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ARTICLES

THE "REASONABLENESS" STANDARD IN THE LAW OF NEGLIGENCE: CAN ABSTRACT VALUES RECEIVE THEIR DUE?

*Harry S. Gerla**

I. INTRODUCTION

For at least forty years, courts and commentators have recognized that a jury's decision on whether a defendant in a negligence action behaved reasonably under the circumstances involves a balancing of the risks created by the defendant's conduct against the utility of the defendant's conduct.[1] When the risks and utilities are concrete and read-

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1. *E.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd*, 312 U.S. 492 (1941); RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965); F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 16.9, at 467-68 (1986) [hereinafter HARPER & JAMES]; W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 172-73 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 556-64 (1972).

Some commentators have criticized the utilitarian orientation of the use of a risk-utility analysis to gauge reasonableness. *E.g.*, Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 468-69 (1978); Rodgers, *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. CAL. L. REV. 1, 8-12 (1980). The criticism is that risk-utility analysis fails to consider intangible values and beliefs. PROSSER & KEETON, *supra* § 31, at 173 n.46. While this criticism may be true of a traditional cost-benefit analysis which requires that each cost and benefit be quantified and translated into a common measure such as money, see Andrews, *Cost-Benefit Analysis as Regulatory Reform*, in COST BENEFIT-ANALYSIS AND ENVIRONMENTAL REGULATIONS: POLITICS, ETHICS, AND METHODS 108 (1982), it is not true of the risk-utility test which is utilized in modern tort law. For example, the Restatement (Second) of Torts speaks in terms of the "social value" of the interests advanced or imperiled, not costs and benefits. RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965). The term "social value" is certainly broad enough to encompass intangible, non-monetizable risks and utilities. Indeed, the central problem discussed in this article, the psychological tendency of individuals to underestimate abstract values, arises only because those values can and should be considered in performing a risk-utility analysis to determine if an actor behaved reasonably under the circumstances.

ily measured by a single standard such as money, the process of balancing should be relatively simple.[2] However, when intangible, nonmonetizable interests must be weighed, the process becomes infinitely more difficult.[3] When intangible interests are involved, the determination of the risks and utilities of an actor's conduct shifts from an almost mechanistic cost-benefit analysis to "a moral judgment based on deliberative reflection."[4] As Dean Calabresi notes:

> If . . . either of the interests involved cannot adequately be converted into money, the decision-maker confronts the problem of comparing what cannot be compared except subjectively: just how important was the actor's interest in not having an abortion (or not running over the dog or maintaining a reputation for probity, etc.) compared to the costs that ensued? Such questions can be answered only by assigning relative weights to the competing sets of interests. But deciding, for example, that not having an abortion is a more valuable interest than some quantity of money is not a factual judgment. It is a judgment about the relative importance one should attach to certain activities. Consequently, it is an assertion about values.[5]

This article discusses how jurors' biases affect their evaluation of abstract values and how courts may be able to prevent juries from underweighting those values. It begins with an overview of tort no-duty rules and immunities which courts are rejecting in favor of a jury's determination of whether the defendant behaved reasonably. The article then explores the importance of abstract values in determining reasonableness under the modern law of negligence. The article next discusses the experimental psychological evidence which supports the idea that the typical juror will overweight concrete risks and underweight abstract values and the implications of that evidence for the law of negligence. Finally, the article discusses the legal controls which are available to counteract the effects of psychological biases on juries' consideration of abstract values in the context of negligence law and the advantages and disadvantages of each of those control mechanisms.

II. TORT NO-DUTY RULES AND IMMUNITIES VERSUS REASONABLE BEHAVIOR ANALYSIS

Frequently, juries are asked to weight values which, if not monetizable, are at least concrete and imaginable, against values which are

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2. G. CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 161 n.218 (1985).

3. *Id.* at 161-62 n.218.

4. Kelman, *Cost-Benefit Analysis and Environmental, Safety and Health Regulation: Ethical and Philosophical Considerations*, in COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATIONS: POLITICS, ETHICS AND METHODS 142 (1982).

5. G. CALABRESI, *supra* note 2, at 161-62 n.218.

abstract which do not have monetizable or even tangible benefits and are more like matters of principle. One of the main reasons for jurors needing to balance such values is the decline in tort no-duty rules and immunities.[6] Tort no-duty rules are rules of law which "shield some kinds of negligent defendants from liability" by "expressly announc[ing] that a particular kind of defendant owes no duty of care to a specified sort of plaintiff in certain described circumstances."[7] Tort immunities are closely related to tort no-duty rules and operate in much the same way.[8] Tort immunities allow a tort defendant whose negligent conduct proximately causes a plaintiff's damages to escape liability on the grounds that the defendant is "immune" from liability.[9] The past three decades have not been kind to either tort no-duty rules or tort immunities (hereinafter referred to collectively as "tort no-duty rules and immunities"). Both concepts have been in decline.[10]

Immunities such as interspousal immunity and charitable immunity have almost vanished from the landscape of twentieth century American tort law.[11] Other immunities, such as state and municipal governmental immunity and parent-child immunity, have suffered serious erosions in many jurisdictions and have been completely abolished in other jurisdictions.[12]

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6. Occasionally, jurors did balance tangible harms against abstract values even before the recent decline of tort immunities and no-duty rules. For example, in Lange v. Hoyt, 114 Conn. 590, 593, 159 A. 575, 576 (1932), the jury was permitted to decide whether the mother of an injured child failed to act reasonably when she delayed taking her daughter to a physician for treatment. The mother justified her conduct on the grounds that providing medical treatment for the child would violate the mother's religious beliefs as a Christian Scientist. *Id.* at 596, 159 A. at 577. The Connecticut Supreme Court of Errors upheld submitting the reasonableness of plaintiff's behavior to the jury under an instruction that they "were entitled to consider with all the other evidence her conduct in the light of her belief in the doctrines of the Christian Science Church and the extent to which she acted in accordance with them." *Id.* at 597, 159 A. at 578. In effect, the jury was allowed to balance the value of the mother's religious beliefs (an abstract value) against the tangible risk of increasing her daughter's injuries.

7. C. MORRIS & R. MORRIS, MORRIS ON TORTS 126 (2d ed. 1980).

8. *Id.* at 151; *see also* Rabin, *The Historical Development of the Fault Principle: A Reinterpretation,* 15 GA. L. REV. 925, 952-53 (1981) (pointing out functional similarity between no-duty rules and tort immunities).

9. C. MORRIS & R. MORRIS, *supra* note 7, at 151.

10. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability,* 15 GA. L. REV. 963, 964 (1981).

11. *See, e.g.,* Townsend v. Townsend, 708 S.W.2d 646, 648 n.7 (Mo. 1984) (In a decision abolishing interspousal immunity in Missouri, the court notes that thirty states have abolished the doctrine completely while eleven other states have partially abrogated it.); PROSSER & KEETON, *supra* note 1, § 133, at 1070 (detailing the decline of charitable immunity).

12. *See, e.g.,* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) (both completely abolishing parent-child immunity); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (limiting parent-child immunity to cases involving the provision of support for children or the exercise of reasonable parental discretion); PROSSER & KEETON, *supra* note 1, § 131, at 1052 (by the 1970s over half the

Tort no-duty rules or limited duty rules have been suffering a similar fate. For example, the traditional notion that a landowner owed only a limited duty of care to licensees has been rejected in a number of jurisdictions.[13] Indeed, beginning with the California case of *Rowland v. Christian*,[14] more than fifteen jurisdictions have completely abrogated landowner no-duty rules in favor of an approach which requires landowners and occupiers to act reasonably with respect to all persons on their land without regard to the legal status of those persons.[15] Other no-duty rules have suffered a similar erosion. At one time, a police officer could not be liable to a citizen injured by a drunken driver whom the officer had refused to arrest custodially.[16] The rationale for refusing to find the officer liable was that the officer owed a duty to the general public, not to the injured citizen.[17] In the past five years, a number of state supreme courts have disavowed this doctrine, known as the "public duty rule,"[18] holding that an officer can be liable to the injured motorist or pedestrian.[19] Even the classic no-duty rule, that one is not obliged to go to the aid of a stranger, even where a reasonable person would do so, has been subject to severe erosion.[20]

Courts have adopted tort no-duty rules and immunities for a variety of reasons. Courts adopted some of the tort no-duty rules and immunities to protect certain values which they believed should be pro-

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states had completely abolished municipal immunities).

13. *E.g.*, Wood v. Camp, 284 So. 2d 691 (Fla. 1973); Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973); Pietiela v. Congdon, 362 N.W.2d 328 (Minn. 1985).

14. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

15. For a comprehensive collection of cases rejecting and accepting the significance of plaintiff's legal status as a determinant of landowner no-duty immunity, see Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee or Trespasser*, 22 A.L.R.4th 294 (1983 & Supp. 1988).

16. *See generally* Note, *Police Liability for Failure to Prevent Crime*, 94 HARV. L. REV. 821, 822-24 (1981); Annotation, *Personal Liability of Policeman, Sheriff, or Similar Peace Officer or His Bond, For Injury Suffered as a Result of Failure to Enforce Law or Arrest Lawbreaker*, 41 A.L.R.3d 700, 703-04 (1972 & Supp. 1988).

17. *E.g.*, Massengill v. Yuma County, 104 Ariz. 518, 520-22, 456 P.2d 376, 378-80 (1969), *overruled*, Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982); Ashburn v. Anne Arundel County, 306 Md. 617, 624-33, 510 A.2d 1078, 1082-85 (1986).

