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## A Pragmatic Approach to Improving Tort Law

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# A Pragmatic Approach to Improving Tort Law

*Catharine Pierce Wells\**

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## I. INTRODUCTION

In 1923, a group of lawyers, judges, and teachers met to consider the desirability of forming the American Law Institute (“ALI”) and of undertaking its ongoing project of restating the law. They began their deliberations with the recognition that the legal system had serious failings<sup>1</sup> and that the public was generally dissatisfied

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1. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1 (1923).

and skeptical about the justice it dispensed.<sup>2</sup> The central difficulty with the system of justice, they thought, was the fact that legal outcomes were so uncertain. Uncertainty, they argued, made the legal system cumbersome, expensive and inaccessible; it denied justice to litigants<sup>3</sup> and discouraged legitimate activities.<sup>4</sup> The reasons for this uncertainty were many. Among them, the prospectus noted:

the lack of agreement among the members of the legal profession on the fundamental principles of the common law, lack of precision in the use of legal terms, conflicting and badly drawn statutory provisions, . . . the great volume of recorded decisions, the ignorance of judges and lawyers and the number and nature of novel legal cases.<sup>5</sup>

These were understood to be serious problems, but, as serious as they were, the solution seemed right at hand. After all, these were precisely the kinds of problems that a group of well intentioned and capable lawyers might effectively address. What was needed, they thought, was an opportunity for the "best" lawyers to work together in an atmosphere that was free from the need to represent the interests of particular clients. Freed of partisan interests, the participants would be able to use objective measures of rational discourse to find agreement, develop precision, and clarify legal doctrines. The result would be a series of restatements that would rally the legal community around correct statements of legal principle.<sup>6</sup>

In 1923, these hopes became a reality with the founding of the American Law Institute and its sponsorship of the ongoing effort to "restate" American law. Since its founding, the ALI has con-

2. Such dissatisfaction, they thought, was serious; it bred "disrespect for law" and they worried that such disrespect would become the "corner stone of revolution." *Id.*

3. Indeed, they were emphatic about the relationship between uncertainty and injustice. When the law is doubtful most persons are inclined to adopt the view most favorable to their own interests; and many are willing if necessary to test the matter in court while those willing to overreach their neighbors are encouraged to delay performing their obligations until some court has passed on all the novel legal theories which skilled ingenuity can invent to show that they need not be performed.

*Id.* at 6.

4. Uncertainty discouraged activity because it made it difficult for people to assess true liability costs. This difficulty was noted in the prospectus: "Because of the existing uncertainty in the law those who turn to it for guidance in conduct often find that it speaks with a doubtful voice." *Id.*

5. *Id.* at 8.

6. They described the *Restatement* this way:

We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life.

*Id.* at 14.

sistently addressed the subject area of tort law.<sup>7</sup> While these efforts have accomplished much that is worthwhile,<sup>8</sup> they have fallen short of their stated goal. In fact, the problems of the tort system today bear a remarkable resemblance to those that were articulated in 1923. Thus, for all the careful restating, the tort system remains steeped in controversy and vulnerable to the twin charges of uncertainty and injustice.

The continuing problem of uncertainty is hardly surprising. By its very nature, tort law involves accidental and unexpected injuries, and these injuries often provoke an emotional and conflicted response. On the one hand, we view tort plaintiffs with considerable sympathy. On the other, their predicaments also inspire a certain amount of fear. Tales about unexpected injuries remind us of our own vulnerability to sudden catastrophe. Blaming the victim can work to appease this fear by seeming to reassure us that continued vigilance can prevent sudden harm. The conflict between these two feelings—sympathy for the plaintiff and fear of our own vulnerability—can produce ambivalence, and, I suspect, this is one of the reasons why the system seems to reach so many irreconcilable outcomes. For example, the system is sometimes remarkably generous to plaintiffs:

A man drowns in a motel swimming pool. His family is able to recover from the motel owner whose only fault was a failure to post a sign stating the obvious fact that there was no lifeguard in attendance.<sup>9</sup>

At other times, it seems downright parsimonious:

A woman is raped in a motel room that has no phone and no security of any kind. The jury found the woman to be 97% negligent because she opened the door in the middle of the night. At the same time, they found the motel owner, who did not even warn her that the neighborhood was dangerous, only 3% negligent.<sup>10</sup>

Of course, it is true that these cases rest upon different doctrinal grounds and that they are not, strictly speaking, inconsistent. Even so, they illustrate something important about the unpredictability of tort law. Tort law is not unpredictable because of doctrinal incon-

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7. Volumes of the *Restatement of Torts* were published in 1934, 1938, and 1939. Volumes of the *Restatement (Second) of Torts* were published in 1955, 1965, 1977, and 1979. Twenty three appendices were compiled from 1963 to 1991. In addition, two sections of the *Third Restatement* were published in 1998 and 2000.

