established by the causal and community models. Those models reduce the range of possibilities that are likely to be actualized in a present decision. Admittedly, the greatest number of those restrictions derives from the models' optimal conditions rather than from the absolute limits of the models' boundaries, but these conditions nonetheless provide an important filter. Although a situation that the models' preferences do not clearly justify will occasionally appear and test the absolute limits of the models' forms,³⁷³ generally the optimal preferences screen out unappealing possibilities from our conscious consideration.

Of course, if torts truly is in a process of perpetual conflict, the question remains whether torts can bring itself into conflict even with its boundaries of causation, community values, adjudicatory process, and loss. Previously, I have suggested that it can do so.³⁷⁴ If this is true, however, then the utility of conceptualizing torts in terms of its causal and community forms becomes open to question.

the freedom to choose always carries with it the potential to abandon the gains achieved before. Hence, I do not mention it in the text.

372. For a short history of the influences of the first five schools of thought on torts, see WHITE, *supra* note 1. For the influence of the latter two schools, see, e.g., Abel, *supra* note 9; Bender, *Primer*, *supra* note 9; Smith, *supra* note 8; Wells, *supra* note 8.

373. This is how I understand the *Sindell* case, which can be brought within the strict terms of the causal model, see *supra* notes 176, 348 and accompanying text, but which certainly violates the causal model's preferences for strong causal proof by plaintiffs.

374. See *supra* text following note 348.

Nonetheless, the vision of humanity, law, and torts in perpetual process does not negate the existence or utility of forms. It is always possible to impose a certain abstract order on the range of possibilities with which a particular present decision confronts us. Thus, we can say that some series of choices are "good" choices, and others are "bad" choices; that some are "just" or "efficient" choices, and others "unjust" or "inefficient" choices. The possibilities can be divided, considered, and reconstituted in any of a number of ways. As abstractions from the possibilities themselves, these orders (or forms) are in a very real sense less important than the possibilities and their process of realization in a present outcome. But abstract forms serve the indispensable function of helping us to catalogue and retrieve the full range of possibilities conveniently and cogently.³⁷⁵ Take, for instance, the *Hymowitz* problem of women suffering cervical cancer. We must make some choice to deal with the experience of loss. Forced to reinvent the range of possible choices for each present occasion, we would likelyprehend possibilities (whether past or new) in a haphazard way that reduces opportunities for equal treatment of like persons. By abstracting choices into various categories—tort, contract, insurance, regulation, government relief, private assistance, and so on—we better assure that the full range of possibilities lies before us³⁷⁶ and, consequently, better assure the quality of the future choices that

375. Whitehead perceived that the existence of process is inextricably tied to the existence of forms (or eternal objects), which are necessary to help us understand and actualize a possibility in a present occasion of experience. See, e.g., WILLIAM A. CHRISTIAN, AN INTERPRETATION OF WHITEHEAD'S METAPHYSICS 215-20, 252-56 (1959); Ivor Leclerc, *Form and Actuality*, in THE RELEVANCE OF WHITEHEAD 169 (Ivor Leclerc ed., 1961); ADVENTURES OF IDEAS, *supra* note 15, at 107-39; Emmett, *supra* note 15, at 292-93. At the same time, Whitehead realized that these forms were indeterminate and could achieve concreteness only through their individual actualization in occasions of experience. Actual experiences, however, would never exhaust the form, which was broad enough to contain a wealth of unrealized possibilities. See CHRISTIAN, *supra*, at 206-14. Whitehead's understanding of forms provides the deeper normative justification for my earlier claim that torts must have some form apart from its extant historical and cultural manifestations, but that the form is indeterminate with respect to specific doctrines or outcomes. See *supra* notes 83-86 and accompanying text.