18. Comment, *Governmental Tort Liability: A New Limitation on the Public Duty Rule in Massachusetts?*, 19 SUFFOLK U.L. REV. 667, 675-76 (1985) (describing the "public duty rule").

19. *E.g.*, Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987); Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984); Weldy v. Town of Kingston, 128 N.H. 325, 514 A.2d 1257 (1986).

20. Exceptions to the rule that no duty exists to go to the rescue of another person have been made on a variety of bases, such as a relationship between the defendant and the plaintiff or the defendant and the actual wrongdoer, the contractual assumption of a duty to act by the defendant, and the control by the defendant of the instrumentality which actually injures the plaintiff. For a comprehensive list of the bases for abrogating this no-duty rule, see RESTATEMENT (SECOND) OF TORTS §§ 314-314A(4) (1965).

tected as a matter of sound social policy. Many of these values are abstract.[21] For example, the rule that a person is under no duty to go to the aid of a stranger protects individual autonomy.[22] Parental immunities were created, in part, to protect the value of giving parents discretion in child rearing.[23]

Those courts and commentators who have rejected tort no-duty rules and immunities have not been insensitive to the values which those devices have sought to promote. Instead, they maintain that those values can be considered and protected when the jury ascertains whether the defendant acted reasonably under the circumstances. For instance, the Minnesota Supreme Court, in completely abolishing the doctrine of parent-child immunity, noted the importance of allowing parents flexibility in raising their children. The court went on to say that the value of according such flexibility could be considered by the jury when it decided whether the parent acted as the "reasonable parent."[24] Similarly, in *Rowland v. Christian,* the California Supreme Court rejected landowner no-duty immunity stating that the traditional consideration of an entrant's status as trespasser, licensee or invitee, while not determinative of liability, could still be considered by the finder of fact in determining whether the landowner acted reasonably under the circumstances.[25]

The inevitable result of the decline of tort no-duty immunities and the concommitant increased reliance on the amorphous reasonableness standard is that juries are more frequently confronted with the need to weight abstract values against concrete risks often personified in the form of an injured plaintiff. The following "hypothetical" fact situation will illustrate this point.[26]

> Sam Smith, a convicted armed robber, has been paroled to the custody of a halfway house in a work release program. At the halfway house Smith is only loosely supervised by the correctional personnel. His com-

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21. Of course, no-duty rules and immunities may be adopted for reasons unrelated to protecting abstract values. For example, the no-duty rule precluding recovery in a negligence action for "mental disturbance, without accompanying physical injury, illness or other physical consequences" is grounded in the concept that such a disturbance is evanescent and easily "counterfeited." PROSSER & KEETON, *supra* note 1, § 54, at 361. Charitable immunity was adopted, at least in part, to encourage the giving of charity and donations. *Id.* § 133, at 1070.

22. Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151, 198, 200 (1973).

23. Hollister, *Parent-Child Immunity: A Doctrine In Search of a Justification,* 50 FORDHAM L. REV. 489, 504-06 (1982).

24. Anderson v. Stream, 295 N.W.2d 595, 599-600 (Minn. 1980); *accord* Hollister, *supra* note 23, at 516.

25. Rowland v. Christian, 69 Cal. 2d 108, 119, 443 P.2d 561, 568 70 Cal. Rptr. 97, 104 (1968).

26. The hypothetical is loosely based upon the case of Reynolds v. Division of Parole and Community Serv., 23 Ohio Misc. 2d 31, 492 N.E.2d 172 (Ct. Cl. 1985).

ings and goings are only lightly monitored and he is allowed a large degree of personal privacy in his room. The supervisors of the halfway house advance two reasons for their relatively light oversight of Smith. First, they argue that supervising parolees relatively lightly assists in their transition back to normal society. Second, they argue that even parolees have certain rights of privacy, and that it is just not "right" to search randomly a parolee's room. Unfortunately, in the privacy of his room, Smith amasses a vast library of pornographic literature, much of it dealing with bondage and sadism. One day, instead of going to work, Smith breaks into a house, finds Jane Jones, a young teenager home alone, and subjects her to many of the cruelties depicted in his cache of literature and then attempts to kill her. While the attempt is unsuccessful, the teen-ager is permanently and severely injured.

In the era of dominant tort no-duty rules and immunities, a negligence suit by the victim against the correctional personnel would, in all likelihood, never reach the jury. First, the suit might well be dismissed because of governmental immunity.[27] Second, even if the suit was not barred by governmental immunity, the plaintiff might still be deemed not to have a submissible case because the defendants owed "no duty" to the plaintiff to supervise Smith.[28] Today, the suit might well be sent to the jury in order to determine if the correctional personnel acted reasonably under the circumstances.[29]

The jury would have to weight the concrete and vividly illustrated risks to public safety created by the relatively light supervision of Smith against the abstract goal of effectively reintegrating former prisoners into society and the even more abstract value of according parolees some measure of privacy and human dignity. Can the jury properly weight the abstract values of allowing even parolees some degree of human dignity and of speeding their reintegration into society against the tangible risk of light supervision as personified by the terribly injured teen-ager? Those courts which have abolished or restricted tort no-duty rules and immunities implicitly assume that the answer to this

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27. *See, e.g.*, Hurst v. State, 698 P.2d 1130, 1131-32 (Wyo. 1985). For a discussion of the problem of state tort liability for injuries inflicted by parolees, see generally Comment, *State Liability for Injuries Inflicted by Parolees*, 56 U. CIN. L. REV. 615 (1987).

28. *E.g.*, Tarter v. State, 68 N.Y.2d 511, 519, 503 N.E.2d 84, 87, 510 N.Y.S.2d 528, 531 (1986); Reynolds v. State, 14 Ohio St. 3d 68, 74, 471 N.E.2d 776, 780 (1984) (Holmes, J., dissenting); Comment, *supra* note 27, at 631.

29. Comment, *supra* note 27, at 631. To be completely accurate, many of the cases may actually be sent to judges sitting as the finder of fact because a large number of state statutes abrogating or limiting state sovereign tort immunity provide that claims against the state are to be tried by the court rather than a jury. PROSSER & KEETON, *supra* note 1, § 131, at 1045. However, not all statutes abrogating state sovereign immunity also eliminate trial by jury. *See, e.g.*, KAN. STAT. ANN. §§ 75-6101 to -6109 (1989); N.M. STAT. ANN. §§ 41-4-1 to -29 (1978) (neither statute contains a provision eliminating trial by jury).

question is "yes." The assumption that these courts are making is not self-evident.

As sociologist Alan Wolfe has noted, balancing tangible harms against intangible rights is not an easy process.[30] Professor Wolfe writes that "[h]arm is concrete, sensate, unambiguous. Rights are abstract and intellectualized, at least once removed away from immediate experience. Weigh the two, and the argument against harm will win, at least with the popular majorities that decide such things."[31] The insights of modern experimental psychology suggest that Professor Wolfe's concerns are well-founded and that the courts that blithely assume that jurors are able to properly balance tangible and intangible values are wrong in their assumption. Specifically, the evidence developed by cognitive psychologists indicates that the average juror cannot accomplish that task because the average juror will tend to overweight the concrete and vivid risk and underweight the abstract value.[32] This bias is not the result of a conscious philosophical commitment to eschewing concrete risks, but is a product of a weakness in human information processing skills.[33]

III. The Role of Abstract Values in the Law of Negligence

In a negligence action, the plaintiff must establish that the defendant's behavior constitutes a breach of her duty to use reasonable care.[34] In the words of the commonly used jury instruction, the plaintiff must establish that the defendant did not act as the reasonable and prudent person would under the same or similar circumstances.[35] Ever since the publication of Professor Terry's 1915 *Harvard Law Review* article[36] and Judge Learned Hand's famous opinions in *Conway v. O'Brien*[37] and *United States v. Carroll Towing Co.*,[38] most courts and commentators have recognized that the basic framework for judging whether a person acted reasonably is a utilitarian calculus in which the social benefits of the person's behavior are weighted against the potential risks created by that behavior.[39]

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30. Wolfe, *Dirt and Democracy*, New Republic, Feb. 19, 1990, at 30.
31. *Id.*
32. *See infra* notes 50-63 and accompanying text.
33. *See infra* note 51 and accompanying text.
34. Prosser & Keeton, *supra* note 1, § 30, at 164.
35. *See, e.g.*, 4 R. Branson & A. Reid, Instructions to Juries § 2320 (3d ed. 1962 & Supp. 1989); 3 E. Devitt, C. Blackmar & M. Wolff, Federal Jury Practice and Instructions § 80.03 (1987).
36. Terry, *Negligence*, 29 Harv. L. Rev. 40 (1915).
37. 111 F.2d 611 (2d Cir. 1940).
38. 159 F.2d 169 (2d Cir. 1947).
39. *See* sources cited *supra* note 1.

Where the benefits and risks involve similar interests and are of the same essential nature, the process of comparison is relatively easy. For example, a customer's automobile parked in a shopping center parking lot is damaged by vandals. The owner of the automobile sues the shopping center owner, claiming that the latter was negligent in failing to provide adequate security for parked cars. The jury must weight the risks to automobiles against the costs of additional security measures that would more likely than not have prevented the damage to the plaintiff's automobile. It should not be a difficult task for the jury to decide whether the defendant acted reasonably. First, both the risk created by the defendant's actions and the utility of his actions can be measured by a common measure, money. Second, the risk and utility are both related to similar economic interests of the parties. For the plaintiff and others similarly situated, the risk is damage to their automobiles and a concomitant loss in the automobile's market value. For the defendant and others similarly situated, the utility of not providing extra security is a benefit to the financial success of the shopping center through the maximization of revenues from the venture.