8. The *Restatements* have been especially important in terms of narrowing the issues and focusing debate. They have also played a major role in rationalizing discussions of tort doctrine for lawyers and judges who may not have time to rethink every research question from the ground up.

9. See *Haft v. Lone Palm Hotel*, 478 P.2d 465, 468 (Cal. 1970).

10. See *Wassell v. Adams*, 865 F.2d 849, 852 (7th Cir. 1989).

sistency; instead, the inconsistency arises from the wide array of conflicting feelings that tort cases excite. Given these feelings, it is unlikely that the solution will be achieved simply by developing more doctrinal clarity.

It is also not surprising that the perceived injustices in tort outcomes are the subject of continuing criticism. Tort law creates winners and losers under circumstances that make losing particularly hard to understand and reconcile. Not only must the loser pay money, (s)he must come to terms with the fact that society has laid the blame at her doorstep. For most of us, this would be a bitter pill to swallow even under the best of circumstances, but the accidental nature of most tort injuries makes these circumstances even more difficult. Accidents are the kind of unplanned and unexpected occurrences that inevitably upset the fragile balance we maintain between self and others. For example, drivers would normally expect to pay for the oil and gas that they consume, but not necessarily for the bumpers and fenders that accidentally get in their way. Similarly, the executives at McDonalds undoubtedly anticipated many expenses when they decided to sell coffee from drive-thru windows, but they probably never imagined that they would have to pay millions of dollars for doing nothing more than serving the coffee piping hot.<sup>11</sup> Because such costs are unexpected and hard to avoid, pro-defendant critics often argue that the tort system is far too generous. Armed with a long parade of seemingly outrageous and excessive verdicts, they argue for strict constraints on tort decision-making. At stake, they suggest, is fundamental fairness as well as the freedom of individuals to engage in legitimate and worthwhile activities.<sup>12</sup>

From the plaintiffs' perspective, however, the tort system is not nearly generous enough. While a handful of tort plaintiffs seem to win the lawsuit lottery with multimillion dollar verdicts, many worthy plaintiffs go without any form of remedy.<sup>13</sup> Instead, their

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11. There was a suit in New Mexico (*Liebeck v. McDonald's Restaurants, P.T.S., Inc.*) that produced a widely publicized jury verdict of approximately three million dollars, but there was no published opinion since the case was settled before appeal. The case is referenced at *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 654 (7th Cir. 1998).

12. Indeed, there are cases of public fireworks displays cancelled, and public festivals shortened. Robert Hanley, *Insurance Costs Imperil Recreation Industry*, N.Y. TIMES, May 12, 1986, at A1. There are also cases of public ice skating rinks closed, and even ministers who will not go to parishioners homes to advise them and all for fear of lawsuits and inability to afford liability insurance. Robert Lindsey, *Businesses Change Ways in Fear of Lawsuits*, N.Y. TIMES, Nov. 18, 1985, at A1.

13. See, e.g., Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 445 (1987).

claims may be frustrated in any number of ways. The suit may be barred by the statute of limitations before they even realize that they have a claim. They may be unable to bear the expense and difficulty of litigation. They may not be able to find an attorney who will take the case on a contingency basis. They may have to accept an inadequate settlement because litigation takes too long. Once in court, insoluble proof problems may result from the accidental nature of the incident. They may also confront arbitrary limitations on their rights of recovery that have been created by past generations of tort "reform." Finally, if they recover, they may find that what they receive in damages is a gross under-valuation of their loss.

From every side, then, the tort system seems to be in disarray. Whether you are pro-plaintiff or pro-defendant, you are likely to see the system as irrational, illegitimate, and woefully inadequate. There is over-deterrence of some activities and under-deterrence of others. Some injuries receive too much compensation and others receive too little. Further, these variations create additional problems in reaching fair settlements and in pricing and insuring risks. Thus, it seems obvious that the tort system could use the kind of conceptual housecleaning that was prescribed in 1923. The new restatement,<sup>14</sup> the *General Principles of the Restatement (Third) of Torts*, presents one kind of solution to this problem, but there are others. As an alternative, one could attempt to rationalize and justify the system by conforming it to the dictates of an acceptable normative theory. Or, as I have suggested elsewhere,<sup>15</sup> one could try to develop a more pragmatic approach.

The purpose of this Paper is to explore these alternatives and to think more generally about the following question: How can lawyers and law teachers use their expertise to improve the tort system? In Section II, I examine the *Restatement* approach. Next, in Section III, I examine the various normative theories of tort law. These theories typically articulate a particular goal—a goal like efficiency or fairness—and then use this goal as a way of discriminating between correct and incorrect outcomes. Thus, they purport to provide a justificatory framework for tort adjudication. Finally, Section IV takes up the quest for a more pragmatic approach. It begins with a realistic appraisal of current tort practices. It then

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14. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES, (Council Draft No. 1, 1998); RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Preliminary Draft No. 1, 1993); RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES, (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].

