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Rhetoric and Rationality in the Law of Negligence

Steven D. Smith*

[It is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs.]

In recent years tort law scholarship has shown an increasing affection for the alluring virtues of rationality. One symptom of this affection is the proliferation of theories of tort law

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The concern with rationality is not limited to tort law scholarship. Professor Bruce Ackerman depicts contemporary legal thought generally as a conflict between traditional methods—what Ackerman labels "Ordinary Observing"—and the increasingly ascendant approach that Ackerman calls "Scientific Policymaking." *B. Ackerman, Private Property and the Constitution* (1977). Rationality is at the core of Ackerman's Scientific Policymaking. Thus, believing the rules and principles of the law to form "a self-consistent whole," *id.* at 11, Ackerman's policymakers "insist upon articulate theoretical consistency." *Id.* at 172-73. Ackerman regards much of the recent work in the area of tort law to be an instance of this general trend. *Id.* at 274 nn.9, 11 & 12; *cf. B. Ackerman, Reconstructing American Law* (1984) (favoring a new mode of legal discourse that Ackerman refers to as "legal constructivism").

that, although divergent in many respects, are similar in their efforts to unify tort law in a comprehensive and rational framework. Although aspiring to an increasingly comprehensive rationality, tort law commentators have evinced a growing disaffection for the doctrine of negligence. This disaffection is not a symptom of any general trend away from negligence and its conceptual underpinning, the idea of reasonableness; indeed, the disaffection comes at a time when courts generally appear to be expanding the domain of negligence. Thus, the theoretical disapproval of negligence deserves further scrutiny.

Perhaps the most pervasive criticism of negligence law is that it fails to achieve its ostensible objectives. Critics contend that negligence law does not effectively reduce accident costs and that it offends community conceptions of corrective justice. Other critics argue that because negligence doctrine is conceptually indeterminate, it involves the courts in problems

ory]. A recent contribution to this school of analysis is Grady, A New Positive Economic Theory of Negligence, 92 YALE L.J. 799 (1983). The moral or corrective justice school is most prominently represented by Professors Richard A. Epstein and George P. Fletcher. See, e.g., Epstein, Defenses and Subsequent Pleas in a System of Strict Liability, 3 J. LEGAL STUD. 1965 (1974) [hereinafter cited as Epstein, Defenses]; Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973) [hereinafter cited as Epstein, Theory]; Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537 (1972). This classification of theories, although perhaps making for some unlikely bedfellows, is useful and will be followed in this Article.

4. Englard observes that "the common denominator among the otherwise very different outlooks . . . is the fundamental belief in the rational foundations of law and in the feasibility of a systematic theory or model." Englard, supra note 2, at 30.

5. The writings of Professors Calabresi, Epstein, and Fletcher, see supra note 3, evidence this growing dislike of negligence doctrine. None of these leading American tort law theorists favors the existing negligence regime. Judge Posner may seem to constitute an exception to this generalization. However, Posner's defense of negligence doctrine, see Posner, Theory, supra note 3; Posner, Comment, supra note 3, is based on the assumption that negligence doctrine can be described by the so-called "Learned Hand test," by which injurious conduct is considered negligent if the magnitude of the injury discounted by the probability of its occurrence exceeds the costs of its prevention. See Landes & Posner, supra note 3, at 884; Posner, Theory, supra note 3, at 32. If, as argued herein, the Learned Hand test does not describe the practical meaning of negligence doctrine, then Posner's writings in effect suggest that negligence be replaced by efficiency analysis.

6. The law defines "negligence" as the failure to exercise the care expected of a "reasonable" person. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 149-51 (4th ed. 1971).


8. See, e.g., CALABRESI, COSTS, supra note 3, at 244-65.

9. See generally Epstein, Theory, supra note 3; Fletcher, supra note 3.
that they are ill-equipped to solve. The doctrine is, thus, a "process flaw" and a violation of rule of law. Underlying each criticism is an implicit conception of rationality against which negligence law is evaluated. When these conceptions are isolated and examined, however, their applicability to tort law appears questionable. This Article criticizes those conceptions and suggests an alternative conception of rationality that illuminates the attraction of negligence doctrine and explains why recent tort theorizing has diverged so markedly from the direction taken by courts.

Part I of this Article sketches briefly the conceptions of instrumental and logical rationality that are implicit in recent criticisms of the negligence regime. Part II describes an alternative vantage point from which to examine tort law, an "internal perspective." It then outlines another version of rationality, "rhetorical rationality," that is suggested by the internal perspective. Part III applies the concept of rhetorical rationality from the internal perspective to demonstrate how negligence doctrine functions in thought and language as a valuable tool for resolving disputes. Parts IV and V reexamine the criticisms of the negligence system and the conceptions of rationality on which those criticisms are based.

I. VERSIONS OF RATIONALITY

Contemporary criticisms of existing negligence doctrine are premised on particular conceptions of what it means for a legal system to be rational. Two versions of rationality, as well as a hybrid variation, can be abstracted from these criticisms.

A. INSTRUMENTAL RATIONALITY

The conception of instrumental rationality implicit in recent comprehensive theories of tort law pervades modern thinking. The instrumental version of rationality is premised on the assumption that the law exists to further identifiable goals or values. Once such goals are ascertained, a substantive

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11. See Henderson, supra note 7, at 468.
legal doctrine such as negligence should be judged by its efficacy in promoting such goals. Thus, a doctrine is rational if it effectively furthers the ends of the law.\textsuperscript{13}

This conception is most conspicuous in the tort theories of Professor Calabresi and Judge Posner, who explicitly suggest that the goal of tort law is to reduce the sum of accident and accident prevention costs.\textsuperscript{14} The "moral" or "corrective justice" theories of Professors Epstein and Fletcher are less overtly instrumentalist. A close examination, however, suggests that the moral theories are founded primarily on the view that the purpose of tort law is to protect individual autonomy.\textsuperscript{15} That value provides a touchstone for evaluating particular tort doctrines; a satisfactory tort principle is one that furthers individual autonomy. Thus, the instrumentalist conception is implicit in the theories of Fletcher and Epstein as well as in those of the economic theorists.

\textsuperscript{13} See Summers, supra note 12, at 437-38, 447.

\textsuperscript{14} See, e.g., Calabresi, Costs, supra note 3, at 26 (asserting that it is "axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents"); Posner, Theory, supra note 3, at 33 (asserting that "the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety").

Professor Calabresi, it should be noted, recognizes that other goals, such as fair wealth distribution, and other values, such as justice, may also properly influence tort law. See, e.g., Calabresi, Costs, supra note 3, at 24-33, 293-300; Calabresi, About Law and Economics: A Letter to Ronald Dworkin, 8 Hofstra L. Rev. 553 (1980).

Professor Schwartz, although noting the paucity of any proffered justification for Fletcher's theory, interprets both Fletcher and Epstein as attempting to distill the principles of responsibility contained in ordinary language and morality. Schwartz, supra note 7, at 990-91. Certainly there is language in Professor Epstein's scholarship to support this interpretation, but such an interpretation fails to explain the ambitious scope and prescriptive purpose of the corrective justice theories. Common morality and language are unlikely to form a cohesive and comprehensive system of responsibility. See B. Ackerman, supra note 2, at 90, 95. Epstein and Fletcher, however, aim to construct such a system, and they seem quite willing to depart from common morality if the demands of rationality so require. Epstein in particular rejects defenses to which community morality might well be sympathetic, such as insanity, coercion, or practical necessity. Epstein, Defenses, supra note 3. But cf. O. Holmes, The Common Law 109 (1881) ("But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse."). Thus, although ordinary morality serves as a starting point for Epstein, his fundamental aim is to build a system around the value of individual autonomy. See, Epstein, Causation and Corrective Justice: A Reply To Two Critics, 8 J. Legal Stud. 477, 479 (1979) ("The justification for [my] principles is quite simply a belief in the autonomy and freedom of the individual.").
The theories predicated on the instrumental version of rationality condemn existing negligence doctrine. This is hardly surprising. Since the negligence doctrine is too indefinite logically to dictate any certain result in an individual case, it is highly unlikely that the doctrine, in the aggregate, would lead to results consistent with any particular goal or value. By this view, therefore, negligence law offends rationality because it is instrumentally inefficacious.