Often, the jury's task is complicated by having to compare risks and utilities which are not only measurable by different standards, but which also accrue to interests which are not directly comparable. Suppose, in the preceding example, the crime was not the vandalization of the plaintiff's car, but an assault and rape committed against her person. The jury would have to weight the utility of the defendant's actions, saving the monetary costs of enhanced security, against the risk created by not providing enhanced security, increasing the chance that someone might suffer physical injuries at the hands of criminals who would otherwise be deterred by increased security measures on the part of the shopping center.[40] As Dean Calabresi has pointed out, the jury, in doing a risk-utility analysis, must assign relative weights to the competing sets of interests.[41] The jury must decide the relative importance of the shopping center's interest in saving money and the plaintiff's interest in her personal security. While the task of balancing monetary interests against personal security interests is not simple for the jury, it is not beyond their collective imagination because both the utility of the defendant's conduct and the risks it poses are tangible and within the jury's common experience. The risks to the plaintiff and others simi-

40. *See, e.g.*, Bradenton Mall Assoc. v. Hill, 508 So. 2d 538, 538 (Fla. Dist. Ct. App. 1987) (shopping center liable for failing to have adequate security to prevent rape of patron in its parking lot); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 641, 281 S.E.2d 36, 39-40 (1981) (assault in parking lot); Brown v. J.C. Penney Co., 297 Or. 695, 698-99, 688 P.2d 811, 813 (1984) (robbery in parking lot).

41. G. CALABRESI, *supra* note 2, at 162 n.218.

larly situated are quite tangible and readily made available for the jury's consideration in the form of an injured human plaintiff. The monetary utility of the defendant's conduct is, however, also tangible and readily explainable to a jury. Unless the jury is composed of spendthrifts or fantastically wealthy individuals, an unlikely event given what is known about the composition of juries, the jury members can, to some degree, appreciate the shopping center's need to save money because they, like the shopping center, have limited financial resources.[42]

In contrast, consider the case of the allegedly negligent supervision at the halfway house of the paroled criminal.[43] The risks of loosely supervising parolees are much the same as the risks involved in the preceding shopping center example—the extent to which persons might be victimized by crimes which would otherwise have been prevented by more active supervision. As in the shopping center example, the risks of physical injury are tangible and readily imaginable by the jury. However, the utility of the defendant's actions is not as identifiable to a jury. The benefits of the defendants' loose supervision of parolees in the halfway house are to facilitate parolees' reintegration into normal society and to accord parolees some measure of privacy which normal individuals take for granted.

The benefit of facilitating reintegration can perhaps be made tangible for the jury by explaining how the accomplishment of that goal can reduce the risk of crimes such as the one which injured the plaintiff.[44] The benefit of according parolees some measure of privacy and dignity will almost surely remain a pallid abstraction for the jury. The justification of protecting the privacy rights of parolees is virtually an appeal to principle. No monetary benefit is received from protecting the "rights" of parolees. Indeed, no tangible benefit is received. If society respects the privacy rights of parolees, it is because society believes it is the "right" thing to do.

The jury, in order to evaluate the reasonableness of the supervisors' behavior, must make a value judgment on the relative importance of avoiding the risks to persons and property from parolees and according parolees some degree of individual freedom while speeding their reintegration into society. The jury must then ascertain the likely magnitude of the risks created and benefits conferred by the defendants'

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42. *Cf.* Van Dyke, *The American Jury*, THE CENTER MAG., May-June 1977, at 36, 44 (indicating that juries tend to be dominated by middle income individuals).

43. *See supra* text accompanying note 26.

44. For a discussion of parolee reintegration, see B. MCCARTHY & B. MCCARTHY, COMMUNITY-BASED CORRECTIONS 218, 221 (1984) (indicating that while behavior controls on detainees in halfway houses are necessary, constant surveillance is inappropriate and may interfere with an inmate developing the sense of responsibility necessary for successful rehabilitation).

conduct and factor in the relative social weights of the values in order to judge whether the defendants acted as reasonable persons in furnishing relatively light supervision to the parolees. The jury's decisional process on the issue of the reasonableness of the defendants' conduct can be summarized in symbolic terms.[45]

The utility of the defendants' conduct can be represented by the following expression: $W_1X_1 + W_2X_2$. W_1 is the social weight which the jury places on the value of reintegrating former prisoners into society. X_1 is the amount of reintegration likely to occur from defendants' policy of lightly supervising parolees. W_2 is the social weight which the jury places on the value of according prisoners some measure of privacy. X_2 is the degree to which the parolees' interest in maintaining some modicum of privacy is likely to be advanced by a policy of refusing to engage in regular searches of parolees' quarters.

The risks created by the defendants' actions can be represented by the following expression: W_3X_3. W_3 is the social weight the jury places on the value of avoiding crimes such as that which befell the plaintiff. X_3 is the amount of crime likely to occur because of the defendants' policy of loosely supervising parolees.

The jury must place relative social judgment weights (represented by the symbolic expressions W_{1-3}) on the values which the litigants claim to promote or suppress. The jury may, for example, decide that the value of preventing crimes against the person is three times as important as the value of according parolees some measure of privacy and twice as important as the value of speeding the reintegration of former prisoners back into society. The jury's decision can be expressed symbolically as $W_1=1$; $W_2=2$; and $W_3=3$. The exact relative weight of the values, e.g., whether W_3 should equal one, three, or thirty, is a social judgment which should generally be left to the discretion of the community as represented by the jury.[46] The process of weighting values should, however, be unbiased.

The jury should ascribe social weights (in symbolic terms, assign relative numbers to W_{1-3}) behind what philosopher John Rawls terms "a veil of ignorance."[47] To paraphrase Rawls, the jurors should not allow their decision on weighting the relative values to be affected by

45. The technique of representing the risk-utility balance in symbolic terms is borrowed from Judge Hand's opinion in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). The formula used in this article is derived from the formula used by Hammond and Adelman in assisting the Denver City Council to decide whether to allow police officers to use hollow point bullets. Hammond & Adelman, *Science, Values and Human Judgment*, 194 SCIENCE 389, 393-94 (1976).

46. For a discussion of who should decide the relative social importance of competing values, see *infra* notes 117-20 and accompanying text.

47. J. RAWLS, A THEORY OF JUSTICE 136 (1971).

how their decision might impact on themselves personally or on the actual litigants in the case.[48] The jurors should "evaluate principles solely on the basis of general considerations."[49] Thus, in the halfway house case, the relative weights which the jurors would place on the values (of avoiding crimes against persons, reintegrating former prisoners into society and according parolees some measure of privacy rights) when considering those values in isolation should not differ from the weights the jurors would place on the values when considering them in the context of Ms. Jones' suit.

The evidence produced by psychological experiments suggests that the relative weights jurors would place on the three values behind a Rawlsian veil of ignorance differ substantially from the relative weights which the jurors place on the values when confronted with the facts of an actual case. Specifically, experimental psychology indicates that, when confronted with the facts of a particular case, jurors will systematically underweight the abstract values (in the example, reintegrating former prisoners into society and according parolees a measure of privacy) and overweight concrete values (in our example, preventing crimes against the person). To put the point in symbolic terms, even if the jurors believed as a matter of general principle that all three values should be weighted equally, i.e. $W_{1\text{-}3}=1$, they are apt in an actual case to weight W_3 more heavily, i.e. $W_{1\text{-}2}=1$, $W_3=>1$. The difference in weights occurs because the values of according parolees privacy and reintegrating former prisoners into society are abstract and intangible, while the risks of facilitating crimes against persons are concrete, tangible, and readily visible to the jury in the form of the injured plaintiff. The psychological evidence which gives rise to this conclusion will be explored in the next section of this article.

A. The Human Psychological Biases Which Affect Jurors

Beginning in the early 1970s, cognitive psychologists conducted a great number of studies of errors in human decision making.[50] The psychologists' research indicated that errors in human judgment are not simply random mistakes, but are systematic manifestations (called "biases") of the inappropriate use of mental shortcuts (called "heuristics").[51] Numerous biases have been identified.[52] Three interrelated bi-

48. *Id.* at 136-37.

49. *Id.* at 137.

50. *See* Jungerman, *Two Camps on Rationality*, in JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 627, 627-32 (1986).

51. Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974).

52. *See generally* L. BOURNE, R. DOMINOWSKI & E. LOFTUS, COGNITIVE PROCESSES 284-99

ases are particularly important in understanding how juries may systematically underweight abstract values in negligence cases. The first bias is a tendency to place more weight on concrete, emotionally interesting information than on more probative abstract data.[53] For the sake of convenience, this bias shall be referred to as the "vividness bias." The bias is illustrated by the following experiment performed by Borgida and Nisbett. Psychology students at the University of Michigan were asked to select courses they wished to take in the psychology department. In one phase of the experiment students were given two sources of information. One source was the statistical summary of the comments of the entire population of students taking the course. The other source was the live comments of three students.[54] Statistically, the impressions of the complete population are more likely to be accurate than the impressions of a possibly unrepresentative sample of three students.[55] Nonetheless, the student subjects were much more influenced by the live testimony of three students than by the cold, but probably more accurate, aggregate data.[56]

The second bias which may affect jurors is called the "availability" bias. People affected by this bias judge the probability of an event not by the actual likelihood of its happening, but by the ease with which they can recall particular instances of the event's occurrence.[57] The following experiment, conducted by Professors Kahneman and Tversky, illustrates this bias. Subjects were asked to estimate in relative terms the number of words in which the letter "r" appears as the first letter of the word versus the number of words in which the letter "r" is the third letter of the word.[58] The subjects consistently judged that words containing the letter "r" as the initial letter outnumbered words containing the "r" as the tertiary letter.[59] In fact, words with "r"

(1979); Jungerman, *supra* note 50, at 629-32; Saks & Kidd, *Human Information Processing: Trial by Heuristics*, 15 L. & SOC'Y REV. 123, 132-45 (1980).