15. See generally Catharine Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

analyzes whether these practices could be changed in order to better serve their intended function.

## II. THE RESTATEMENT APPROACH

In 1998, the American Law Institute began the long process of restating the general principles of tort law.<sup>16</sup> The aim of the project was to clarify basic concepts by providing a “vocabulary not only for the whole of tort law but also for tort law principles in their application to other fields.”<sup>17</sup> Notably, this purpose is significantly less ambitious than the one articulated in 1923. While there is still an emphasis on doctrinal clarity, the Foreword to the *Restatement (Third)* reflects little hope that the project will facilitate the administration of justice by providing uniformity of law and certainty of outcomes. The goal is no longer to precisely restate correct rules but rather to separate the wheat from the chaff; to boil down the “thousands of judicial decisions, . . . hundreds of law review articles and commentaries . . . [and] legal sources .. [that] span the legal spectrum from theoretical analys[e]s . . . to the workaday concepts of jury instructions”<sup>18</sup> to a few manageable concepts.

In examining the *Restatement (Third)*, it is important to keep in mind that negligence doctrine has never consisted of the kind of rules that can make outcomes seem predictable and certain. The central issue in a negligence case is the defendant’s breach of due care. Traditionally, due care has been described as that degree of care that would be exercised by “a reasonable and prudent person”<sup>19</sup> or by “an ordinarily prudent person”<sup>20</sup> under the same or similar circumstances. Note that these definitions use a variety of general normative terms such as “reasonable,” “ordinary,” and “prudent.” These terms leave the jury such wide discretion that Leon Green’s statement in 1930 seems particularly insightful: “[W]e may have a process for passing judgment in negligence cases, but practically no ‘law of negligence’ beyond the process itself.”<sup>21</sup> This emphasis on process, together with a corresponding thinness in substantive doctrine, is a distinctive feature of the tort law and

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16. See *supra* note 14.

17. Discussion Draft, *supra* note 14, at xi.

18. *Id.*

19. DAN B. DOBBS, *THE LAW OF TORTS* § 117 (2001).

20. *Gossett v. Jackson*, 249 Va. 549, 554, 457 S.E.2d 97, 100 (1995) (*quoted in* DOBBS, *supra* note 19, at n.5).

21. LEON GREEN, *JUDGE AND JURY* 185 (1930).

one that must be kept in mind when considering the *Restatement (Third)*'s announced strategy of "selection by exclusion."<sup>22</sup>

A good example of this strategy is found in the section on negligence.<sup>23</sup> The duty of care is described as "reasonable," but terms such as "ordinary" and "prudent" are omitted. The section then proceeds to identify what it calls the primary factors:

Primary factors to consider in ascertaining whether conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the actor and others if the actor takes precautions that eliminated or reduce the possibility of harm.<sup>24</sup>

The overall intent of this section seems to be to narrow the concept of negligence by emphasizing ("selecting") rational calculation and by omitting ("excluding") any reference to negligence as the violation of societal norms. While the primary factor approach does not necessarily result in predictable outcomes,<sup>25</sup> it does seem to limit the range of the decision-maker's discretion by ruling out other seemingly legitimate factors.

To the extent that the *Restatement (Third)* actually simplifies negligence by "selecting" rational calculation and "excluding" societal norms, it represents a radical change from existing law. Under current practices, the law, in most cases, provides that tort decision-makers may—but need not—use the measure of rational calculation to judge negligent conduct.<sup>26</sup> Note that even though Section Three is exclusively focused on rational calculation, this is not the full picture. What one hand takes away can be restored with the other; what the draft simplifies in one section can be confounded in another. For example, Comment C<sup>27</sup> recognizes certain exceptions—infancy, disability, and emergencies—to the rational calculation standard<sup>28</sup> and also acknowledges that this standard is not the appropriate one to use in cases of inadvertence.<sup>29</sup> In addition to these

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22. Discussion Draft, *supra* note 14, at xi.

23. *Id.* § 3, xxi.

24. *Id.* This is, of course, the cost benefit calculation described in *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

25. This is because there can be differences in valuation of many of the items involved, and because there may be some disagreements as to exactly which precautions would be required.

26. The reporter's notes argue at length that what it calls the "balancing approach" is the universal standard. But the success of this argument is achieved primarily by the identifying the use of terms like "reasonable care" and the "care of a prudent person" with the balancing approach.

27. Discussion Draft, *supra* note 14, § 3 cmt. c.

28. *Id.*

29. For example, it indicates that rational calculation may not be the correct approach in cases where the accident is caused by lapses in the defendant's attention. It states:



exceptions, there are separate sections that deal with violations of custom and statute. Section 11, for example, provides that the existence of a custom will be relevant but not conclusive evidence of negligence,<sup>30</sup> and Section 12 provides that, under certain circumstances, violation of a statute will be conclusive with respect to a negligence claim.<sup>31</sup> Thus, while rational calculation is stated to be the "primary" factor, the draft as a whole maintains the current practice of allowing the simultaneous use of several different measures of due care.