B. LOGICAL RATIONALITY

To Professor James Henderson, rationality represents not merely a criterion for judging the legal system but the essence of the system itself. "Adjudication," he notes, "is a social process of decisionmaking in which the affected parties are guaranteed the opportunity of presenting proofs and arguments to an impartial tribunal which is bound to find the relevant facts and to apply recognized rules to reach a reasoned result." Moreover, although Henderson's discussions contain instrumentalist passages, and although he tacitly acknowledges that there may be more than one species of rationality, he indicates that the legal system requires a particular kind of rationality, one having the character of logical demonstration. Thus, like the Aristotelian formulation of deductive logic, Henderson's analysis focuses on the necessary and inexorable quality of legal rationality. "Each litigant," he explains, "is promised the opportunity to rely on rules that, he can argue, not only support but require the result that he urges on the court." The constraints of rationality thus ensure the presence of a "single right result in each case."

Henderson's insistence on necessary reasoning and a single correct conclusion provides only a skeletal conception of rationality. Far from fleshing out the picture, his analysis serves rather to obscure it. Henderson offers a description of the rational character of the legal process to support his argument that the law cannot deal satisfactorily with "polycentric"

16. See supra note 5.
17. Henderson, supra note 7, at 469 (emphasis added).
19. For instance, Henderson acknowledges that managerial problems, which he believes unsuitable for resolution under rule-bound methods proper to courts, may nonetheless be amenable to "rational" solutions. Id. at 909.
22. Henderson, supra note 7, at 469.
problems, problems requiring the consideration of multiple and interdependent factors. The relationship between logical rationality and "polycentricity," however, is problematic. Some polycentric problems may be susceptible of solutions that have the inexorability of logical demonstration, while problems with no apparent polycentricity may defy any strictly logical solution. The ordinary automobile accident case, for which Henderson apparently considers the negligence doctrine appropriate, presents problems that cannot be solved by strict logical reasoning.

Henderson's preferred example of a polycentric problem, the medical malpractice suit, further confuses his conception of rationality. Malpractice cases are not inherently either more or less "polycentric," nor are they more or less susceptible to logical solution, than more traditional tort actions. Such actions merely involve factual matters that are less familiar to lay persons. Judges and jurors are better able to evaluate the reasonableness of a driver's behavior than of a doctor's surgery because they themselves drive but do not perform surgery.

In view of these difficulties, it is tempting to interpret Henderson as suggesting only that some cases are too complicated to be resolved through the judicial process. This interpretation, however, would have nothing to do with the necessary quality of legal reasoning. The concept of "polycentric" problems, a central concept of Henderson's analysis, would illustrate at most one kind of dispute that is often too complex for courts to resolve. Moreover, if Henderson's analysis is reduced to mean only that courts and juries are ill-equipped to solve factually complicated problems, his position would pare away a good portion of the civil case dockets—complex antitrust and securi-

23. See id. at 475-77; Henderson, supra note 10, at 907-08.

24. Professor Lon Fuller, from whom Henderson borrowed the concept of "polycentric" problems, see Henderson, supra note 7, at 475 n.23, offers as an example the engineering problem of determining the proper angles in the construction of a bridge. See Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 403 (1978). Although the problem is complex and presents interdependent questions, the angles for a given bridge can be determined with mathematical precision.


26. See Henderson, supra note 10, at 923-24; see also Henderson, supra note 7, at 480 ("Perhaps the best example of a case recognized by courts from the beginning to involve potentially threatening levels of polycentricity is that involving the alleged negligence of a physician rendering treatment.").

27. See Culley, In Defense of Civil Juries, 35 Me. L. Rev. 17, 22 (1983) (observing that malpractice cases are not significantly more complex than other personal injury cases except with respect to the use of expert testimony).
ties fraud cases, for example—before touching even relatively complicated tort cases.\textsuperscript{28}

It seems appropriate, therefore, to accept Henderson's insistence on the logical, inexorable quality of legal reasoning. By this view, negligence doctrine, with its underlying concept of "reasonableness," transgresses the canons of rationality because it does not allow courts to reach results in a wholly logical fashion.\textsuperscript{29}

C. A HYBRID: THE RULE OF LAW AS A CONDITION OF RATIONALITY

Although Henderson's writings present a conception of logical rationality, his references to the ideal of "rule of law\textsuperscript{30}" and his extensive reliance on the work of Professor Fuller\textsuperscript{31} suggest another conception of rationality, a variation that combines elements of the instrumental and logical versions of rationality.

Fuller attempted to elaborate a set of criteria, an "inner morality,"\textsuperscript{32} to which law must adhere if it is to function as law at all. Although he described these criteria as "procedural natural law,"\textsuperscript{33} Fuller explained and defended them largely in instrumental terms, asserting that "some minimum adherence to legal morality is essential for the practical efficacy of law.\textsuperscript{34}"

Unlike contemporary tort theorists, however, Fuller did not identify particular substantive objectives that the law should

\textsuperscript{28} Arguably, malpractice cases are precisely the kind of cases that, with the aid of expert testimony, can be readily brought within the comprehension of judges and juries. \textit{See id.}

\textsuperscript{29} It is unlikely, of course, that \textit{any} tort doctrine could measure up to this standard of rationality. Henderson suggests that the problem of indeterminateness could be alleviated by replacing negligence with strict liability. \textit{See Henderson, supra note 10, at 922.} However, as Henderson admits elsewhere, even a true system of strict liability would give rise to enormous problems of delineating the boundaries of persons or activities that would be subject to strict liability. \textit{See Henderson, The Boundary Problems of Enterprise Liability, 41 Md. L. Rev. 659 (1982) [hereinafter cited as Henderson, Enterprise Liability].} Such problems of demarcation might well generate as much uncertainty, and consequent discretion, as does negligence law.

The possibility and desirability of a logical model of judicial rationality has been the subject of considerable discussion during much of this century. For an overview of these criticisms and responses, see R. WASSERSTROM, \textit{The Judicial Decision} 13-38 (1961). \textit{See also} Fletcher, \textit{Two Modes of Legal Thought}, 90 \textit{Yale L.J.} 970, 995-97 (1981).

\textsuperscript{30} \textit{See} Henderson, \textit{supra} note 7.

\textsuperscript{31} \textit{See} Fuller, \textit{supra} note 24; \textit{see also} L. FULLER, \textit{The Morality of Law} (1964) [hereinafter cited as L. FULLER, \textit{Morality}].

\textsuperscript{32} L. FULLER, \textit{Morality}, \textit{supra} note 31, at 42.

\textsuperscript{33} \textit{Id.} at 96.

\textsuperscript{34} \textit{Id.} at 156.
promote. Rather, his central concern was to facilitate rational behavior by those individuals subject to the law. Thus, the various criteria that constitute the law's "inner morality"—promulgation, clarity, consistency, and constancy—are calculated to enable individuals to comprehend what it is that the law requires of them and to make rational decisions consistent with those requirements.\(^3\)

Henderson endorses Fuller's view. Like Fuller, Henderson describes a set of criteria to which the law should conform, justifying such criteria, in instrumental terms, as "the conditions necessary for tort law to guide both primary and adjudicative behavior."\(^3\) Henderson declines, however, to identify particular substantive objectives that the law must serve,\(^3\) and he expressly denies that the rule of law rests on a purely instrumentalist foundation, arguing instead that the idea is "rooted in notions of the dignity and responsibility of human individuals."\(^3\) To Henderson, dignity encompasses rationality. Thus, the assumption fundamental to the law is that "the persons to whom the rules are addressed are intelligent enough to understand the rules and responsible enough to conform their conduct to them."\(^4\)

Henderson and Fuller view law as the condition of rationality in society. The logical character of the law has an instrumentalist function; it facilitates rationality by removing uncertainty from legal rules and by eliminating discretion in legal authorities. As a consequence, individuals ascertain what is and is not lawful and act accordingly.