53. R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 55-61 (1980).

54. Borgida & Nisbett, *The Differential Impact of Abstract vs. Concrete Information on Decisions*, 7 J. APPLIED SOC. PSYCHOLOGY 258, 261 (1977).

55. The reason the reports of the large group of students would be more likely to be accurate than the observations of the live panel of students is the statistical principle known as "the law of large numbers." The principle states that the larger the sample size, the more likely the sample is an accurate reflection of the population as a whole. R. NISBETT & L. ROSS, *supra* note 53, at 77-78. Thus, the summarized information of the large group of students is more likely to reflect accurately the views of the entire population of students than the information given by the small panel of live students.

56. Borgida & Nisbett, *supra* note 54, at 266.

57. M. EYSENCK, A HANDBOOK OF COGNITIVE PSYCHOLOGY 297 (1984).

58. Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in 5 COGNITIVE PSYCHOLOGY 207, 212 (1973).

59. *Id.*

as the third letter are much more common than words in which "r" is the initial letter.[60] The reason subjects continually made this mistake is that words which began with the letter "r" are much easier to recall than words which have "r" as the third letter.[61]

The third bias which may unduly influence the determination of reasonableness by jurors is the "saliency" bias. A saliency bias is the tendency of "colorful, dynamic, or other distinctive stimuli [to] disproportionately engage attention and accordingly affect judgments."[62] This bias is illustrated by experiments which demonstrate that individuals who are brightly lit, moving or highly contrasting (e.g., through wearing a different color shirt) draw a disproportionate amount of perceptual attention.[63]

The biases described in this section tend to operate in most human beings.[64] When a jury considers whether an actor behaved reasonably under the circumstances, it must weight abstract values which are possible justifications for the actor's behavior. These biases will usually lead the jury to underweight the abstract justifications for the behavior and overweight the concrete risks created by that behavior.

The manner in which vividness, availability and salience biases can adversely impact a jury's ability to weight abstract values in determining if an actor behaved "reasonably" is easily appreciated by once again considering the hypothetical case of the teen-ager who has been assaulted by a prisoner from a halfway house. The jury, in assessing whether the correctional personnel's policy of loose supervision of residents was reasonable, will have to weight the benefits of speeding convicts' reintegration into society and according them a measure of personal dignity, against the risk that, by loosely supervising the residents, they will be able to commit crimes such as that which Smith committed against Jones.

The values of reintegrating prisoners into society and protecting their privacy are not likely to provoke vivid imagery in the minds of the jurors. The values are apt to remain pallid intellectual abstractions for most of the members of the jury. If the jurors have any commitment to the values of reintegrating prisoners into society and according them a

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60. *Id.* at 211.

61. *Id.*

62. Taylor, *The Availability Bias in Social Perception and Interaction*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 192 (1982).

63. *Id.* at 193.

64. *See* Jungerman, *supra* note 50, at 627, 629-32 (discussing studies indicating pervasiveness of biases). *But see id.* at 633-37 (discussing studies purporting to show that the bias exists in the research on biases rather than human beings themselves); Fischhoff, *Judgment and Decision Making*, in THE PSYCHOLOGY OF HUMAN THOUGHT 178-82 (1988) (discussing the controversy over the existence and extent of cognitive biases).

measure of privacy, that commitment will most likely be a cold intellectual commitment rather than a passionate visceral commitment.

This point can be illustrated by considering precisely how the defendants would relate to the jury the benefits of giving the inmates of the halfway house a certain degree of freedom. The benefits would have to be related to the jury by the testimony of the correctional personnel, criminologists, psychologists or perhaps the prisoners themselves. Such testimony is likely to be dry and abstract rather than concrete and vivid. It is true that an able defense lawyer may be able to bring the points the witnesses are making home to the jury more effectively by eliciting anecdotes which help the jurors to visualize the abstract benefits of loosely supervising the prisoners. This technique can, however, be utilized only to a limited extent because one of the utilities of loosely supervising the prisoners, according them a measure of personal dignity, ultimately manifests itself only in the minds of the prisoners and the members of society.

The jurors are also unlikely to be able to recall instances of successful reintegration of former prisoners into society or instances of abuse of the privacy rights of former prisoners. For the ordinary juror, the issues of criminal rehabilitation and the rights of prisoners or parolees are not apt to be everyday concerns.[65] Moreover, stories dealing with these issues do not seem to proliferate in the mass media.[66]

The contrast between these abstract values and the risk that the denizens of the halfway house will commit crimes against innocent victims could not be more marked. First, the very presence of the physically injured victim in the courtroom can provide the jury with a concrete and vivid illustration of the costs of loosely supervising the parolees.[67] The ease of comprehension provided by the plaintiff's pres-

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65. In a 1986 CBS/New York Times poll, people were asked what was the most important problem facing their community. Prisons and penal reform did not make the list. UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1988, 183 (1989) [hereinafter DOJ SOURCEBOOK]. In contrast, 8% of the people responding listed crime as the most important problem facing their community. *Id.* Between 1980 and 1987, prisons and penal reform did not make the Gallup poll list of the most important problems facing the nation. *Id.* at 182. In contrast, crime consistently was mentioned by between two and five percent of respondents as the most important problem facing the United States. *Id.*

66. The *New York Times* printed only 85 stories on prison conditions during 1988. During the same year, it printed 281 stories on crimes and criminals. NEW YORK TIMES INDEX (1988). The disparity between the number of stories on prisons and the number of stories on crime is likely to be much greater in the electronic media and in print media which do not purport to be "newspapers of record."

67. All courts agree that if the plaintiff has the capacity to assist in the presentation of her case, or to understand the proceedings, she has a right to be present in the courtroom. Where the plaintiff lacks the capacity to assist in the presentation of her case, courts are split on whether she has a constitutional or common law right to be present in the courtroom when her presence might unduly prejudice the jurors. Grunes, *Exclusion of Plaintiffs from the Courtroom in Personal*

ence can be reinforced by evidence such as the plaintiff's testimony, the testimony of treating physicians, and photographs depicting the physical trauma the plaintiff has suffered.[68]

Second, the jury is likely to recall an actual case or to imagine a situation in which a convicted criminal would commit another crime. If crime statistics are correct, a far larger number of jurors, or their close family members, will be a victim of crime than will be a prisoner.[69] The jurors are also bombarded with stories in the mass media on crime, at least some of them dealing with crimes committed by persons on parole or furlough from incarceration.[70]

In the halfway house hypothetical case, all three biases will favor overweighting the cost in the form of increased crime and underweighting the benefits in terms of eased reintegration of the former prisoners into society and according the prisoners a measure of privacy. The risk of criminal assault is concrete and vivid and instances of such assaults are readily recallable. The benefits of reintegration and the rights of parolees to a modicum of privacy are abstract, emotionally uninteresting and unlikely to be represented by readily available examples in the minds of the jurors.

The three biases which impact the jury's appreciation of abstract values in the hypothetical case will normally lead to a systematic depreciation of all abstract values because abstract values tend to share the characteristics exhibited by the values of reintegrating prisoners and according them a measure of personal dignity. Abstract values, in general, are pallid and do not manifest themselves in instances which

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Injury Actions: A Matter of Discretion or Right, 38 CASE W. RES. L. REV. 387, 388-89 (1988).

68. Photographic evidence of the plaintiffs injuries—which is likely to reinforce in the minds of the jurors the vividness and concreteness of the risks of the defendants' conduct—is likely to be admissible. *See generally* 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1222 (2d ed. 1969).

69. The conclusion that many more people are or will be familiar with victims of crime than are or will be familiar with inmates is inevitable given that many individual criminals commit multiple offenses victimizing several persons and that not all criminals are apprehended. C. SILBERMAN, CRIMINAL JUSTICE, CRIMINAL VIOLENCE 75-78 (1978). Gross statistics also support this conclusion. The United States Department of Justice estimates that 37,730,820 crimes were committed in 1988 and that 24.4% of all households were "touched by a crime." DOJ SOURCEBOOK, *supra* note 65, at 285, 319. At the end of 1988, the total federal and state prison population was 556,748. *Id.* at 612. These statistics show that the pool of victims of crime is much larger than the pool of inmates.

70. S. SCHEINGOLD, THE POLITICS OF LAW AND ORDER 62-63 (1984) (noting the extensive media coverage of crime and pointing out that media coverage of crime includes not only stories of actual crimes, but a significant number of stories involving crime in fictional entertainment programs). The most notorious recent story of a person committing a crime while on parole or leave from prison is the tale of Willie Horton. While on furlough from a Massachusetts prison, Willie Horton raped a woman in Maryland. J. GERMOND & J. WITCOVER, WHOSE BROAD STRIPES AND BRIGHT STARS 10-11 (1989). In the 1988 presidential election, the Bush campaign effectively used the story of Horton's crime to label Bush's opponent, Governor Michael Dukakis, as "soft-on-crime." *Id.*

are promptly recollected by the average person.[71] Given that ordinary individuals, because of prevailing psychological biases, tend to give abstract values less importance than they would merit in a fair decision-making process, the question of how to assure that those values are weighted by juries in an unbiased manner must be addressed.[72] The next section of this article turns to that task.