In the end, the *Restatement (Third)*'s account of negligence deserves much praise. It is both wonderfully comprehensive and deeply subtle in its handling of the fundamental tensions of tort law. On the other hand, given that there is little change in the substantive law or in the analytical framework that supports it, it is, therefore, hard to see what has been "clarified."<sup>32</sup> Tort decision-makers retain their discretion over tort outcomes, and tort outcomes thereby remain unpredictable and uncertain. What, then, has the *Restatement (Third)* accomplished? This is a hard question to ask, but it is an important one. Does it really simplify and clarify the discussion, or does it merely add one more piece of confusing argumentation? In fact, we need to consider whether a lack of clarity is really the heart of the problem. Perhaps, the tort law is broken in a way that the *Restatement* approach cannot easily fix. *Restatements* work best when there is a lot of variation and confusion in the substantive doctrine,<sup>33</sup> but this does not seem to be the particular problem of negligence law. Rather, the problem with negli-

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[T]he primary factors are most relevant in cases in which the actor is generally aware of some risk entailed by conduct yet because of the burden of risk prevention is willing to tolerate that risk. By contrast, in cases in which the actor's alleged negligence consists mainly in the actor's inattentive failure to advert to the risk, explicit consideration of the primary factors may be awkward, and the actor's conduct can best be evaluated by directly applying the standard of the reasonably careful person.

*Id.*

30. *Id.* §11.

31. *Id.* §12.

32. In fact, there are some ways in which the situation may have become even more confused. Take, for example, the emphasis on rational calculation. It is well known that many of the cost-benefit factors are not easily quantified. Items such as the defendant's leisure and convenience as well as the plaintiff's pain and suffering do not lend themselves to simple quantification. One can only hope that the primary factor language will not encourage quantification where none is fairly possible. In addition, to the extent that Section 3 ignores the issue of societal norms, one could fear that there will be much less incentive to clarify them and acknowledge their relevance.

33. Some areas of tort law may well be more amenable to the *Restatement* approach. The Institute's recent work on the apportionment of damages would seem to be a good example.

gence law seems to implicate a somewhat deeper confusion about the goals and values that underlie the tort system.

### III. THE COMPREHENSIVE APPROACH: NORMATIVE THEORY AS A FOUNDATION FOR TORT LAW

In the past thirty years, one of the most popular ways of thinking about tort law has been to consider it in the context of a larger normative theory. Whether the larger theory speaks in terms of economics or moral philosophy, these attempts share a common strategy. The theorist begins by identifying a particular virtue as the ultimate goal of the tort system. For example, one common goal is the virtue of efficiency. This goal is then used as a means of distinguishing between correct and incorrect legal outcomes.<sup>34</sup> When successful, this strategy not only provides a guide for tort decision-making, it also provides a justification for tort decisions insofar as they are made in accordance with the theory. Thus, the approach provides a comprehensive theory of tort law—we know both what courts should do and why they should do it. For a theory to be comprehensive in this sense, it must meet two criteria: first, the stated goal must unambiguously determine a particular outcome in the vast majority of cases, and second, the goal must be understood to be an unequivocal good. Failing either of these criteria means that the theory will not work as a systematic justification of tort outcomes. A theory that fails these criteria may, nonetheless, yield important insights, or it may provide some measure of justification in some individual cases. What it cannot do, however, is justify or rationalize the system as a whole, and failing this, it is unable to provide a clear and coherent basis for improving tort law.

Prominent among the goals that the various normative theories of tort law have identified for tort law are corrective justice, efficiency, and fairness. Each of these goals has been used to develop a comprehensive theory of the kind I have described above.

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34. Or, more accurately, they regulate the selection of the correct legal rule, which in turn mandates particular outcomes. Thus, each of these theories is rule based in the sense that it endorses certain rules and then uses these rules to determine outcomes.

*A. Corrective Justice*<sup>35</sup>

The emergence of negligence doctrine in the nineteenth century placed the concept of fault at the center of judgments about tort liability. Under negligence doctrine, the general rule is that plaintiffs could recover upon a showing that the defendant was at fault and that the defendant's fault caused the plaintiff's harm. The equation between fault and tort liability thus created a rational and tidy framework for tort law—one that makes it plausible to see the tort system as an instrument of corrective justice.<sup>36</sup>