Henderson does not distinguish his ideal of "rule of law" from his conception of logical rationality. These ideas are, however, subtly different.\(^4\) Logical rationality concerns itself with

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35. Id. at 49, 63, 65, 79.
36. Fuller explained that the morality of law is based on a view of the individual as a responsible agent. See id. at 162-63. This view attributes to persons the capacity to make and carry out rational decisions. Fuller contrasted this view with that implied by differing psychological theories such as behaviorism. See id. at 163-64.

37. Henderson, supra note 10, at 904.
40. Id. at 918.
41. Fuller observes that adjudication often involves reasoning that does
the formal question of whether the law satisfies impersonal criteria of logical reasoning, whereas the "rule of law" philosophy insists that the law be certain and comprehensible to those persons who are subject to it. The latter requirement conceivably might be at once both more and less demanding than the former. Rules applicable in a purely logical way might be difficult for people to comprehend, yet many people might be able to understand and apply standards, guidelines, or rational considerations in ways that are not strictly logical. Thus, it is helpful to consider logical rationality and the idea of "rule of law" as related but not identical versions of rationality.

II. AN ALTERNATIVE VERSION: THE RATIONALITY OF RHETORIC

"Rhetoric," when applied to legal scholarship, often is not intended as a term of praise. This section, however, regenerates the term and suggests that it offers a version of rationality that may be more useful in tort law than the conceptions of rationality considered previously.

A. THE INTERNAL PERSPECTIVE: TORT LAW FROM THE INSIDE OUT

Most contemporary theorists critical of the negligence system view tort law from an "external perspective." In understanding the functions of tort law, as well as in evaluating its performance, theorists frequently play the role of an outside observer, one who is not personally involved in the legal process and who can assess the social effects of law or of a particular legal doctrine. A different perspective, however, is available. By imaginatively placing oneself in the position of a participant in a tort action, one can assume an "internal perspective." See Fuller, supra note 24, at 380-81.

42. Acknowledging this possibility, Henderson would recognize "process constraints" in addition to logical rationality. Such constraints would require comprehensibility, verifiability, conformability, and manageability. See Henderson, supra note 10, at 911-16.

43. Professor Fiss uses the terminology of internal and external perspectives to describe evaluations made from inside and outside an "interpretive community." See Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 748-49 (1982). It is not at all clear whether the participants in a lawsuit, whose perspectives are considered in this Article, would constitute an "interpretive community." Thus, the terminology used herein may not be entirely consistent with the meaning Fiss may have intended.
The internal perspective offers a different viewpoint from which to analyze tort law. A theorist who perceives tort law from the inside out is able to discern features of the legal process that are inconspicuous to the outside critic. Several of the differences inherent in an internal perspective deserve special attention.

1. The centrality of the dispute

Although it is clear from any viewpoint that the tort system functions by resolving disputes, for the inside viewer the dispute is the primary reality upon which all other features of the legal process are based. The litigants are in court only because they have a dispute, and when the dispute is disposed of they will disappear back into the out-of-court world. The dispute is also of fundamental importance to the judge; the judge's office has been created because disputes arise.

From an internal perspective the dispute is primary. Two other significant phenomena, the out-of-court problem or wrong and the substantive law, are of secondary importance. The alleged out-of-court wrong, of course, gives rise to the dispute and constitutes its subject matter. Nonetheless, the participants in a legal proceeding are concerned primarily with the dispute and only secondarily with the out-of-court wrong. This priority is apparent from two facts. First, from the perspective of a participant in a lawsuit, the dispute unquestionably exists, even though the out-of-court wrong may not. The ultimate judgment in the case may be that no wrong has occurred, either because the defendant did not in fact do what was al-

44. This is not to suggest that the two perspectives are necessarily antagonistic. A comparison to the field of economics illustrates the point. Economics, like tort law, is concerned with a highly decentralized system of decision making in the distribution of goods. Each individual decision has only a negligible effect on the overall allocation. Thus, although economists appropriately study aggregate factors such as general rates of inflation, employment, and investment, such aggregates are the result of numerous individual transactions made by individual persons and firms, and those transactions are themselves worthy of study. Ideally, the study of decision making on a micro level would complement macroeconomics. See generally E. Weintraub, Microfoundations: The Compatability of Microeconomics and Macroeconomics (1979); The Microeconomic Foundations of Macroeconomics (G. Harcourt ed. 1977). Similarly, although it is appropriate to study the general effects of tort doctrine, the doctrine is of course developed and applied by judges and litigants in individual lawsuits, and their perspectives also merit attention.

45. See P. Devlin, The Judge 3 (1979) (defining law as "a civilized method of settling disputes"); Fuller, supra note 24, at 372 ("The object of the rule of law is to substitute for violence peaceful ways of settling disputes."). But cf. infra note 49.
leged, or because what the defendant did was not wrong. Thus, the dispute is necessarily real while the out-of-court wrong may not be.

Second, even a real out-of-court problem or wrong does not necessarily result in a dispute of which the legal system must take cognizance. A wronged party may decide to suffer in silence or to settle the matter without any judicial determination of rights or relief. In either case the court need not concern itself with the out-of-court wrong. An out-of-court wrong, therefore, is neither a necessary nor a sufficient condition of a dispute. And, unless a wrong manifests itself as a dispute, it has no existence in the internal world of the law.

The dispute is also prior in importance to substantive liability rules in the sense that rules are made and invoked in response to the demands generated by disputes. This priority presents a means-end dichotomy: the resolution of the dispute is the end toward which a legal action is directed, whereas the applicable liability rule is merely a means for achieving that end.

However obvious from an internal perspective, these priorities will likely be overlooked or reversed by one who views the legal process from a distance. As current tort theories illustrate, the external perspective is likely to focus on the functional relation between the out-of-court problem or wrong (the accident-caused injury, for example) and the applicable liability rules, hardly pausing to appreciate that the only operative function of liability rules is to resolve disputes. Thus, the external perspective reverses the order of emphasis suggested by the internal approach. Out-of-court problems and the liability rules applicable to them receive priority; the need to resolve disputes, though unquestioned, receives scant attention. Similarly, the external perspective turns the means-end dichotomy inside out. Insofar as the existence of a dispute is a necessary condition for judicial action, disputes become merely the means for implementing the ends ostensibly reflected in substantive liability rules. An external critic may even search for

46. See infra note 119 and accompanying text.
47. Most disputes that do result in the filing of a lawsuit are settled before trial. See infra note 125.
48. From an external perspective, of course, this relationship may be reversed—rules of liability may be seen as generating disputes.
49. For Professor Fiss, for instance, "courts exist to give meaning to our public values, not to resolve disputes." Fiss, supra note 36, at 29. Thus, disputes provide "occasions for judicial intervention," and dispute resolution is simply the "mode of judicial operation." Id. at 29-30 (emphasis in original).
ways to facilitate disputing so that such implementation can be more thorough.50

2. Cognizance of context

The second peculiarity of the internal perspective follows directly from the first. For the internal viewer, the law exists only in relation to particular disputes. Unlike the external viewer, whose examination can extend to the entire tort system (and perhaps beyond), the internal viewer establishes his or her horizons with reference to the immediate dispute. Thus, the extrinsic values or broad social goals that the tort system may exist to serve are less visible to the internal viewer. The internal viewer, however, is more immediately aware of other contextual factors that impinge on the law.