376. Of course, even forms do not eliminate the problem of incomplete prehension of possibilities. It is quite likely that one person will perceive the *Hymowitz* problem only through the forms of regulation or legislation, another only through the forms of tort and regulation, and a third only through the form of private assistance. Nonetheless, by being able to "cubbyhole" a range of possibilities within one form, we reduce the initial burden of memorizing the large numbers of possibilities presented within each form.

depend on our present outcomes. Hence, forms are confining only insofar as a person becomes so captivated by a form that he or she fails to recognize the reason for the form's existence—the unleashing of the full range of possibilities for a present experience.

In a certain sense, therefore, our focus on the existence or precise content of any form is not especially important. Calling *Hymowitz* a torts case rather than a welfare redistribution or cost internalization case will not cause the republic to fall or somehow reduce the range of actualized possibilities confronting DES plaintiffs. Indeed, an occasional misbranding as a tort case can serve to remind those of us stuck in the "torts rut" of the full range of nontort possibilities inherent in present experiences.

On balance, however, the wholesale infusion of nontort possibilities into tort law (i.e., the destruction of tort law's form) is a losing proposition. The overexpansion of any form ultimately risks the reduction rather than the expansion of actualized possibilities. Suppose, for instance, that the form of "torts" could grow to include all of the common and statutory law. The enormity of the form would make it impossible to bring to mind the full range of possibilities for present experience—except in the haphazard way that forms are designed to prevent.³⁷⁷ Inevitably, we would find that the form of "torts" was no longer useful and would begin anew the process of subdividing "torts" into new forms that were.

The secondary nature of forms may make the entire enterprise of this Article seem insignificant: If the form of torts can exclude little in the way of theory, doctrine, or practice and if we now discover that the little which is excluded can nonetheless be seen as a legitimate external (i.e., nontort) solution to loss, what good is it to know that torts is comprised of a causal and a community model? If you expect specific "right" solutions to loss allocation problems, I must concede that the answer is "very little." But if the focus is on the critical unit of torts—the present case whose outcome must be decided—the form gains an immediate relevance. For the plaintiff prosecuting, the defendant defending, and the adjudicator deciding the case, the elemental requirements of loss, adjudicatory process, causation, and community values, as well as the optimal conditions associated with each model, provide a quick check of the possibilities of a tort response and a reminder to check other adjudicatory responses (contracts, antitrust, and so on) as well.³⁷⁸

³⁷⁷ See *supra* note 376 and accompanying text.

³⁷⁸ If we shift focus to the role of law in society, the form of torts is also quite significant. It might well be (although I am unable presently to prove it) that there are

Therefore, the form of torts can be justified, at least in part, in normative terms. The most satisfying dimension of the normative defense is its ability to unite the discordant sounds of so many theories and trends that fall into and out of fashion. We cannot deny the unbridgeable chasms between efficiency and justice, morality and pragmatism, formalism and critical scholarship; nor can we reconcile the conflicting individual results and reasoning of cases adhering to each of these theories. A process-oriented theory of torts steps away from the contradictions and hostilities and embraces all. "We have an outcome to determine," the process theory says, "and we welcome all of your perspectives. They give us choices, and to choose is to be alive. We especially want your fresh ideas. Law and economics was exciting in its time, but has since lost its novelty. It has become a part of our prehension, a part of our routine analysis that originates from our past experiences. We want new choices as well—choices never yet imagined. They too will excite us in their youth, become a more comfortable part of our experience in their maturity, and recede from memory in an obsolescent old age. And then we shall want still newer theories. Now, let us begin by asking what choices are conceivably available to us, and why might we choose them?"

Thus, in a way not quite pragmatic,³⁷⁹ process theory finds wisdom and freedom in the irreconcilable. All of the grand normative theories, as well

dimensions of human experience into which law cannot extend. Because the scope of law cannot be greater than the sum of its component parts, the knowledge of the reach of each of those component parts is a necessary step in the development of a jurisprudence of law in process.