Much of what makes the tort system seem legitimate and logical is the fact that it most often shifts accident costs in cases where it is possible to argue that the defendant has done something wrong. Nevertheless, when fault is used as the basis for a comprehensive theory, the resulting theory generally fails to meet the criteria established above. One reason for this is that the concept of fault has no fixed meaning. There are, indeed, many different things that might be meant when we say that a tort defendant was "at fault." First, it could mean that (s)he was vicious in the sense that (s)he actually intended to inflict personal injury on the defendant. Or, second, (s)he might have been selfish. Perhaps (s)he wanted something so badly that (s)he was willing to inflict a severe injury upon the defendant in order to get it. Third, (s)he might have been heedless—(s)he loved taking risks even when (or especially when) a bad outcome might be inflicted on others. Fourth, (s)he might have been merely careless; perhaps (s)he overlooked some precautions or did them haphazardly. Fifth, (s)he might have been inattentive or distracted. Maybe (s)he was daydreaming, or maybe (s)he just "spaced out" at the crucial moment. Sixth, (s)he might have employed bad judgment; (s)he underestimated the probability or severity of a harmful outcome or overestimated the burden (s)he would incur in avoiding it. Seventh, (s)he might have broken the law. Eighth, (s)he might have deviated from the normal way of doing things for whatever reason. Ninth, (s)he might merely have profited from a risk generating activity. And so forth.

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35. For examples of corrective justice theories, see Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits, (Part 2)*, 2 *LAW & PHIL.* 5, (1983) and Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *LAW & PHIL.* 37, (1983).

36. The phrase comes from Aristotle's *Nicomachean Ethics*. The basic idea is that when one party wrongfully deprives another of some benefit, the wrongdoer must compensate the victim.

This flexibility in the concept of fault is one of the chief reasons why the link between liability and fault has rarely been challenged. Thus, many theorists have argued that fault is the touchstone of tort liability.<sup>37</sup> It should be noted, however, that this flexibility in the concept of fault poses real difficulties for fault-based comprehensive theories. Such theories have problems meeting the first criterion—unambiguous endorsement of results—because they do not utilize a unitary and consistent concept of fault.<sup>38</sup> Further, they cannot meet the second criterion—general acceptance of the goal in question—because there is no general agreement as to which of these concepts of fault justifies shifting tort losses.<sup>39</sup> Further, any attempt to meet the first criterion, by accepting a more precise definition of fault, will make it more difficult to meet the second requirement by making the concept of fault less amenable to general agreement.<sup>40</sup> Thus, while corrective justice theories remind us that blaming the defendant can be an important part of tort liability, they do not provide the kind of comprehensive picture that would give credibility to the tort system or to efforts for its reform.

### B. Efficiency<sup>41</sup>

In the last Section, we saw that the *Restatement (Third)* utilizes a cost benefit approach as the “primary factor” in assessing negligence liability. In so doing, it reflects the dominant tradition in analyzing tort liability over the last twenty years. The foundation of this approach is contained in the recognition that the reasonable person will not take every possible precaution. A reasonable ap-

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37. For example, Holmes writes, “No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part . . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.” OLIVER W. HOLMES, JR., *THE COMMON LAW* 94-95 (1881) (quoting the language of “the late Chief Justice Nelson of New York”).

38. The exception, of course, is Ernest Weinrib's effort to utilize Kantian moral theory to help us decide when the defendant's conduct is wrongful. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 84-113 (1995). Weinrib's approach, however, relies upon the possibility of turning Kant's moral system into a detailed practical guide to moral action. While this might be attempted, it is doubtful that such an interpretation of Kant's moral system could be either universally approved or proved to be correct. See *infra* text accompanying note 39.

39. For more on this problem, see Wells, *supra* note 15, at 2364-75.

40. See Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984).

41. For examples of theories of this kind, see WILLIAM M. LANDES & RICHARD A. POSNER, *ECONOMIC STRUCTURE OF TORT LAW* (1987) and GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

proach, it is assumed, requires that tort defendants take only those precautions that are efficient in the sense that they produce safety savings that exceed their costs.

Like the notion of negligence as fault, the efficiency standard has three distinct characteristics. First, it seems to apply in every case. If we are willing to cost out such things as minor increments of time, increased attention, bodily injuries, pain and suffering and even loss of human life, then, at least in principle, every case can be resolved by using the economic approach. Second, like the fault standard, the efficiency standard has great flexibility. Issues about what we count and how we count it may be resolved in many different ways. We could, for example, maintain that a human life is nearly priceless or, on the other hand, argue that, for liability purposes, it should be valued (as it is for damages) by the economic loss to the survivors. Third, the efficiency standard has its own built-in justification. Promoting efficiency, like facilitating justice, is itself a good thing.<sup>42</sup> Efficiency gains translate to welfare gains and, presumably, to gains in happiness and satisfaction.