B. The Methodology of Protecting Abstract Values

Not all abstract values are entitled to the same protection. Some abstract values are not only viewed as important by most members of our society, but are constitutionally enshrined, such as the freedom of speech[73] or the free exercise of religion.[74] Other abstract values, such as the need for parents to have leeway in raising their children, while not necessarily of constitutional import, command wide support. In contrast, some abstract values, such as a notion of the sovereign rights of the owner of land, would find little support in today's society.[75] Fi-

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71. The objection may be raised that the biases discussed relate to non-social judgments rather than to social judgments, the judgments that the jury must make in determining if the risks of an actor's conduct outweighs the utility of the actor's conduct. Professor Shelley Taylor of UCLA Medical School points out there are several reasons for questioning the supposed dichotomy between social and non-social judgments. First, the distinction between social and non-social judgments is somewhat arbitrary. Taylor, *supra* note 62, at 191. While a decision on whether more words in the English language contain the letter "r" as the first letter or the tertiary letter may not seem to be a social judgment, see Kahneman & Tversky, *supra* note 51, at 1127, a decision on which psychology classes students prefer can at least arguably be viewed as something of a social decision, see Borgida & Nisbett, *supra* note 54, at 261-62. Second, social judgments involve the same kind of uncertainty as non-social judgments. Taylor, *supra* note 62, at 191. Third, social judgments involve even more uncertainty than non-social judgments because the person making the judgment is dealing with human beings who do not always openly display their attributes, attitudes, and beliefs. *Id.* Some empirical evidence exists supporting Professor Taylor's position that the psychological biases discussed in this article affect social judgments. *See* Reyes, Thompson & Bower, *Judgmental Biases Resulting From Differing Availability of Arguments*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 2, 8 (1980) (experiment indicating that availability and vividness biases affected mock jurors judgments on guilt or innocence of suspect).

72. Even scholars who are skeptical of the significance of cognitive biases in human psychology need not necessarily disagree with the conclusion that those biases may adversely affect the ability of juries to balance tangible risks against abstract benefits in negligence cases. One of these scholars argues that the psychological biases have few direct consequences in everyday life. Fischhoff, *supra* note 64, at 180. As Professor Fischhoff has pointed out:

> if biases do not affect most decisions, there will not be the feedback. As a result people may be particularly vulnerable to the effects of suboptimal judgments and decision making in those, perhaps few, situations in which accuracy is crucial . . . when they need to get things right the first time.

Id. A jury's decision on whether tangible risks outweight abstract utility may well be for the jurors one of those unique situations which is foreign to their experience and in which they must "get things right the first time."

73. U.S. CONST. amend. I.

74. *Id.*

75. *Cf.* Rowland v. Christian, 69 Cal. 2d 108, 116, 443 P.2d 561, 566, 70 Cal. Rptr. 97, 102

nally some abstract values, such as maintaining racial purity, are positively abhorrent to most members of our society and in fact run counter to the values incorporated in the United States Constitution.[76]

A decision to pick and choose which abstract values are more important may seem arbitrary. Perhaps such a decision is indeed arbitrary, but unless one wishes to descend into a morass of anarchy or pure relativism, in which values such as maintaining racial purity have equal footing with values such as maintaining racial equality, such choices must be made. Courts (and legislatures) have been making such choices for hundreds of years. Courts have chosen to protect the abstract value of individual autonomy by creating a no-duty rule that one need not go to the aid of a stranger, except under limited circumstances.[77] Courts have not sought to protect the abstract value of obtaining pleasure from the suffering of others by granting immunity for sadistic acts and practices.[78] In sum, before deciding how to protect abstract values, courts will first have to decide which abstract values to protect.

Once a court has decided what abstract values to protect, it must determine how to protect them. At this point, it would be in the best tradition of legal scholarship to propose some brilliant all-purpose scheme for protecting abstract values in the law of negligence without sanctifying them to the point of overweighting them. Unfortunately, no such "magic bullet" exists. Courts (and even the advocates who practice in them) do have available to them a variety of techniques to alleviate the tendency of jurors to underweight abstract values. These techniques will not work in all circumstances and may have serious costs associated with them. A perverse relationship seems to exist between the efficacy of the techniques in protecting abstract values and the undesirable costs imposed by the techniques. The more effective the technique is in protecting abstract values, the larger the undesirable costs it imposes. Conversely, the fewer undesirable "side effects" a technique has, the less effective it is in protecting abstract values.

The relationship between efficacy in shielding abstract values and the costs imposed by the technique (which perhaps should be termed the "iron law of protection of abstract values") forces courts to choose

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(1968); Humphrey v. Twin State Gas & Elec. Co., 100 Vt. 414, 418, 139 A. 440, 442 (1927) (both questioning applicability of feudal notions of land ownership to modern society).

76. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down anti-miscegenation statutes on equal protection grounds and rejecting maintenance of racial purity as a legitimate state objective).

77. PROSSER & KEETON, *supra* note 1, § 56, at 375.

78. Indeed, the intentional infliction of emotional distress gives rise to tort liability. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

among unpleasant alternatives. In protecting abstract values from underweighting by jurors, courts may opt for different techniques or a mix of different techniques depending upon the importance which courts attach to the value they are trying to protect and the courts' assessment of the costs and benefits of the protective methods they choose. This article now explores the efficacy and costs of the various techniques for protecting abstract values from systematic underweighting by jurors.

C. *Retaining Tort Immunities and No-Duty Rules*

The preservation of tort no-duty rules and immunities would seem to be an appropriate tactic for protecting abstract values since the decline of such rules and immunities increased the need for juries to balance abstract values against tangible costs.[79] Tort no-duty rules and immunities are certainly efficacious in protecting abstract values. For example, the value of affording parents discretion in raising their children is certainly protected by parent-child immunity which shields the former for negligence suits by the latter.[80] The value of an individual's autonomy in deciding what actions she should take or whom she should aid is preserved by the no-duty rule that one is under no obligation to go to the aid of a stranger.[81] Unfortunately, tort no-duty rules and immunities often protect abstract values too well, giving those values virtually absolute protection, a result which courts find difficult to tolerate.[82]

A pure parental immunity would allow a parent to injure his or her child by drunkenly driving at excessive speeds in a car without brakes. A strict landowner no-duty rule would allow a landowner or occupier to injure hundreds of discovered trespassers by failing to take simple and low cost precautions in conducting active operations on her land. An increasing number of courts have been unwilling to accept the first result,[83] and virtually all courts would reject the second result.[84] Courts simply cannot live with most unalloyed tort no-duty rules or immunities.[85] Thus, a court which is unwilling to abrogate a tort no-

79. *See supra* notes 11-25 and accompanying text.

80. Hollister, *supra* note 23, at 516.

81. *See* Epstein, *supra* note 22, at 197.

82. *See infra* notes 83-85 and accompanying text.

83. *See, e.g.*, Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Williams v. Williams, 369 A.2d 669 (Del. 1976); Transamerica Ins. Co. v. Royale, 202 Mont. 173, 656 P.2d 820 (1983).

84. Maldonado v. Jack M. Berry Grove Corp., 351 So. 2d 967 (Fla. 1977); Kumkumian v. City of New York, 305 N.Y. 167, 111 N.E.2d 865 (1953); RESTATEMENT (SECOND) OF TORTS § 336 (1965); 5 HARPER & JAMES, *supra* note 1, § 27.6, at 193; J. PAGE, THE LAW OF PREMISES LIABILITY § 2.5 (2d ed. 1988).

85. *See* Rowland v. Christian, 69 Cal. 2d 108, 117, 443 P.2d 561, 567, 70 Cal. Rptr. 97,

duty rule or immunity must tinker with the rule or immunity in order to save it. The tinkering takes two related forms.

One form of tinkering abrogates the rule or immunity except for broadly defined residual areas where the rule or immunity remains in force because the court believes that the application of the rule or immunity is particularly important in that area. For example, some courts which have abrogated parental immunity have retained it in matters of reasonable "parental authority over the child" and the "exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."[86] Virtually all courts that have stripped away municipal immunity have retained it in cases involving "discretionary functions" of the municipal government.[87]

The other form of tinkering rejects the use of broadly defined categorical areas in which the tort no-duty rule and immunity is to continue in force. Instead, this method relies on numerous detailed rules of law which set forth the circumstances under which the no-duty or immunity does or does not apply, thereby limiting the no-duty rules or immunities. The best example of this process is the classic landowner no-duty rule based upon the status of the plaintiff.[88] Thus, most courts which recognize traditional landowner no-duty rules also hold that a landowner must use due care in the conduct of active operations to protect a trespasser whom she has discovered upon her land,[89] and that licensee must be warned of artificial or natural conditions which are highly dangerous and which the licensee is unlikely to discover for himself.[90]

Both approaches to mitigating the harshness of no-duty rules have their faults. The first approach may still leave circumstances where patently unreasonable and socially wasteful conduct is protected by the tort no-duty rule or immunity because, by definition, behavior with risks that outweigh its utility is protected by the no-duty rule as long as the behavior falls within the residual area covered by the no-duty rule or immunity. Moreover, issues of whether particular conduct falls inside or outside the residual areas often prove intractable for courts attempting to apply the distinctions they have created. Courts have

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103 (1968) (noting that while original landowner no-duty immunities were simple, complexity was engendered by courts attempting to achieve "just rules in our modern society").

86. Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963); *accord* Wagner *ex rel.* Griffith v. Smith, 340 N.W.2d 255, 256 (Iowa 1983).