The insider perceives the law not as consisting of an ethereal body of abstract rules, but rather as operating in particular factual and procedural situations. A judge or jury applies the law to the specific facts of each case, and although certain facts may be ultimately irrelevant to the resolution of the dispute, the judge or jury still considers the facts and decides whether they are relevant. The omnipresence of the particular factual setting precludes disembodied thinking about liability rules in the abstract.51 It also precludes any notion that substantive

Fiss, of course, is primarily concerned with constitutional adjudication, but he extends his analysis, somewhat hesitantly, to "traditional common law cases." Id. at 29.

50. Thus, Posner, who treats damage awards as incentives that induce private plaintiffs to enforce the law, suggests that government must bear some of the costs of adjudication because otherwise "the amount of litigation might be too small." R. POSNER, ECONOMIC ANALYSIS OF LAW 321-22 (1972); see also Posner, Theory, supra note 3, at 77-91; Shavell, The Social versus the Private Incentive to Bring Suit in a Costly Legal System, 11 J. LEGAL STUD. 333 (1982).

51. The weight of context, and the elusive importance of the particular facts, are suggested evocatively in Professor John Noonan's essay on "The Passengers of Palsgraf":

Why are Helen Palsgraf's children relevant to the judgment any more than the color of her hat? . . . If they are not relevant to the judgment, why are they relevant to the history of the case? But such impatient questions assume that the historian will agree with Cardozo. As Fuller observes, as he defends the "skeletonizing" of cases, reduction of the facts "is a delicate business, and necessarily anticipates the analysis which will be applied to the simplified situation." Facts which cannot be shown to be crucial to the disposition of a case are important in grasping how person affected person; Mrs. Palsgraf's children, Cardozo's preeminence, and others I have stated are among them. Even details which are purely extrinsic to any participant in the process have an effect on the understanding of the case. The day of the accident was "hot"—a detail of consummate irrelevance in terms of any legal principles but suggestive of the circumstances in which urban users of public transportation need to travel, a reminder of the inno-
law exists in a vacuum. Although a judge may distinguish between substantive and procedural law for some limited purposes, substantive doctrine always arises in a procedural context, such as a motion to dismiss or a debate over jury instructions, and is always wedded to procedural questions involving, for instance, burdens of proof or sufficiency of pleadings. For the internal viewer this context-specific slant underscores the mutual interdependency of, and the consequent need for a functional "fit" between, substance and procedure.\(^{52}\)

3. The criteria for evaluating substantive rules

Although both outside and inside viewers of tort law expect a substantive liability rule to produce "correct" results, their criteria for determining what results are "correct" inevitably differ. An outside critic identifies goals that the system should promote or values to which it should adhere. Whether these criteria consist of specific policy goals, such as efficiency or individual autonomy, or of more formal attributes of logical rationality, they provide an objective standard that exists outside the confines of any particular case and against which the law, and the result in a given case, can be judged.\(^{53}\)

From an internal perspective, by contrast, the particular dispute looms large and the ostensible extrinsic goals of the

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\(^{52}\) The cence of Helen Palsgraf's seaside excursion. How such a fact should affect the outcome is nondemonstrable, yet it will play a part in the process by which judgment is reached.


\(^{53}\) Current tort theorizing, by contrast, has given only cursory attention to the interrelationship between substantive doctrines and procedural rules and to the possible value of procedure in itself—what one scholar has called "process values." Summers, Evaluating and Improving Legal Process—A Plea for "Process Values," 60 CORNELL L. REV. 1, 3 (1974). Procedure is most often treated under the rubric of cost of administration. See, e.g., CALABRESI, COSTS, supra note 3, at 28, 225-26, 251, 255-59; Posner, Comment, supra note 3, at 209; Epstein, Theory, supra note 3, at 188. But cf. infra note 97.

Professor Henderson has pointed out the neglect of procedure in recent tort law analysis. See Henderson, supra note 10, at 902-16. Henderson, however, does little to correct the imbalance. Purporting to adopt a "process perspective," Henderson argues that "process constraints" have shaped the substantive content of certain tort principles. Id. Henderson's use of the term "process" is puzzling, however. His so-called "process constraints," such as "comprehensibility" and "conformability," id. at 911, 914, do not seem to be procedural considerations. Rather, they are formal but nonetheless substantive requirements for legal rules. Certainly, both "form" and "procedure" are often used as the other term of a dichotomy, the first term of which is "substance." But it does not follow that "formal" requirements are necessarily "procedural" (or "process") constraints.

\(^{53}\) See Summers, supra note 12, at 447.
legal system are at best remote. Deprived of any objective outside reference point, the inside viewer is skeptical of statements labeling a given rule or result “right” or “correct.” A result cannot be simply “right”; it can only be “right” for litigants whose disputes courts resolve. Since for the internal viewer a commendable decision is one based on, and defensible in terms of, values that the litigants accept, the internal perspective’s criterion for evaluating substantive law can be described as “fairness-in-context.”

Several implications of this criterion require elaboration. First, the criterion does not lend itself to distinctions that may be pertinent in other contexts, such as those between subjective and objective values or between individual and community values. From an internal perspective, the purpose of the law is to resolve disputes, not to solve philosophical problems. Thus, the law cares about the values held by the litigants. The litigants will tend to believe, however, that values are perfectly objective. They will argue that a particular result is not merely “distasteful to me” but is “unfair.” Similarly, the court’s attention likely will be focused on the immediate litigants, not on the broader, less-definable “community.” This does not mean, however, that the court will choose to be governed by the litigant’s values rather than by those held in the community as a whole. In most cases, the distinction will be erased in discourse regarding what is “fair.”

If the criterion of “fairness-in-context” is insensitive to considerations that might seem urgent to an outside critic, it is

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54. In a similar vein, Lord Devlin, whose understanding of the law reflects his long experience in viewing the legal system from the internal perspective of the judge, asserts that legal institutions exist to minimize civil disorder by resolving disputes and that “their value to the community is to be measured by the extent to which they do this and not by the extent to which their judgments and verdicts are pleasing to the critical eye.” P. DEVLIN, supra note 45, at 4.

55. It is obviously unlikely that the judge will be able to render a decision that is pleasing to all parties. If such a result were available, the parties would have reached it without going to court. The judge, however, may be able to find or fashion a legal principle that all parties accept, so that the decision turns only on disputes of fact. Even if such a principle is not available, the judge may seek to base a legal decision on values that all parties accept at some level, even though the parties may disagree on the proper ordering or application of those values.

56. Observing that the law seems able to solve problems that history and philosophy cannot, Professor Martha Minow notes that “[t]here is rather something in the sinews of legal reasoning that allows its decisionmakers to reach and justify their decisions without disclosing the depth of the problem at hand.” Minow, Book Review, 92 YALE L.J. 376, 389 (1982) (reviewing M. GLEN-DON, THE NEW FAMILY AND THE NEW PROPERTY (1981)).
acutely aware of contextual factors that the critic might overlook. Just as there is no universal objective criterion for determining whether a result is correct, there can be no a priori test for determining what facts are relevant to a decision. Thus, in seeking to arrive at a fair decision, the judge must consider all the facts that the parties may deem pertinent to the controversy. In addition, the fairness of a decision depends not only on its substantive grounds but also on the procedures by which it is reached. A substantive liability rule, therefore, must be compatible with procedures that are themselves accepted as "fair."