On the surface, efficiency theories seem like they could work as comprehensive theories of tort law. Unlike corrective justice theories, they have an air of mathematical precision that suggests the availability of a correct economic answer for each tort case. The problem, however, is that the air of precision is somewhat deceptive. An efficiency theory will actually be precise only if it assigns a specific monetary value to each element of the cost-benefit calculus. In short, it must be able to say in each case how much human time, human attention, human suffering and human life are worth. Obviously, such valuations can be quite controversial. For example, while most might agree that there is an upside limit to the amount we should spend to save a human life, it is unlikely that we can reach any agreement as to what, in dollar terms, that amount might be. If, however, an economic theory does not commit itself to an unambiguous theory of valuation, then it cannot unambiguously endorse specific outcomes. So long as the cost-benefit formula cannot be turned into a real mathematical calculus, theorists can only speculate as to what efficiency requires, and so long as there are ambiguities in the worth of human time, attention, and injury, no calculation will be possible in the vast majority of cases. Thus, like

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42. The efficiency standard, however, is not without controversy. While many would agree that, all things being equal, efficiency is a good thing, fewer would be satisfied that it is the *sine qua non* for shifting accidental losses.

corrective justice theories, efficiency theories are unable to meet both of the criteria. If, on the one hand, the manner of calculation is determinate enough to provide clear answers, then, on the other hand, it will be too controversial to act as a comprehensive justification for tort law.

### C. Fairness

The fairness approach has at least two different forms. One form centers on a substantive notion of fairness. A second focuses on community standards.

#### 1. Substantive Fairness

This approach is best exemplified by the work of George Fletcher.<sup>43</sup> Fletcher proceeds from two assumptions: one, that there is a background level of reciprocal risk which we all agree to share, and two, that the tort law will not intervene in cases where the plaintiff's injuries were a product of this background level of risk. Thus, he argues:

A victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short for injuries resulting from non-reciprocal risks.<sup>44</sup>

By rationalizing tort liability in terms of reciprocal risk, Fletcher is able to recast the theoretical foundations of tort law from their roots in the concept of fault to a more modern conception of fairness and equality.<sup>45</sup>

One problem with Fletcher's theory, as a comprehensive theory,<sup>46</sup> is that it is too abstract to provide us with much guidance in difficult cases. This is because the concept of reciprocity is hard to apply:

If one man owns a dog, and his neighbor a cat, the risks presumably offset each other. But if one man drives a car, and the other rides a bicycle? Of if one plays baseball in the street and the other hunts quail in the woods behind his house? No two people do exactly the same things.<sup>47</sup>

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43. See George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

44. *Id.* at 542.

45. Specifically, Fletcher's concept of reciprocity is linked to a Rawlsian conception of fairness. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); John Rawls, *Justice as Fairness*, PHIL. REV., Apr. 1958, at 67(2):164-94.

46. See *supra* text accompanying note 33.

47. Fletcher, *supra* note 43, at 572.

Given these difficulties in application, it is obvious that Fletcher's theory will fail the first criterion—it cannot determine an unambiguous outcome in the vast majority of cases.<sup>48</sup> Despite this, the theory does have an impressive amount of explanatory force. It sheds insight on the nature of negligence liability, its relationship to the various pockets of strict liability and the underlying values of the tort system. The difficulty, however, is that it is not comprehensive; from a decision-maker's point of view, it seems to add but one more layer of analysis to a rhetorical field that is already overcrowded with tests and standards.

## 2. Community Standards of Fairness

Rather than appealing to fairness as an abstract concept, we might see the goal of fairness in a more concrete way. Specifically, we could see the tort system as enforcing publicly recognized standards of fairness. In an earlier article, I developed this view by arguing that the fault theory of tort liability was too narrow:

It is fair, of course, to force a blameworthy defendant to pay for injuries he has caused. But it is also fair . . . to shift losses under other less blameworthy circumstances. This expanded conception of fairness is based on the common sense idea that people should not be blamed for engaging in certain kinds of conduct so long as they assume financial responsibility for the harms they cause to others.<sup>49</sup>

Thus, I argued, the central question for tort liability should be: Is it fair, all things considered, to require the defendant to pay for the plaintiff's injuries?

This notion of fairness, however, is substantially different from the one that animates Fletcher's theory. For Fletcher, fairness is a question of reciprocity, equality, and choices that might have been made in the initial position. For me, it is something less abstract. Fairness may be the dominant goal of the tort system, but the system itself does not utilize a general theory of fairness in deciding individual cases. Instead, it relies upon the ordinary intuitions of ordinary decision-makers to decide, in each individual case, what fairness requires. We can, in short, understand the procedures of tort law as a way of applying community standards. In effect, the members of the jury operate as a kind of sampling mechanism. As proxies for the community, they receive the evidence, hear the ar-

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48. As Fletcher states: "[T]he judgments require use of metaphors and images—a way of thinking that hardly commends itself as precise and scientific." *Id.*

49. Wells, *supra* note 15, at 2359.

guments, listen to the judge's instructions, discuss the case with one another, and reach a consensus decision with respect to the particular facts at hand. In reaching their conclusion, they speak for the community, and in most cases, the tort system treats this result as determinative.<sup>50</sup>