87. PROSSER & KEETON, *supra* note 1, § 131, at 1052-53.

88. *Id.* § 58, at 393; 5 HARPER & JAMES, *supra* note 1, § 27.1, at 129-31.

89. *See* sources cited *supra* note 84.

90. RESTATEMENT (SECOND) OF TORTS § 343 (1965); J. PAGE, *supra* note 84, § 3.8, at 44.

struggled with defining what a discretionary governmental function is or what the ambit of parental discretion in raising children encompasses. These struggles illustrate just how difficult it is for courts to apply their own distinctions which were created to salvage tort no-duty rules and immunities by carving out broad areas where the rules and immunities will remain in effect.[91]

The second approach, attempting to control tort no-duty rules and immunities through detailed rules of law, often leads to systems of Ptolemaic complexity with rules depending on distinctions courts find extremely difficult to make in practice.[92] The classic illustration of this phenomenon is the complexity of landowner no-duty rules. Not only is the extent of the landowner no-duty rule dependent upon the status of the plaintiff as a trespasser, licensee, or invitee, but also *inter alia* upon (a) the age of the plaintiff,[93] (b) whether the thing which injures the plaintiff stems from a condition on the land or an active operation,[94] and (c) whether the activity or condition threatens the plaintiff with

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91. The distinction between governmental functions (which enjoyed municipal immunity) and proprietary functions (which did not) has been described by the Supreme Court of Pennsylvania as "one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction." Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 597, 305 A.2d 877, 883-84 (1973) (quoting K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.07, at 460 (1958)). The court illustrated the confusion the distinction engendered by noting that in prior decisions it had held an after hours school recreation program to be a governmental function, but a summer school recreation program to be proprietary function. *Id.* at 598, 305 A.2d at 884 (citing Shields v. Pittsburg School Dist., 408 Pa. 388, 184 A.2d 240 (1960) and Morris v. Mount Lebanon Township School Dist., 393 Pa. 633, 636, 144 A.2d 737, 738 (1958)).

In the area of parent-child immunity, courts which have retained the immunity in cases of the exercise of ordinary parental authority and discretion with respect to food, clothing, housing, medical services and other care, have also experienced great difficulty in determining whether particular parental conduct falls within the zone of retained immunity. Hollister, *supra* note 23, at 513-14. Professor Hollister notes that courts have held that leaving a vaporizer where a fifteen month old child could reach it was considered negligent parental supervision and therefore not the exercise of ordinary or reasonable discretion, but that leaving an eight month old child alone for a few minutes during which time she chewed on an electrical extension cord was "held to involve parental discretion with respect to housing and other care." *Id.* at 513. Professor Hollister further notes that courts have split over whether failure to supervise a child is within the bounds of ordinary parental discretion at all. *Id.* at 514.

92. *See* sources cited *supra* note 88.

93. Landowners owe a greater duty of care to trespassing children than to trespassing adults. RESTATEMENT (SECOND) OF TORTS § 339 (1965). Landowners must take reasonable steps to protect children against artificial hazards which they are unlikely to discover on their own. *Id.* Numerous courts have applied this rule. *See, e.g.*, Wolfe v. Rehbein, 123 Conn. 110, 193 A. 608 (1937); Jones v. Billings, 289 A.2d 39 (Me. 1972); Schofield v. Merrill, 386 Mass. 244, 435 N.E.2d 339 (1982); Larson v. Equity Coop. Elevator Co., 248 Wis. 132, 21 N.W.2d 253 (1946).

94. *See, e.g.*, Linxwiler v. El Dorado Sports Center, Inc., 233 Ark. 191, 343 S.W.2d 411 (1961); Hardin v. Harris, 507 S.W.2d 172 (Ky. 1974); RESTATEMENT (SECOND) OF TORTS § 341 (1965) (all requiring the owner or occupier of land to use ordinary due care with respect to licensees when conducting active operations on the land).

serious bodily harm or merely ordinary bodily harm.[95] To make matters worse, courts do not necessarily agree on the significance of these factors.[96]

The difficulty of drawing the distinctions occasioned by the cluster of standards surrounding landowner no-duty rules is quite apparent to anyone who has tried to explain why a person "cutting through a department store to save time" is a licensee, but a person entering the department store to use a public telephone maintained for the convenience of customers is an invitee.[97] These complexities and confusions are generated by a tangle of rules which Justice Burke, dissenting in *Rowland v. Christian*, described as "supply[ing] a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law."[98] The unintentional and amusing irony in Justice Burke's description of landowner no-duty rules can be appreciated by anyone who has attempted to slog through this confusing subject. Attempting to protect abstract values through tort no-duty rules or immunities tempered by specific legal rules limiting their application often produces unworkable complexity and confusion rather than workable stability and predictability.

Retaining tort no-duty rules and immunities will effectively protect abstract values. Unfortunately, retaining them will also exact a high price by encouraging unreasonable and socially wasteful behavior, or by creating complex and unmanageable systems of rules.

D. Judicial Intervention in the Balancing Process

Judicial activity aimed at protecting abstract values can take a variety of forms. The tort no-duty rules and immunities discussed in the preceding section are, by and large, judge-made, and thus can be seen as a form of judicial interventionism in defense of abstract values. A closely related form of judicial intervention is the attempt to protect abstract values by "crystalliz[ing] the law into mechanical rules . . . of

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95. *Compare* RESTATEMENT (SECOND) OF TORTS § 334 (1965) (requiring owners and occupiers of land to use reasonable care in carrying on activities which threaten constant trespassers on a limited area with *death or serious bodily harm*) *with id.* § 336 (requiring owners and occupiers of land to use reasonable care in carrying on activities which threaten discovered trespassers with *physical harm*).

96. *Compare* Gray v. Sentinel Auto Parks Co., 265 Md. 61, 288 A.2d 121 (1972) (holding that landowner need only refrain from wilfully and wantonly injuring licensee) *with* Osterman v. Peters, 260 Md. 313, 272 A.2d 21 (1971) *and* Elliott v. Nagy, 22 Ohio St. 3d 58, 488 N.E.2d 853 (1986) (both rejecting the notion that landowner owes any special duty to child trespassers).

97. J. PAGE, *supra* note 84, § 4.3. Professor Page terms the distinction "tenuous." *Id.* Professor Page is being somewhat charitable in his evaluation of the distinction.

98. Rowland v. Christian, 69 Cal. 2d 108, 120, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (1968) (Burke, J. dissenting).

universal application."[99]

Rules of law formulated by judges on a case by case basis will, in theory, eventually protect abstract values. That protection comes, however, at a very high price. Attempting to protect abstract values by creating rules in concrete terms to be applied to a special class of cases will eventually generate an overly complex and unmanageable system of rules, much as the attempt to limit landowner no-duty immunities by specific concrete rules has generated a nightmarishly complex and unwieldy system.[100]

These concrete rules will also be useless in unusual situations and be unadaptable to changing conditions. The notion that concrete rules of conduct ought to replace the amorphous negligence standard is not new. In the early twentieth century, Justice Holmes and many other judges placed a great deal of faith in the ability of common law courts to develop rules of law which would relieve a jury of the task of deciding whether particular behavior was reasonable and leave the jury only with the task of determining what actually occurred in a particular case.[101] The attempt to formulate mechanical rules in this fashion foundered because of the rules' inability to deal with changed or unusual circumstances, and the rules themselves fell into disuse.[102] At times it is more dangerous to stop one's car, get out, look and listen at a railroad crossing than simply to proceed across the tracks.[103] A rule that required all vehicles to stop at railroad crossings may have made some sense in an era when motor vehicles were comparatively rare. It is a prescription for massive inconvenience and dislocation in an era of heavy vehicular traffic. Mechanical mini-rules of law, designed to protect abstract values, are likely to suffer the same disadvantage.

Another possible judge-oriented solution to the problem of protecting abstract values is to commit the process of determining the reasonableness of the defendant's conduct (or the plaintiff's conduct in case of a defense of contributory or comparative negligence) to the court when abstract values are plausibly alleged to justify the actor's conduct. Giving judges the task of balancing abstract values against tangible interests is hardly a remarkable development in the law. For example, in deciding constitutional issues, judges balance the state's need for an expeditious and administratively efficient procedure against an individual's right to due process,[104] the state's need to prevent violence and

99. PROSSER & KEETON, *supra* note 1, § 35, at 217-18 (footnote omitted).
100. *See supra* notes 93-96 and accompanying text.
101. PROSSER & KEETON, *supra* note 1, § 35, at 218-19.
102. C. MORRIS & R. MORRIS, *supra* note 7, at 60.
103. Pakora v. Wabash Ry., 292 U.S. 98, 104 (1934).
104. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (in deciding whether due

disorder against an individual's right to freedom of expression,[105] and the state's need to combat crime against an individual's right of privacy in the guise of freedom from unreasonable searches and seizures.[106]

Of course, merely because questions involving the balancing of abstract values against tangible harms are routinely committed by the law to decision by judges does not necessarily mean that judges are any better at properly weighting those values than ordinary jurors. Indeed, given that judges are human beings, one would suspect that they are subject to the same cognitive biases as their fellow mortals. If judges are in fact subject to the same cognitive biases, one could legitimately question the efficacy of protecting abstract values by allowing judges to determine the reasonableness of an actor's behavior when abstract values are alleged to justify that behavior. No psychological studies have been made on judges to determine the extent to which they are affected by the typical cognitive biases. However, good reasons exist to suspect that judges, unlike ordinary jurors, may be *relatively less* apt to underweight abstract values because of cognitive biases.