379. I take pragmatism to be a philosophical method that seeks to find the solution in the "here and now" that best advances the interests of humanity, without worrying about the intellectual claims of some primordial scientific, cultural, or deontological principle that it should never be violated. See Ruth A. Putnam, *Pragmatism*, in 2 *ENCYCLOPEDIA OF ETHICS* 1002 (Lawrence C. Becker ed., 1992); Smith, *supra* note 38, at 422; Symposium, *supra* note 22. So understood, a pragmatic theory and a process theory of torts vary in important regards. Process theory permits a decision maker to follow a primordial principle and to exclaim in good deontological fashion: "Damn the consequences! Full speed ahead." Similarly, process theory allows choices for the worse; pragmatism insists that its choices be made with an eye to the betterment of humanity. Third, process theory suffers a culture to remain static, whereas pragmatism requires (in a way offensive to many European and Asian cultures) continued experimentation in the name of progress. See NORTHROP, *supra* note 19, at 47. There are other differences as well, although they lie beyond the scope of this article. See John Dewey, *The Philosophy of Whitehead*, in *THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD* 641-61 (Paul A. Schilpp ed., 1941) (discussing points of agreement and disagreement between Dewey's pragmatism and Whitehead's metaphysics); Tidmarsh, *supra* note 84 (same).

as approaches that deny grand theories, have equal and respected life. Each position stakes out a range of acceptable (and unacceptable) possibilities. One position's counsel may be refused today, but the position's survival in the present lets it carry the fight for its possibilities until tomorrow, whose choice can only be partially determined by the choice today. Conflicting outcomes, rules, and theories are the norm, and no individual choice can hope to be consistent with each of a myriad number of distinct and often opposing choices. But it does not need to be. In a system of perpetual evolution (and devolution), consistency is not an issue.

This reconciliation of competing positions through a vision of change comes at too high a price for those who have staked everything upon a particular theory or critique of torts. From their perspective, the opportunity for a pet theory of efficiency or fairness to compete with pragmatic good sense or the disestablishment of entrenched hegemonies for the soul of each tort outcome gives inadequate shrift to the one true principle of torts. For two reasons, however, the criticism is unavailing. First, the need to anoint a particular theory or critique leaves either incurable ambiguities or insufficient room for improvement. For instance, to proclaim corrective justice as the "one true principle" fails to define whose version of corrective justice is the correct one,³⁸⁰ and to choose Jules Coleman's 1983 version of corrective justice leaves no room for later improvements on or refinements of that theory.³⁸¹ Second, suppose that we could draw Rawls's "veil of ignorance" around torts. Essentially, we have two techniques to address the tensions among the various visions of torts: We could either pick one theory and discard all the rest forever, or we could give each theory the opportunity to compete to influence each occasion of loss allocation. If no theory could know whether it would be the one ultimately adopted or one of the many forever rejected, I suspect that any reasonably strong vision of torts would prefer the chance of influence (the second option) to the high risk of eternal annihilation (the first option). A level playing field and confidence in its validity should be enough for any conceptualist or anti-conceptualist view of torts, and that is precisely what process theory guarantees.

380. There are a number of competing theories. Some leading descriptions include COLEMAN, *supra* note 14; Epstein, *supra* note 24; Fletcher, *supra* note 28; Schroeder, *supra* note 113; Weinrib, *supra* note 34; Wright, *supra* note 36.

381. For Coleman's 1983 views, see Jules Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5 (1983). Coleman himself has attempted to improve upon his earlier ideas. See COLEMAN, *supra* note 14, at 318-28.