The internal perspective also implies a reversal in the priority of decision and justification. Tort theorists tend to concern themselves primarily with determining how disputes should be decided. Justification is a derivative task. A proper justification presumably is merely an exposition of the reasons for the decision. The internal perspective, with its concern for the parties' sense of fairness-in-context, reverses this emphasis. Merely deciding a case is not difficult. The judge will know at least two possible ways to decide a dispute by merely reading the complaint and the answer. The difficult task, however, is reaching a decision that can be justified or rendered "fair-in-context." Thus, the availability of an adequate justification may determine the decision, rather than vice versa.

This emphasis on justification requires the judge to con-

57. See supra note 51.
58. The lay litigant may well assess the fairness of a decision largely by the procedures through which it was reached. Values such as a right to one's "day in court" and to trial by jury may count for more than the merits of a substantive liability rule. Professor William H. Simon has described the similarity between this perception of procedural justice and the attitudes people take toward games:

The game is a social phenomenon in which the satisfactory quality of the outcome depends almost entirely on the proper implementation of procedures. People usually feel that when the rules are followed the outcome of a game is just, precisely because the rules have been followed. They usually are not inclined to assess outcomes in terms of an independent set of criteria.

Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29, 104. Simon points out that under this view, even apparent arbitrariness of results "is a virtue which proves the integrity of the system." Id. at 104-05. Arbitrariness thus dispels any suspicion of systemic bias.
59. The distinction between decision and justification is elaborated in R. Wasserstrom, supra note 29, at 26-28.
60. Cf. P. Devlin, supra note 45, at 198 ("The judicial function is not just to render a decision. It is also to explain it, wherever explanation is possible, in words which will carry the conviction of its rightness to the reasonable man whom in his mind the judge should always be addressing.").
sider the available means of persuading the parties that a result is fair and to evaluate a liability rule in terms of its persuasive potency. Thus, it is appropriate to consider the role of rhetoric, or the "art of persuasion,"61 in legal reasoning.

B. RHETORIC AND RATIONALITY

Rhetoric, like logical rationality, has its historical roots in Aristotle's formulation of deductive logic.62 Although rhetoric was widely associated with sophists, noted for their ability and unscrupulous willingness to show that black was white and white was black,63 Aristotle maintained that rhetoric, far from being mere verbal trickery, is an art with its own laws and methods, closely akin to logic.64 Logic is concerned with proof, and since rhetoric uses proof as a method of persuasion, it incorporates logic.65

Rhetoric, however, goes beyond logic in at least two significant respects. First, because rhetoric encompasses practical questions that cannot be answered with logical certainty, it is not confined to necessary demonstration as a method of persuasion.66 Second, rhetoric is concerned not only with the objective validity of arguments, but also with the effects of arguments on listeners. Thus, a rhetorical method cannot be evaluated in the abstract but must be examined with respect to a particular audience.67

Aristotle recognized that rhetoric is a neutral tool, an instrument capable of being employed on either side of a controversy.68 He contended, however, that the constraints of rhetoric are likely to favor results that are desirable for the simple reason that "things that are true and things that are bet-

62. See id.
63. This unflattering portrayal of the sophists pervades Plato's dialogues. See, e.g., Sophist 231d-235c; Meno 91a-92b; Gorgias 456a-457b, 456c; Greates Hippias 282c, collected in THE DIALOGUES OF PLATO (B. Jowett trans. 4th ed. 1953).
64. ARISTOTLE, supra note 61, at bk. I, chs. 1, 2.
65. See id. at bk. 1, ch. 2.
66. See id. Aristotle states:
There are few facts of the "necessary" type that can form the basis of rhetorical syllogisms. Most of the things about which we make decisions, and into which therefore we inquire, present us with alternative possibilities. For it is about our actions that we deliberate and inquire, and all our actions have a contingent character; hardly any of them are determined by necessity.
Id. at bk. 1, ch. 2, 28-29.
67. See, e.g., id. at bk. II, ch. 22.
68. Id. at bk. I, ch. 1.
ter are, by their nature, practically always easier to prove and easier to believe in." A consummate rhetorician conceivably may be able to persuade the audience that white is black, but it is certainly easier to prevail in arguing that white is white.

Aristotle's analysis of rhetoric suggests a conception of "rationality" that is remarkably consistent with common usage. A "rational" person is simply one who considers and acts on the basis of reasons, not necessarily one who has developed any formal algorithm for decision making. Similarly, a "rational" decision is simply one based on sound reasons. Like rhetorical arguments, such reasons may operate with inexorable logic, but they need not and, given the uncertainty that pervades most practical matters, usually will not. Reasons usually can be given for alternative decisions or courses of action. Thus, although people may seek to base their decisions on sound reasons, they generally do not expect such reasons to lead them to a single, unquestionably correct result. They nonetheless value rationality because, as Aristotle said of rhetoric, careful consideration of reasons is thought to have a tendency to lead to the "true" and "better" decision.

Rhetoric, as well as the conception of rationality that it generates, is compatible with the internal perspective of tort law. Both deal with concrete individual problems, and both achieve their objective by persuasion. Just as an exercise in rhetoric must be judged not by the objective validity of its arguments but by its effect on the audience, so the decision in a lawsuit must be evaluated, from an internal perspective, not by any objective criteria but rather by its fairness as perceived by the persons affected. Moreover, both tort law and rhetoric are context-specific. Rhetoric must choose methods suitable for a particular audience; law must take account of the particular facts, parties, and procedures of an individual dispute. These parallels suggest the possible value of what may be called the conception of rhetorical rationality.

69. Id. at 23.
70. Aristotle assumed that the rhetorician would be speaking to an untrained but nevertheless reasoning audience. See id. at bk. I, ch. 1, 19-22; bk. I, ch. 2, 24-23.
71. Philosophers and scientists, however, appear to be moving toward a similar view. See H. Putnam, supra note 12, at 125 ("Today, virtually no one believes there is a purely formal scientific method."). See generally id. at 174-200.
72. See supra note 66.
73. See Aristotle, supra note 61, at bk. I, ch. 1.
74. Cf. Minow, supra note 56, at 389 (describing law as a "rhetoric of rights").
III. THE RATIONALITY OF REASONABLENESS

From an internal perspective, the critical test for negligence law is its persuasive potency, its power to render decisions of particular disputes fair-in-context. Since negligence law is, in Fletcher's phrase, the "paradigm of reasonableness," this question requires an examination of the concept of "reasonableness."

A. REASONABleness as a Formal Concept

Critics often observe that the concept of reasonableness is highly indeterminate. The concept, however, is indeterminate in a specialized sense, and an examination of that sense exposes the source of the concept's effectiveness in the adjudicative process.

Terms can be considered indefinite, and thus functionally indeterminate, when they are not sufficiently specific to be useful in the context in which they are expected to serve. The

75. Fletcher, supra note 3, at 556.
76. This criticism is at the core of Henderson's attack on the negligence doctrine. See Henderson, supra note 7; Henderson, supra note 10. But the objection is hardly unique to critics holding a conception of logical rationality. Holmes, despite his celebrated denial that logic is the life of the law, see O. Holmes, supra note 15, at 1, was troubled by the negligence doctrine's capacity to produce divergent results in factually similar cases. Id. at 122-29. He admonished courts to use precedent to develop greater specificity in negligence law, lest "all our rights and duties throughout a great part of the law [be left] to the necessarily more or less accidental feelings of a jury." Id. at 126. Although Holmes, as a judge, tried to follow this admonition, see Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927), the courts generally have not, see, e.g., Pokora v. Wabash R.R. Co., 292 U.S. 98 (1934) (suggesting that standards of conduct should be drawn from facts of life rather than from rules of law).
77. For instance, if I tell you, "I am moving to the Midwest," you will have trouble trying to look me up next year. I can avoid the problem by substituting a similar but more specific term: "I am moving to 1234 First Street, Topeka, Kansas." The terms "the Midwest" and "1234 First Street, Topeka, Kansas" are alike in kind—both refer to known places—but one is simply more precise than the other and, for that reason, more determinate.