The vividness, availability and saliency biases, to some extent, operate on the basis that individuals are much more likely to credit and appreciate the familiar or readily imaginable fact or value more than the unfamiliar fact or value.[107] Judges are more likely to be familiar with and appreciate abstractions and abstract values than are jurors. First, judges are generally trained as attorneys. Whatever else legal training accomplishes, one cannot deny that it does teach the student to deal with abstractions in the form of legal concepts.[108] Throughout the curriculum, the law student is exposed to abstractions because legal doctrines are themselves abstractions.[109] Indeed, in the course of their legal education, students must frequently consider the specific question of how to balance tangible harms against abstract principles. In constitutional law, students consider the extent to which tangible harm to the

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process requires hearing before termination of Social Security disability payments, administrative burden and other societal costs must be taken into account).

105. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (balancing state's interest in preventing violence and the individual's freedom of expression saying that the state may not forbid "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

106. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 699 (1981) (noting that the Supreme Court, in a series of cases, has balanced the intrusion on the personal security of persons detained by police against "substantial law enforcement interests").

107. *See supra* notes 50-63 and accompanying text.

108. *Cf.* Cramton, *The Current State of Law Curriculum*, 32 J. LEGAL EDUC. 321, 331 (1982) (criticizing what the author perceives as an overemphasis on semi-abstract conceptualism in the legal curriculum).

109. *Cf.* E. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-9 (1948) (perceiving the creation of legal doctrine as a never ending circle).

community must be endured to promote the values of freedom of speech, religion, or individual privacy.[110] Criminal procedure students consider the extent to which the community's tangible interest in fighting crime must be subordinated to the individual's abstract rights to privacy and to be free from being compelled to take part in her own incrimination.[111]

Second, judges are faced with issues requiring the balancing of abstract values against tangible consequences more often than lay persons. For example, every time a judge must decide whether to suppress a confession or other evidence on the grounds that it was illegally obtained or seized, she must consciously balance the abstract values of privacy and freedom from being forced to participate in one's own downfall against the tangible consequence of possibly making it more difficult to convict a factually guilty party.[112] Every time a judge must decide whether to force a child to receive medical treatment over the religiously-based objections of the child's parents, she must consciously balance the values of freedom of religion and parental discretion in raising children against the tangible harm which might befall the child.[113] Thus, by training and experience, judges are not only likely to have dealt with abstract values, but also to have been required to balance those values against tangible harms. This may, to some extent, counteract the availability and saliency biases of judges.[114] Judges' ex-

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110. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 873-86, 1063-68 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 841-56, 1251-75 (2d ed. 1988) (discussions in student-oriented constitutional law texts of cases attempting to balance freedom of speech against possibility incitement to violence or other illegal activity and cases attempting to strike balance between free exercise of religion and tangible harms such as threats to health and safety and military discipline).

111. *See, e.g.*, W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 67-68 (1985) (discussion in student-oriented criminal procedure text of extent to which courts weigh constitutional guarantees against compulsory self-incrimination and unreasonable searches and seizures against the impact of these protections on police efficiency).

112. *See, e.g.*, Duckworth v. Eagan, 109 S. Ct. 2875, 2883 (interim ed. 1989) (O'Connor, J., concurring) (emphasizing the need to balance freedom from compelled self-incrimination against the need to arrest and convict violators of the law); Michigan v. Summers, 452 U.S. 692, 699-701 (1981) (discussing need to balance right of privacy in guise of freedom from unreasonable searches and seizures against need for effective law enforcement).

113. *See, e.g., In re* Sampson, 29 N.Y.2d 900, 901, 278 N.E.2d 918, 919, 328 N.Y.S.2d 686, 687 (1972) (requiring medical treatment where necessary to save the life of the child); *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972) (medical treatment not compelled).

114. The reason that experience is not certain to counteract the biases is that the susceptibility of the biases to correction is far from clear. Empirical studies on the success of debiasing give no clear indication on the optimal techniques for overcoming psychological biases, or whether such biases can even be overcome. *See* Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422 (1982); *see also* Edwards & Winterfeldt, *On Cognitive Illusions and Their Implications*, in JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 642, 657-59 (1986).

periences in dealing with abstract values may, to a limited extent, overcome the vividness bias. In their own minds, judges may tend to view the values with which they must deal so often as concrete realities rather than as abstractions.

While judges may be more likely than ordinary jurors to evaluate abstract values adequately, they are certainly not perfect Platonic guardians of those values. Judges probably cannot free themselves totally from normal psychological biases against abstract values. Therefore, allowing judges to determine reasonableness will not furnish complete assurance that abstract values will be given their appropriate weight. Some abstract values will be slighted even if judges are deciding the reasonableness of the actor's behavior. Moreover, allowing judges to strike the balance between abstract values and tangible harms in determining if an actor behaved reasonably under the circumstances entails serious problems.

Committing the balancing process to judges may run afoul of federal and state constitutional guarantees of the right to trial by jury.[115] This problem can be alleviated to some extent by taking advantage of the fuzziness of the line between questions of fact and questions of law and perhaps allowing some judicial balancing under the guise of deciding an issue as a matter of law.[116]

Even more serious than constitutional impediments is the fundamental policy question of whether important decisions on what weights are to be placed on competing values should be relegated to judges. The decision on what weight to give a particular value (abstract or otherwise) is a social decision. Using the earlier symbolic formula, the value at which to set $W_{1 \ldots X}$ represents a social value judgment.[117] Judges are a highly unrepresentative cross section of society. Judges are more predominantly male, white, and wealthy than the body politic as a whole.[118] While juries are perhaps also unrepresentative of their communities, they mirror the characteristics of those communities much closer than do judges.[119] Should a highly unrepresentative group, such as judges, make fundamental decisions about the importance of competing values? The question is not easily answered. The issue in one

115. *See, e.g.*, U.S. CONST. amend. VII; DEL. CONST. art. I, § 4; IOWA CONST. art. I, § 9; N.Y. CONST. art I, § 2; OHIO CONST. art. I, § 5 (all guaranteeing right to jury trial).

116. Vinson, *Tort Reform the Old-Fashioned Way: By Trial and Appellate Judges*, 1987 DET. C.L. REV. 987, 1001-02 (author suggests jury discretion should be curbed by taking advantage of the "fuzzy" line between questions of law and fact).

117. *See supra* note 45 and accompanying text.

118. V. HANS & N. VIDMAR, JUDGING THE JURY 247-48 (1986); C. JOINER, CIVIL JUSTICE AND THE JURY 65 (1962).

119. *See* sources cited *supra* note 118. *But see* Van Dyke, *supra* note 42, at 44 (indicating juries tend to be more white, male and middle income than their communities).

guise or another has sparked voluminous and often bitter debates in a variety of areas of law.[120] Those debates will not be resolved in this article. All that can be done at this point is to recognize that allowing judges to determine reasonableness when abstract values are involved would probably lead to fundamental value judgments being made by a highly unrepresentative body. Whether this development would represent a grave problem, a positive boon or something in between is an issue that courts and legislatures must resolve.

A less radical alternative to allowing judges to determine reasonableness when abstract values are involved is to protect abstract values by having judges use their existing power to direct verdicts in cases in which reasonable minds cannot differ.[121] This judicial power has the advantage of having passed constitutional muster and being fairly widely accepted as a legitimate exercise of the judicial function.[122] Unfortunately, directed verdicts are unlikely to be of much assistance in cases where abstract values must be balanced against tangible harms. The balancing of abstract values against tangible harms is a process of social judgment in which the party doing the balancing ascribes relative social importance to the competing values. The balancing process is not particularly amenable to a determination that reasonable minds cannot differ.[123] A judge can say with some assurance that reasonable

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120. Of the many possible examples of the debate over the representativeness of judges, two will suffice to illustrate the point that the debate permeates many areas of the law. In constitutional law, the debate between interpretivists and originalists can be viewed as dispute over the degree to which "unelected" judges may substitute their views of constitutional values for the views of a popularly elected legislature. *Compare* Cherminsky, *The Supreme Court, 1988 Term—Foreward: The Vanishing Constitution,* 103 HARV. L. REV. 43, 74-96 (1989) (questioning whether the practice of judges making fundamental constitutional value judgments is truly "undemocratic") *with* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L. REV. 1, 6 (1971) (attacking judges' use of personal values in making decisions on constitutional law as being antithetical to democratic theory).

In criminal law the dispute over whether courts should be free to apply common law to crimes can also be viewed as dispute over the ability of judges to represent adequately the mores and views of their communities as opposed to their own possibly parochial views. *See* Jeffries, *Legality, Vagueness and the Construction of Penal Statutes,* 71 VA. L. REV. 189, 190 (1985) (noting that the idea that crimes should be defined by legislatures rather than judges in part rests on the notion that the legislature is more "politically competent," i.e., representative).

121. *See* Vinson, *supra* note 116, at 1001 (suggesting that judges use their power to direct verdicts to "reform" tort law by controlling runaway juries in tort cases); FED. R. CIV. P. 50(a) (providing for directed verdicts); *infra* note 122 (discussing standard for directed verdicts).

122. *E.g.,* Galloway v. United States, 319 U.S. 372 (1943); Murray E. Gildersleeve Logging Co. v. Northern Timber Corp., 670 P.2d 372 (Alaska 1983); Souper Spud, Inc. v. Aetna Casualty & Surety Co., 5 Conn. App. 579, 501 A.2d 1215 (1985); Keen v. Davis, 38 Ill. 2d 280, 230 N.E.2d 859 (1967); Gibbons v. Price, 33 Ohio App. 3d 4, 514 N.E.2d 127 (1986).