Those who stake out a theory of justice or morality, however, will raise another flaw in process theory: Its inability to reject the unjust or the immoral renders its relativism especially dangerous and despicable. The reality that process theory generally, and the descriptive theory of torts specifically, permits poor and even evil outcomes cannot be denied. Causation is only a gentle brake on evil influences, and communities can sometimes be hopelessly blinded by prejudice or evil intent. Nonetheless, if our enterprise is to understand what tort law is, this moral critique offers little of interest. Undeniably, torts has made many wrong turns in its history.³⁸² Even at its own normative level, however, a world of morality or justice in which all answers are neatly worked out is not an especially attractive one. Process theory invites those who wish a moral or just world to work toward its attainment; it merely denies the possibility that we can achieve a state of absolute justice or perfection.³⁸³ In process theory, the journey that we have undertaken rather than the destination that we will never reach is our focus.³⁸⁴ To denigrate the journey, as the moral critique does, is to suggest that all those who die short of Shangri-La have lived less perfect lives than those who reach the promised land. To the contrary, process theory finds meaning in the journey, celebrates our present existence, and makes us as fully participatory in humanity as those who preceded and those who follow us. True progress toward a more moral or just world can occur, but will occur only when there is the equal opportunity to regress.

Conclusion

A process theory of torts may appear incapable of providing any lessons about what torts "should" do today. In general, I acknowledge the criticism. We must find the "ought" of torts in personal credos of justice, efficiency, pragmatism, or the like; we must be constantly willing to defend our views against attack and to adjust them in light of new possibilities. Nonetheless, I do believe that the process theory has at least one important implication for

382. For two cases which I believe to be missteps, see *Tarleton v. M'Gawley*, 170 Eng. Rep. 153 (K.B. 1793) (allowing action of interference with slave trader's economic advantage); *Mogul S.S. Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598 (1889) (countenancing oligopolistic efforts at predatory pricing in colonial China), *aff'd*, 1892 App. Cas. 25.

383. See *ADVENTURES OF IDEAS*, *supra* note 15, at 356 ("There is no totality which is the harmony of all perfections. Whatever is realized in any one occasion of experience necessarily excludes the unbounded welter of contrary possibilities.").

384. See *MODES OF THOUGHT*, *supra* note 15, at 131.

the future of torts. As a complex and pluralistic society increasingly marginalizes community values (and thus the community model), torts will increasingly become a less important dimension of our response to occasions of loss. Put somewhat differently, the future of torts depends upon the existence of a vibrant core of community values.

The proof is simple. If we conceive of torts as the confederation of causal and community models, it is evident that the causal model, with its formal preferences, will spend its time logically spinning out the doctrinal structures demanded by principles selected in a past moment of creativity³⁸⁵ Its formal, backward-looking methodology aims at a perfection no longer vibrant. Because it seeks answers through the prehension of existing data, doctrines, and theories, the causal model does not seek out the new possibility or the novel vision that challenges established structures. That responsibility falls instead on the community model. Although conservative in its own way,³⁸⁶ the community model is ultimately open to future change—even to radical change when the community demands. Only the community model, by disposition, is likely to actualize new possibilities and new approaches to loss allocation. Indeed, this effect will be felt beyond the actual limits of the model itself.³⁸⁷

If we were to assume the absence of the community model and its creative impulses, novel solutions to loss allocation would not disappear. They would still exist and be available for actualization through other forms of law such as contract, legislation, or welfare entitlements; or perhaps through nonlegal forms as well. But these creative solutions—these aims at new and higher perfections—would not be tort solutions. In this way, torts would be marginalized as a living form of possibilities. Indeed, torts would not be significantly distinct from other external, government-imposed methods of loss allocation. Stuck in the mud of some previously declared notion of appropriate behavior, torts will become far less interesting than the novel possibilities of nontort solutions. Like a tort system hitched to a particular conceptual solution, torts will wither and, perhaps, die.³⁸⁸

385. See *supra* notes 150-58 and accompanying text.

386. Before the community model can act, there must be widespread knowledge and shared opinions about particular activities. Thus, even the community model is unlikely to bring torts to the cutting edge of possibilities.

387. See *supra* notes 290, 348 and accompanying text.

388. See NORTHROP, *supra* note 19, at 93 (reporting findings of sociological jurisprudence that positive laws that are not "reinforced by the content of the norms embodied in the culture become ineffective"); *id.* at 102-04; *supra* note 362-68 and accompanying text.