Formal concepts are essential to avoid the classic conundrum that otherwise would afflict every practical or academic inquiry. Since the inquirer does not know the answer to the inquiry, how will the answer be recognized when it is encountered? The problem is clearly described by Plato in the following dialogue:

MENO: And how will you investigate, Socrates, that of which you know nothing at all? Where can you find a starting-point in the region of the unknown? And even if you happen to come full upon what you want, how will you ever know that this is the thing which you did not know?

SOCRATES: I know, Meno, what you mean; but just see what a tiresome dispute you are introducing. You argue that a man cannot inquire either about that which he knows, or about that which he does
concept of "reasonableness," however, does not seem to be indeterminate in this sense; it is not necessarily too imprecise to be useful. Although a computer programmed to comprehend formal logic and dictionary denotations of words might be unable to decide whether a driver who zigzags rapidly from lane to lane acts "unreasonably," a judge or jury would draw that conclusion without the slightest intellectual strain.

The concept of reasonableness is indeterminate because it is a "formal concept." Formal concepts describe, in form but not in content, the objective of an inquiry. A student of ethics, for example, may be unsure about what constitutes "good" but will know that what is being sought will answer to the formal description "good." Similarly, an aesthetic philosopher may not understand what makes something "beautiful" but will know that "beautiful" describes the object of the inquiry. Concepts such as these—"beauty," "truth," and "goodness"—describe an objective, but they do not indicate what the material content of that objective is. In that sense, these concepts are indeterminate. They are, after all, formal concepts. "Reasonableness" is also a formal concept: it describes a valued attribute of individual or social conduct, but it does not set forth the actual conduct itself.

Two characteristics of formal concepts are significant for purposes of this Article. First, because they are free of content, formal concepts have the capacity to eliminate disagreement and produce accord, at least on one level. If you make a statement of value with substantive content—"The government should act to promote economic prosperity"—I may disagree. If, however, you make a statement of value that is purely formal—"The government should do what is good"—I can hardly quarrel with you (although I may observe, of course, that your statement does not say very much). People may disagree about what constitutes "goodness," "truth," and "beauty," but they are unlikely to reject the values themselves.

The second significant characteristic of formal concepts is that they are capable of subtly assuming substantive content in appropriate contexts. If you and I not only believe, but also know we both believe, that "good" is "pleasure," then between

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78. "Destination" is another more common example. The word always describes the place to which a person is going yet never tells what or where that place is.

us the terms "good" and "pleasure" become almost synonymous. In fact, even though a skilled inquisitor might prove that your understanding conflicts with mine in subtle ways, we may both use the term "good" thinking we mean the same thing—pleasure.\textsuperscript{79}

Reasonableness is a potent rhetorical device because it is a formal concept. Like all formal concepts, reasonableness is content-free and, consequently, has a unifying capacity. It supplies a criterion of judgment with which no one can sensibly disagree, since to do so would place one on the side of "unreasonableness." Like other formal concepts, however, reasonableness also has the chameleon-like ability to incorporate specific values or judgments that happen to be shared by people in a given context. For instance, most people in our society would be able to pass from the idea "Mary was zigzagging down the street" to "Mary was driving unreasonably" without even noticing that any mental step was necessary to get from the first idea to the second. The concept of "reasonableness," therefore, can be as full of, or as free from, specific substantive content as the situation allows.

The concept of "reasonableness" is thus able to justify results in a way that can at least appear responsive to the sense of fairness held by competing litigants, even when their specific values diverge. This unifying capacity, shared by all formal concepts, may be purely verbal. From an internal perspective, however, the object of law is to resolve disputes and thus a verbal unity is preferable to actual conflict.\textsuperscript{80}

The unifying capacity of the "reasonableness" concept, as well as its limitations, can be clarified by considering the concept's operation in opposite "ideal" communities. Assume that one community has a comprehensive and specific set of notions about "fairness," "fault," "blame," and "responsibility." No one in the community disagrees with or even questions these notions. Disputes presented in this community can be resolved under a "reasonableness" principle because the principle will be understood to include the shared notions of the commun-

\textsuperscript{79} Of course, if our disagreement becomes overt, then the term "good" will lose its substantive content and again become a purely formal concept, but it will continue to be accepted by us both. I will argue that what you call pleasure is not "good." But we will still agree on the desirability of "good," whatever that is. To do otherwise would amount to arguing, absurdly, that "good is not good."

\textsuperscript{80} The more troublesome question is whether a verbal unity will satisfy the parties' sense of fairness. See infra text accompanying notes 82-88.
Although some might suggest that such a community should frame liability rules that expressly incorporate the community's specific values, the choice of wording of the rules makes no difference in effect. Since the community's values are uniformly shared, the values will be considered synonymous with "reasonableness." 82

Consider now the other, more troublesome extreme of a community so pluralistic that it has no consensus about any specific values whatsoever. Disputes in such a community can still be decided on a "reasonableness" criterion. Although in this context "reasonableness" becomes a purely formal concept without substantive content, 83 it still is, precisely because it is a formal concept, a ground of decision with which no one can plausibly disagree.

To be sure, the use of the reasonableness concept in this radically fragmented community poses serious problems. Although the concept of reasonableness itself may be free of substantive content, the actual decision maker, the judge or jury, may be forced to choose among more specific substantive judgments and values in order to decide whether the conduct in question was "reasonable." Thus, deciding cases under a reasonableness criterion may only conceal, without solving, the problem of choosing between competing values. Moreover, litigants may perceive that reasonableness is merely a facade for the behind-the-scenes value choices that are being made.

These problems prompt several observations. First, regardless of whether it would be preferable for the community to

81. Cf. Fuller, supra note 24, at 374 (suggesting that vague legal standards like "fair practice" are most useful where there is a "strong sense of community" based on "generally shared notions of right and wrong").

82. It might seem that in such a unified society disputes would not occur at all. However, even though everyone agreed about values, and thus about the principles and rules that should govern the imposition of liability, disputes would nonetheless arise from factual disagreements. Although legal scholarship naturally focuses on questions of law, the public as a whole may view the law as a given and regard the problem of resolving factual disagreements as the principal reason for the existence of courts.

83. Compare, however, the observation of Professor Hilary Putnam: We are committed by our fundamental conceptions to treating not just our present time-slices, but also our past selves, our ancestors, and members of other cultures past and present, as persons, and that means, I have argued, attributing to them shared references and shared concepts, however different the conceptions that we also attribute... However different our images of knowledge and conceptions of rationality, we share a huge fund of assumptions and beliefs about what is reasonable with even the most bizarre culture we can succeed in interpreting at all.

H. PUTNAM, supra note 12, at 119 (emphasis added).
make an overt public choice among competing values, the reasonableness concept is applicable precisely in those situations in which no such choice has been made. If a legislature has enacted a statute superseding negligence law in a given area, for example, then the courts will of course follow the statute. For a court, however, to adopt overtly values that are not generally shared in the community and that have not been approved by the community's representative institutions would certainly jeopardize the court's pretensions to neutrality. This would undermine the possibility of rendering decisions that will be perceived as fair.

Second, litigants may indeed perceive that the application of the "reasonableness" concept involves choices among more specific substantive values and, as a result, they may not be satisfied that a decision is fair. In reality, however, this is an observation not so much about the "reasonableness" concept as about the community itself. When a community is deeply divided about nearly all basic values, it obviously will be difficult, whatever the liability rule, to resolve disputes in ways that appear fair to opposing litigants. Indeed, a community so divided probably faces disintegration. Nonetheless, so long as the community and the courts continue to exist, the courts have no choice but to resolve as best they can those disputes that are presented.