123. The phrase "reasonable minds cannot differ" is the formulation of the standard for granting a motion for a directed verdict utilized by the United States Court of Appeals for the Sixth Circuit. McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir. 1988). Other courts usually phrase the test in terms of there being "but one conclusion a reasonable person could have

minds would not differ when considering whether it is unreasonable to spend a million dollars for security precautions to prevent ten thousand dollars in vandalism. Likewise, a judge may conclude that it is reasonable to spend ten thousand dollars on safety devices to save a million dollars in personal and property damages. A judge cannot determine with the same assurance that the value of preventing crimes in the community is twice (or some other multiple) as important as a former prisoner's right to enjoy a measure of privacy and dignity.[124] The traditional judicial device of directing verdicts to control juries may be relatively uncontroversial, but it is also likely to be inefficacious in protecting abstract values.

Judicial comment upon the weight of the evidence is a more controversial juror control mechanism.[125] Judicial comment is, however, also unlikely to be of much use in protecting abstract values. Even if American judges could comment as freely and extensively on the evidence as their British counterparts,[126] their comments still could not directly address the importance of abstract values. A judge can perhaps comment that a person's story of how an accident occurred is somewhat difficult to credit. However, what comment can be made about the relative importance of protecting oneself from physical injury and honoring a sincere, albeit possibly mistaken, belief that one's religion forbids a female adherent from being on a ski lift after sundown with a man to whom she is not married?[127]

Although the traditional judicial prerogative to comment upon the evidence may be of limited use in protecting abstract values, a more focused judicial comment to the jurors (in the form of a specific corrective instruction) on the nature of the reasonableness determination and the nature of abstract values might seem to be more helpful. For example, in the halfway house hypothetical, the judge might instruct the

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reached." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2525, at 545-46 (1971) (quoting Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1971)). There appears to be no substantive difference between the two formulations.

124. For the process of ascribing social weights to values, see *supra* text accompanying note 45.

125. *See* Vinson, *supra* note 116, at 1000-01 (suggesting that judges use their power to comment on the evidence to control unfettered jury discretion and "reform" tort law). For a general discussion of the legality and limitations of judicial comment upon the evidence, see Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988).

126. English judges "routinely and unreservedly [make] their views on the persuasiveness of the evidence known to the jury." Weinstein, *supra* note 125, at 162.

127. The particular balancing of values described in the text confronted the court in Friedman v. State, 54 Misc. 2d 448, 282 N.Y.S.2d 858 (1967), *aff'd and modified*, 31 A.D.2d 992, 297 N.Y.S.2d 850 (1969). The court had to determine if the plaintiff was contributorily negligent in jumping from the ski lift.

jury that, in deciding whether the supervisors of the parolee acted reasonably, they must weight the social benefits of the supervisors' actions against the risks created by their actions. The judge would then admonish the jury that, merely because the risks created by the supervisors' behavior were readily visible, and the utility of the supervisors' actions had no concrete manifestations, the jurors should not diminish the importance of the latter.

Two problems stand in the way of *ad hoc* judicial attempts to educate jurors not to be biased against abstract values. First, under current legal rules on the limits of judicial comment and jury instructions in negligence cases, the type of instruction set forth above may not be allowed.[128] Second, and more important, the utility of such an instruction is not all that clear. Experimental psychologists are deeply divided on the efficacy of education in overcoming heuristic biases.[129] Even if the optimists among the psychologists who claim that the biases are remediable are right, an effective corrective process is likely to require laborious effort with constant feedback being given to the decision-maker who is to be "debiased."[130] A relatively brief instruction by a judge in the midst of a trial hardly conforms to that prescription and is not likely to compensate for what is probably a lifetime of mental habits. For these reasons, the efficacy of corrective jury instructions in overcoming jury biases against abstract values is questionable.

E. The Role of Advocates in Protecting Abstract Values

Those who assert that their conduct was reasonable because it was justified by abstract values do not stand alone in the courtroom. They usually have counsel representing them. This fact raises the issue of what advocates can do to overcome the tendency of jurors to be biased against abstract values. The obvious answer is for counsel, where possible, to try to furnish concrete examples of the abstract value in an action in order to give the jurors readily available concrete reference points to comprehend the significance of the abstract value. Counsel can employ a variety of techniques in attaining this objective. For example, the attorney can follow the old nostrum in preparing expert witnesses by making sure that the expert witnesses cast their theories in

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128. *Cf.* Phillips v. Kimwood Mach. Co., 269 Or. 485, 501, 525 P.2d 1033, 1040 (1974) (requiring a judge to consider risk/utility factors in deciding whether to submit a design defect/products liability case to the jury, but forbidding the use of the factors in jury instructions and requiring the jury to be given a "reasonable person" instruction if the case is submitted to it); *see also* C. MORRIS & R. MORRIS, *supra* note 7, at 60 (noting that trial judges fear reversal for departing from the "reasonably prudent person" charge).

129. *See* sources cited *supra* note 114.

130. Edwards & Winterfeldt, *supra* note 114, at 657.

terms which are familiar to the lay juror.[131] Attorneys also might rely more on anecdotal, observational evidence rather than cold, gross statistical evidence. This latter suggestion runs counter to the instincts of some trial attorneys who fear that the cold quantitative data will prove overwhelmingly powerful for the side who introduces it.[132] For example, an attorney who is faced with a choice of presenting either the expert testimony of an anthropologist based upon her anecdotal observations or the testimony of a sociologist based upon cold, gross aggregate data may wish to choose the former because it provides the jury with vivid, recallable examples to illustrate the value the advocate is attempting to defend.[133]

The problem with attempting to remedy underweighting abstract values through alternative techniques of advocacy is that often the techniques may be legally unavailable or unsuccessful. The use of illustrative anecdotes may, for example, be barred unless the facts related are within the personal experience of the witness.[134] Thus, in the halfway house example, a criminologist testifying on the benefits of loose supervision of parolees in reintegrating them into society may be prevented from providing the jury with specific "success stories" unless she has personally observed the facts she is describing.

Even if there were not legal problems with the admissibility of the anecdotal evidence, the assistance counsel can furnish in helping jurors appreciate abstract values is limited because some abstract values are simply not amenable to illustration through concrete anecdotes. The more abstract the value, the more difficult it is to illustrate through anecdotes. While "success stories" of former criminals making valuable contributions to society can, perhaps, make concrete the abstract value of facilitating their reintegration into society, a similar story illustrat-

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131. S. HAMLIN, WHAT MAKES JURIES LISTEN 281-82 (1985); Bridgers, *The Selection, Preparation, and Direct Examination of Expert Witnesses* in MASTER ADVOCATES' HANDBOOK 200-01 (D. Rumsey ed. 1986).

132. Saks & Kidd, *supra* note 52, at 138.

133. *Id.*

134. Witnesses are normally not allowed to relate incidents which they have not personally observed. 2 I. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 657(a) (1979). The common law even extended this principal to expert witnesses who were not allowed to render an opinion based on incidents they had not personally observed. 2 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 73 (5th ed. 1990). If a jurisdiction follows this approach, illustrative anecdotes will not be admissible unless they were personally observed by the testifying expert. The Federal Rules of Evidence and those states adopting the federal rules have tremendously liberalized this common law rule by allowing an expert to base her opinion on facts which would not otherwise be admissible into evidence, e.g., facts not personally observed by the expert, FED. R. EVID. 703, and to relate the specific incidents which form the basis of her opinion. FED. R. EVID. 705. *But see* OHIO R. EVID. 703 (generally adopting the Federal Rules of Evidence but retaining the common law rule that even an expert must base her opinions on facts personally observed or already admitted into evidence at the hearing).

ing their need to be accorded a measure of personal privacy is difficult even to imagine.

In sum, improved advocacy is probably the method of protecting abstract values which gives rise to the fewest adverse effects. Unfortunately, in keeping with the iron law of protection of abstract values, evidentiary problems and the difficulty in creating readily grasped illustrations of highly abstract values make improved advocacy the least effective method of protecting those values.

IV. CONCLUSION

In the modern law of negligence, jurors are increasingly being called upon to weight abstract values against tangible values reflected in tangible harm or injury. Contrary to the implicit assumptions of some jurists, psychological evidence suggests that jurors cannot carry out that chore in an unbiased manner. A variety of techniques for protecting abstract values is available to courts.

None of the techniques is optimal in all circumstances. In choosing among the techniques, courts are faced with an inevitable trade-off between efficacy of the technique and undesirable side-effects. Because of this trade-off, a court's decision on which technique to utilize will be a difficult one. The best a court may be able to do is to experiment with various methodologies on an *ad hoc* basis. In doing so, the courts will have to weight not only the costs and benefits of the various techniques but also the relative importance and abstraction of the values they are trying to protect. Important values with constitutional implications, such as the free exercise of religion, may call for the use of techniques which may over-protect the value, such as fixed rules of law combined with judicial balancing of the risks and utilities of an actor's conduct. Less important values, such as the status of a person as a landowner, may only merit techniques such as improved advocacy which have few or no "side effects," but also have little efficacy in protecting the abstract value.

Other courts and commentators will not always agree that the methodology selected by a court reaches the optimal trade-off between efficacy and undesirable costs. Perhaps the court itself will become dissatisfied with the techniques it has adopted and adopt a different method (or, more likely, a mix of methods) for protecting abstract values. The one thing a court should not do, however, is bury its head in the sand by making the erroneous assumption that when jurors determine whether an actor in a negligence case acted "reasonably," the jurors will automatically give abstract values the weight which they are due.