Therefore, the future of torts as a viable form for loss allocation hinges on the existence of a community model, which in turn depends on a vibrant core of community values. In a technologically complex society, however, the community increasingly lacks knowledge of the instrumentalities of injury; in a pluralistic society, the community lacks a coherent opinion about a defendant's proper methods of operating those instrumentalities. When technology and pluralism combine, as they have in our society, the community's sensibilities become relevant primarily for widely practiced and noncontroversial activities such as car driving, entry on others' premises, and land ownership,³⁸⁹ as well as a few oddball instances of failing to rescue, remooring ships in a storm, and hunting accidents with equally negligent shooters. In important and "hot" areas such as products liability, malpractice, privacy, and negligent economic harm, the community model is simply not a player on the stage.

I do not know whether the remaining pockets of the community model will sustain the far-flung empire of torts over the long haul. Recent events certainly give rise to doubt that they can. The waves of tort reform show how interest group solutions can supplant community norms when consensus on tort solutions no longer exists. The much-debated recent withdrawal of the common law from the precipice of experimentation³⁹⁰ may reflect our reluctance to push the causal model boldly toward new frontiers when the community model has not caught up. On the other hand, in its literature, cases, and practices, torts has already developed a vast array of roads not taken, and the continuance of the community model in at least some areas makes it possible that, like *Sindell*, some cases in the future will escape the inherent conservatism of the causal model.

Although the fate of torts in a largely (but not entirely) complex and pluralistic society is uncertain, the prognosis for torts improves dramatically if we revisualize the nature of our communities. Although the community

389. Even here there are limits on consensus, as exemplified in the community's disagreement about the duty of a social host toward those injured by a drunken guest. *See, e.g., Kelly v Gwinnell*, 476 A.2d 1219 (N.J. 1984); Sharon E. Conaway, Comment, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV 403, 405 & n.21 (1988) (discussing cases imposing liability on social guests and their legislative abrogation).

390. *See generally* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV 731 (1992); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV 479 (1990); David G. Owen, *The Fault Pit*, 26 GA. L. REV 703 (1992); Schwartz, *supra* note 307

influence remains the primary creative force for new possibilities in torts, the time lag for the adoption of new values in a community means that by the time of the adoption, these values have long lost the cutting edge that process theory prefers. Moreover, traditional communities, which are often paternalistic and prejudiced against the unknown, can suppress the realization of new possibilities even more effectively than formalism, which must at least pursue new possibilities when logic dictates.³⁹¹ In these communities, the true freedom that nourishes process theory is not possible. At the same time, the rejection of any community in favor of personal freedom cannot be the answer, for the escape from community leaves torts trapped in the causal model. In a tort system without a vibrant sense of community, we become isolated from each other *and* from the law, for neither connects well to our personal mores and experiences.

The only way to solve this dilemma is to re-invent our sense of community. We must create "new communities that are not experienced as restrictive of freedom."³⁹² The communities must be radically open to the journey on a never-ending path toward new and higher perfections. They must be committed to immediate and sustained dialogue about the new possibilities suggested by unfamiliar conduct, so that the ignorance and pluralism that stymie the community model are quickly overcome.

This antidote is radical, and we might not choose to take it. Perhaps saving a central place for torts is simply not worth the price. Maybe it would be easier to downsize the scope of the causal model by removing nagging problems like products liability from tort law's consideration. Perhaps torts should plug along and wait either for community consensus to catch up or for torts to shrivel up.

Whatever the answer, process theory connects torts to the larger issues of the society that we now have and the one that we may choose to have in the future. If torts wishes to be an integral part of that future society, community norms must bear upon the center of its work.

391. Cf. Fletcher, *supra* note 28, at 572 (recognizing that theory of reciprocity might inadequately protect minorities who engage in activities that are not norm); Symposium, *supra* note 22, at vii-viii (posing question of whether pragmatism can be reconciled with minority voices).

392. COBB & GRIFFIN, *supra* note 16, at 113.