Standing alone, the community conception of fairness does not qualify as a comprehensive theory of tort liability. By its very nature, the community concept is indeterminate with respect to tort outcomes. This is because the standard will beget nothing but controversy so long as it is considered in the abstract and without a specific set of practices for determining community sentiment. When, however, the abstract conception is supplemented by the idea that the community standard of fairness is whatever the jury says it is, the standard will be determinate, but it may not necessarily represent an unequivocal good. This is because outcomes that are obtained in accordance with current tort practices may be "fair" in the specialized sense described above, but this does not entail that they are "fair" in the laudatory sense of the word.<sup>51</sup>

#### *D. The Limits of Normative Theorizing*

There can be no question that the normative theories discussed in this Section have enriched both tort law and tort theory. My point has been merely to underscore the fact that they do not provide a comprehensive basis for legal decision-making. Consequently, they are inadequate as a prescription for improving the tort system. Nor is this lack of comprehensiveness a simple matter of imperfect theorizing. Rather, we need to recognize that it is basically impossible for an abstract theory to determine practical outcomes without the help of concrete decision-making practices and real human decision-makers.<sup>52</sup> The interaction of these two factors—theory and practice—determines the effectiveness of the system. Both are essential. Tort practice frames the issues that tort theory must address. In turn, tort theory provides tort practice with

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50. I have greatly oversimplified in this brief description. There are obviously instances when the point of the judge's instructions is to preclude the application of jury's own conception of fairness. Directed verdicts, special verdicts, and j.n.o.v.'s are also used, in some cases, to second guess the jury's normative conclusions. As I argue in the next Section, the notion of community standards does not make too much sense independent of a specific procedure for determining what they are.

51. Recognizing this distinction is crucial because the practice of labelling certain outcomes as "fair" relative to a practice should not foreclose an inquiry into the merits of that practice.

52. See generally Catharine Wells, *Situated Decisionmaking*, 63 S.C. L. REV. 1727 (1990).



a common culture and vocabulary. Tort practice, however, is also affected by a host of other practical and emotional considerations. Thus, the role of theory in reforming the system is not to ask *de novo*: What is the highest good that could be served by the tort system? Rather, its role is to function as a critique of tort practice. In this vein, we might ask: What is the point of the practice? Does it work? Does it serve the needs of the people who use it? What frustrates its operation? Is there anything about the practice that needs clarification? Who does it disappoint? Whose interests are not adequately counted? And, finally, are there tort cases where we should not invoke the practice at all?

What I am suggesting here is that contemporary tort theory has had its costs as well as its benefits. On the plus side, we may count an increased understanding of the economic and moral foundations of tort law and the abstract clarity that this understanding has brought to substantive tort doctrines. On the negative side, however, tort theory has obscured some very important features of tort law and led to an increasing sense that tort theory has little to do with the real problems that plague the tort system. In the next Section, I will outline a more pragmatic approach—one that might serve to refocus discussion on some of these important questions.

#### IV. REEXAMINING TORT THEORY AND PRACTICE

Once we acknowledge the interdependence of theory and practice, then it becomes clear that the place to begin our analysis is with a realistic appraisal of contemporary tort practice. Doing this, we find that tort practices are essentially bifurcated—some tort cases are settled through an administrative system,<sup>53</sup> while others are resolved through the courts.<sup>54</sup> Of the latter group, most cases are settled prior to trial and only a few continue to a court-imposed final judgment. Much torts scholarship has focused on the resolution of cases through the court system and, in particular, on defining legal doctrine and its application to individual cases. There is, however, little collective wisdom addressing the relative merits

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53. For example, each state has some version of a Workmen's Compensation Statute under which recoveries for workplace accidents are funneled through an administrative agency or a specialized court system. Another example is the growing use of binding arbitration to resolve medical malpractice claims.

54. As a kind of hybrid, there is also the phenomenon of mass torts—tort cases involving large numbers of plaintiffs whose cases are aggregated for some or all of the legal process. See, e.g., Deborah Hensler & Mark Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993).

of administrative and legal remedies; certainly, this would be a fruitful area for further research.

When we focus on the court system, we find that the jury resolves most of the substantive issues in tort cases. Tort juries generally consist of six to twelve ordinary citizens who have been chosen at random.<sup>55</sup> Their decision must be the result of group deliberation and consensus judgment.<sup>56</sup> While the judge instructs the jury on the law, these instructions tend to be vague;<sup>57</sup> indeed, most tort instructions seem to do little beyond enumerating a number of common sense factors that the jury might apply.<sup>58</sup> While jury decision-making leads to a certain amount of unpredictability, it also has certain advantages that make it particularly appropriate for adjudicating tort cases.

I noted in the beginning that the paradigm tort case is an accident case that involves personal injury to the plaintiff. Physical evidence may be sparse; testimonial evidence may be conflicting; and perceptions may be scattered and disorganized. In addition, the case may inspire intense and conflicting emotion not only among the parties, but also among those who hear the story. This means that resolving the case is more than just a bookkeeping matter. It is difficult for a resolution to seem fair when there is no apparently objective measure of the facts. It is also hard to deal realistically with the feelings of sympathy and fear that these cases inspire. Jury resolution of such cases can address both these issues.