Even in such a pluralistic community, the concept of reasonableness offers the greatest likelihood for successful resolutions. The concept's very lack of specificity facilitates the accommodation of competing values in ways that may be analytically unseemly but practically useful. Few cases present an "all or nothing" situation, and the openness of the reasonableness concept to competing values or judgments may enable the judge or jury to fashion a compromise that is partly responsive to antagonistic positions. Such compromises allow a court at

84. Professor Calabresi has recently challenged the assumption of statutory supremacy over common law doctrine. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). Calabresi's proposals do not, however, purport to describe existing judicial practice. Moreover, even Calabresi would permit courts to revise or set aside statutes only under very limited conditions. See id. at 120-45.

85. See Resnick, Managerial Judges, 96 HARV. L. REV. 374, 382-83, 427-28 (1982) (noting the importance traditionally attached to judge's "impartiality").

86. For instance, even before the adoption of comparative negligence, juries were notorious for rendering compromise verdicts in negligence cases. See Schefflin & Van Dyke, Jury Nullification: The Contours of a Controversy, 43 LAW & CONTEMP. PROBS. 51, 70 (1980); cf. Lempert, Civil Juries and Complex Cases:
least to assuage, if not to satisfy entirely, all parties' sense of fairness.

Moreover, from an internal perspective it may be discreet to protect specific value choices behind a facade of "reasonableness." Since a court usually has various legal and factual avenues for reaching a result, a decision justified only in general "reasonableness" terms, though perhaps not deeply satisfying to any of the participants, at least provides no firm basis for a litigant to conclude that the case was decided on the basis of unacceptable values.

Finally, even if a court spells out its specific value choices, the decision may be marginally more palatable to the disappointed litigant if those choices are linked to the general criterion of "reasonableness." Although the litigant will still disagree with the court's judgment, the decision has been placed within a general rationale that the litigant does accept. A decision that appears to be merely a misapplication of a sound basic principle may be more acceptable (or unacceptable on a less fundamental level) than a decision that seems flatly hostile to the litigant's essential values.

Thus, although no liability rule is likely to function smoothly in a deeply divided community, the "reasonableness" expedient may be even more necessary in such a community than in one characterized by consensus. Most actual communities will fall somewhere between the two ideal types described. Consensus will exist with respect to some values but not with respect to others, and the degree of consensus will vary from time to time and from issue to issue. The reasona-

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*Let's Not Rush to Judgment*, 80 Mich. L. Rev. 68, 82 (1981) (discussing the jury's role as agent for effecting "compromises between interest groups").

87. The value of judicial candor has recently been the subject of debate. Compare G. Calabresi, *supra* note 84, at 172-81 (arguing for greater candor) with Weisberg, *The Calabresian Judicial Artist: Statues and the New Legal Process*, 35 Stan. L. Rev. 213, 249-56 (1983) (criticizing Calabresi's proposal for greater candor). Although suggesting that it may often be impolitic for a judge in resolving individual cases to lay bare the reasons for a decision, this Article does not address the broader implications of the "candor" debate.

88. It is not surprising, therefore, that negligence doctrine seems to blossom during periods that experience a deterioration in consensus about social values. Professor Robert Rabin has argued that negligence doctrine became the dominant tort doctrine during a time in which industrialization had undermined traditional status roles and left social relations in turmoil. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 950-61 (1981). Similarly, the recent expansion of negligence liability, *see supra* note 7, approximately coincides with a period that has experienced, or at least has become conscious of, a decline in consensus regarding some central societal values.
bleness concept will assume as much or as little content as the context of a particular dispute permits. "Reasonableness" will exert its power to unify on the most specific level available.

The "reasonableness" concept is thus an embodiment of rhetorical rationality. The concept ensures that a dispute will be decided in accordance with reasons. Such reasons, however, need not assume any narrowly defined logical form, nor need they be relevant to any ostensible extrinsic goal. Indeed, the law itself neither supplies the reasons nor establishes objective criteria for judging the relevance of reasons. Whether particular facts or considerations should bear on the "reasonableness" of the conduct in question depends on the values and judgments of the persons—litigants, judge, and jurors—involved in an individual lawsuit.

B. REASONABLENESS IN CONTEXT: THE PROCEDURAL SETTING

The internal perspective requires that substantive rules be viewed in their procedural context. An overview of the procedural law applicable to tort cases reveals the functional fit between the doctrinal concept of reasonableness and existing procedural law.

Reasonableness is a formal concept the substantive content of which is defined by the values held by those involved in, or affected by, a dispute. Current procedures facilitate this "defining" function by allowing the parties substantial freedom to determine the facts and issues upon which a controversy is decided. This freedom has both exclusive and inclusive functions. Because the system is adversarial, rather than inquisitorial, facts and issues will not be considered by the court unless the parties choose to present them. Liberal procedural rules, however, give the parties much freedom to discover, develop, and present virtually any fact or issue they deem pertinent.\(^8^9\)

The open-endedness of current pleading, discovery, and evidentiary rules reflects a striking functional congruity with the open-endedness of negligence doctrine. Negligence requires

\(^{89}\) The Federal Rules of Evidence and Civil Procedure represent a body of current procedural rules that provide litigants a great deal of discretion in defining the scope of the controversy. For example, parties may generally assert as many claims or defenses as they desire. See Fed. R. Civ. P. 8(a)-(c), 18(a). Alternative pleading of inconsistent claims and defenses is permitted routinely. See Fed. R. Civ. P. 8(e)(2). The scope of relevance under discovery rules is expansive, see Fed. R. Civ. P. 26(b), as is the definition of relevance applicable at trial, see Fed. R. Evid. 401. And although technical limitations on admissibility of evidence persist, the limitations are commonly subject to numerous exceptions. See Fed. R. Evid. 801-04 (hearsay rule and exceptions).
the parties to supply the substantive content, and procedural rules permit the parties to do so by presenting whatever arguments seem appropriate in the particular context. Liberal procedural rules, of course, do not require open-ended substantive doctrines—the applicability of current procedural codes is not limited to negligence cases. The inverse proposition, however, is more doubtful. An open-ended substantive rule such as negligence would seem out of kilter with a procedural code that placed significant restrictions on what the parties could plead and prove. Thus, at the very least, negligence law and current procedure evince a clear compatibility in function.

A second feature of current procedural law that warrants attention is the law's preference for allowing juries to resolve disputes. The preference for juries is evident in the rule that offers a jury trial to any party who requests it. in recent judicial decisions that have narrowed rules precluding jury trials in equity cases, and in the standard that emphatically discourages judicial resolution of controversies at a pretrial stage. The jury may be preferred to the judge for many different reasons. Nevertheless, the important role of the jury in tort law provides another example of the functional fit between procedural law and negligence doctrine.

The jury's role, according to the standard description, is simply to accept the law as explained by the judge and apply that law to the facts, resolving factual disputes under the burden of proof rules contained in the judge's instructions. In a negligence case, however, the judge's instructions to the jury are inherently incomplete. The jury is told to decide whether the defendant's conduct was "reasonable," but since "reasonableness" is a formal concept, the substantive content of the instruction must be filled in by the litigants and, ultimately, by the jury.

The jury is an ideal institution to perform this "filling in" function. Because it normally consists of individuals from the community in which the litigants are themselves members, the

90. Fed. R. Civ. P. 38(a), (b).
92. A court is entitled to grant summary judgment, thus precluding a jury trial, only if it can conclude, after viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of the that party, that there is no genuine issue that might require jury resolution. See Fed. R. Civ. P. 56; 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727, at 121-25 (2d ed. 1983).
jury is likely to share values held by the litigants, and the litigants are likely to perceive that this is so.\textsuperscript{94} The jury also has the ability to make illogical but pragmatically valuable accommodations among competing values. This ability derives not only from the fact that the jury does not have to explain its decision publicly, but also from the likelihood that all values that have any substantial support in the community will be represented on a multimember jury. Finally, insofar as it is useful to conceal actual value choices that must be made, the jury's general verdict is a useful instrument for doing so. Thus, the application of an open-ended doctrine like negligence virtually demands a representative institution like the jury.