The first issue—differing perceptions about the basic facts of the accident—is addressed by the fact that the issue is not resolved

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55. While juries have traditionally consisted of twelve jurors, in *Williams v. Florida*, 399 U.S. 78, 102-03 (1970), the Supreme Court ruled that six member juries are constitutional in criminal cases. Later, in *Colgrove v. Battin*, 413 U.S. 149, 160 (1973), the Supreme Court extended six member juries to civil trials. However, the court firmly established this lower limit in *Ballew v. Georgia*, 453 U.S. 223, 243 (1978), ruling that juries of less than six members violate the Sixth Amendment's representative requirement. See J. Clark Kelso, *Jury System Improvement*, 47 HASTINGS L. J. 1433, 1488-89 (1996).

56. Regarding the deliberative function of a jury, the Supreme Court stated in *Williams* that the jury's importance "lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," and further that a jury should "be large enough to promote group deliberation." *Williams*, 399 U.S. at 100.

57. For an extended discussion of the vagueness of tort instructions and the resulting breadth of jury discretion, see Wells, *supra* note 15, at 2386-89.

58. For example, the emergency instruction used in *Wilson v. Sibert*, 535 P.2d 1034, 1039 n.11 (Alaska 1975), tells the jury that "a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." See also MASSACHUSETTS SUPERIOR COURT CIVIL JURY INSTRUCTIONS § 2.1.10 (*Res Ipsa Loquitur*).

by a single decision-maker. The plaintiff says: "You were driving too fast." The defendant says: "You got in the way." With a single decision-maker, the suspicion is great that the case is decided because that decision-maker, for whatever reason, identifies with—and adopts the viewpoint of—one of the parties. With a jury, this is a far less likely perception. Individual jurors will see the case from differing perspectives, and a joint resolution will only be possible once they have engaged in a group process of sorting through the facts of the case.<sup>59</sup>

The second issue—the need to sort through feelings of sympathy and fear in order to reach a reasonable outcome—is also addressed by the group deliberation process. Some jurors may sympathize with the plaintiff; some may have fears that lead them to blame the victim. With a single decision-maker, these feelings may be decisive, but in group discussions, a more reasoned discourse may emerge. The nature of the judge's instructions reinforces this result. Not only do such instructions focus on such non-emotive standards as the reasonable person and the concept of due care, but they also are rife with the language of rational debate and deliberation.<sup>60</sup> The result of this procedure is a verdict that seems less emotionally biased and that also seems to restore a certain amount of order to what had earlier seemed to be a chaotic and uncontrollable situation.

Once we have identified an essential feature of tort adjudication and enumerated its advantages, it is possible to think about it in a more pragmatic and functional way. Thus, for example, we begin with the notion that an important feature of the tort system is its substitution of jury discretion for more binding technical legal rules. We also recognize that the group decision-making approach has certain advantages in terms of producing a verdict that seems thorough and fair. With this as a background, we are able to ask practical questions about improving the system. These questions might include the following:

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59. For an extended discussion of the value of jury adjudication, see Wells, *supra* note 15, at 2390-95.

60. For example, the Massachusetts Superior Court Civil Jury Instruction for reasonable care states "you are to determine how a person of reasonable prudence would act in these circumstances." MASSACHUSETTS SUPERIOR COURT CIVIL JURY INSTRUCTIONS § 2.1.4 (Reasonable Care Varies with Circumstances). Similarly there are charges that "you must then consider whether the defendant's negligent conduct caused the plaintiff's injuries." *Id.* § 2.1.8 (Causation). Also the jury can be instructed that "you may infer that the occurrence was caused by negligence." *Id.* § 2.1.10 (Res Ipsa Loquitur).

- Is there some way to facilitate the group process that we value in jury adjudication? Are there additional instructions or procedures that might be helpful?
- Is there anything we can do to make jury trials less cumbersome without undermining their advantages?
- Should we use jury trials in every tort case, or are there cases where the additional resources they require cannot be justified in terms of the benefits they convey?
- Since one of the chief advantages of jury trials is that they bring the appropriate kind of closure to a disastrous occurrence, is it not important that they take place in a timely fashion?
- What other interests are not being served by the jury trial? Has our desire for appropriate closure led us to overlook the deterrence and compensation aspects of tort law?

In some ways, these are obvious questions, but it is important to note how different they are from those generated by the two approaches discussed earlier. They differ from those generated by the Restatement approach in that the discussion is no longer limited to doctrinal questions. They differ from those generated by the Comprehensive Normative Theory approach in that they recognize that the rational implementation of worthy goals is only a part of what the tort system is designed to do. In short, I believe that when we recontextualize the tort law in this way, we shift our focus from a limited concept of law reform to a more practical and holistic vision for change.