In contrast to the foregoing discussion, recent theoretical tort scholarship criticizes existing procedural law. Theories emphasizing considerations of economic efficiency generally favor the assignment of responsibility for accidents on a categorical basis, thus rejecting both the case-by-case method and the use of juries.\textsuperscript{95} Theories that view the function of tort law as providing corrective justice between individuals would seem more congenial to the case-by-case method. To the extent that "corrective justice" theories specify the criteria governing liability with greater exactness than does negligence law,\textsuperscript{96} however, they appear to render liberal pleading and discovery rules, and even the institution of the jury, largely unnecessary.\textsuperscript{97} The prominent features of present procedural law,

\textsuperscript{94} Some litigants, of course, may have idiosyncratic values. Yet the fairness of a decision based on community values may be acknowledged even by a person who does not share those values. In order for any kind of civilized society to exist, a community must determine that some kinds of behavior are wrong or impermissibly injurious. Although an individual member of the community may disagree with the community's judgment, the individual may nonetheless be able to accept it by recognizing that acquiescence in such community judgments is part of what it means to live in a community.

\textsuperscript{95} See Calabresi, Costs, \textit{supra} note 3, at 161, 255-59, 286. Posner initially argued that juries were well-suited for making efficiency calculations, \textit{see} Posner, \textit{Theory}, \textit{supra} note 3, at 51-52, but he has since retreated from that position, at least with respect to contemporary juries, \textit{see} Landes & Posner, \textit{supra} note 3, at 917; \textit{cf.} Henderson, \textit{Enterprise Liability}, \textit{supra} note 29, at 693 (noting the incompatibility of enterprise liability with idea of "tailor-made justice in every case"); Rodgers, \textit{supra} note 2, at 10 (noting "the inadequacy of the private lawsuit for making broader social calculations").

\textsuperscript{96} Epstein's theory, for instance, would leave causation as virtually the only issue in most cases by eliminating both the requirement that a plaintiff prove negligence and a number of common defenses.

\textsuperscript{97} Epstein, for example, expresses admiration for, and would borrow features of, the older English procedural system that was much more focused, and thus more rigid, than the existing procedural system for civil litigation. \textit{See} Epstein, \textit{Pleadings and Presumptions}, 40 U. Chi. L. Rev. 556 (1973).
therefore, appear faulty when viewed from an external perspective.

Current procedures seem sensible, however, when one views tort law from an internal perspective. If the law's primary aim is to resolve individual disputes in accordance with the disputants' sense of fairness, then liberal procedures that foster individual decision making are consistent with that aim.\(^8\) Moreover, prevailing procedural law shares the negligence doctrine's conception of rhetorical rationality because both the procedural and substantive law are calculated to facilitate the presentation of those reasons that the parties deem pertinent, without circumscribing such reasons by imposing formal or instrumental constraints on admissibility.

IV. NEGLIGENCE AND THE OBJECTIVES OF THE LAW

The "internal perspective" demonstrates the compatibility of negligence doctrine and the concept of reasonableness with a conception of rhetorical rationality. This section reexamines the conceptions of rationality in the recent criticisms of the negligence doctrine.

A. NEGLIGENCE AND INSTRUMENTAL RATIONALITY

A number of modern tort theorists espouse an instrumental view of tort law and criticize negligence doctrine for failing to achieve the law's ostensible objectives—efficient reduction of accident costs or individual autonomy.\(^9\) If these are indeed the objectives of tort law, the criticism is powerful. From an internal perspective, however, the instrumentalist assumption that tort law has identifiable extrinsic objectives is questionable.

1. How a tort doctrine can have an objective

Normally "objectives" are attributed to persons who are capable of purposive thought and behavior, not to things such as "tort law." Statements about the "objectives" of "tort law" thus could be considered crude anthropomorphic nonsense. This conclusion by itself, however, seems trivial. People, after all, often create or use tools for particular purposes, and it is common to speak loosely of such purposes as belonging to the tools

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\(^8\) Even if current procedures are efficacious, they may be simply too costly to maintain. This Article does not seek to assess this latter criticism.

\(^9\) See supra text accompanying notes 14-15.
themselves. Nonetheless, the conclusion highlights a point that must be kept clearly in mind. If a statement that a tool has a certain purpose means anything intelligible, the meaning is not that in some metaphysical sense the purpose inheres in the tool; nor does the statement mean simply that the person has or intends the purpose. Rather, the statement means that the person has the purpose and intends the particular tool to be used for that purpose.100

One who says that tort law has a particular objective, therefore, cannot mean simply that the objective is a "good thing." Few would question that reduction of accident costs or preservation of individual autonomy are generally worthy ambitions, but that does not mean they are the "objectives" of tort law. The instrumentalist's assertion must mean something more. It must mean that judges, the persons who make and administer the law,101 intend it to serve such objectives.102 This point, although obvious, is frequently forgotten. Discussions of the "purpose" or "objectives" of legal doctrines often imply that the doctrines themselves somehow harbor such objectives. The confusion is convenient. It gives license for much discourse

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100. Other meaningful ways of understanding the statement are conceivable. One might argue, for instance, that Nature or Providence or creative evolution intend the tool to be used for the purpose. Current tort theories, however, do not seem inclined to provide the necessary theology or metaphysics to allow statements about the "objectives" of tort law to be meaningful in any such sense.

101. Some tort law theorists might extend this attribution of objectives beyond judges to legislatures, or perhaps even to the community at large. Since the theorists have been less than explicit about what they mean when they say tort law has certain objectives, it is difficult to know how broadly they might define the group that ostensibly harbors such objectives. However, the larger and more amorphous such a group becomes, the less plausible is the attribution of any particular objective to that group. Thus, the construction of the instrumental thesis discussed herein takes the thesis in its most plausible form.

102. The theorists might of course take a wholly different tack. They might concede that their preferred objectives do not describe, in any meaningful sense, the purpose of past or existing tort law, but then argue that such objectives should be recognized as the goals of the law. Economic efficiency, it might be argued, is a good thing, and tort law (appropriately modified) could promote efficiency. Tort law thus should adopt efficiency as its objective. None of the theorists, however, appears to make explicitly such a purely prescriptive argument. Rather, they base their theories on objectives that are presumed to enjoy recognition already. See supra note 14. Nor is the theorists' adoption of this position accidental. From a conception of instrumental rationality it is possible to assess the rationality of means to an assumed end, but such a conception provides no way to evaluate the rationality of ends. The ends must be taken as given. See H. PUTNAM, supra note 12, at 168. If tort law was not created and does not presently exist to promote efficiency, then instrumental rationality can afford no basis for concluding that that criterion should become the "objective" of the law.
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based on such ghostly objectives. Once it is recognized, however, that only persons, and not doctrines or rules, can have objectives, an embarrassing question arises: What evidence is there that, in developing and applying tort doctrines, judges actually are animated in any systematic way by the purpose of furthering extrinsic objectives?

2. Sizing up the evidence

Two possible sources of evidence are apparent. First, judges might expressly acknowledge such objectives in judicial opinions and jury instructions. Second, such objectives might be inferred from what judges do—judicial decisions might be explicable on the assumption that their authors intend the law to achieve such objectives.103

An examination of the language of negligence case law provides meager support for the theory that judges actually intend the law to achieve broad extrinsic objectives. Although some judicial opinions expressly acknowledge objectives, such as economic efficiency,104 the majority do not. Indeed, the case law discloses a veritable grab bag of principles, policies, and rights, any of which may be invoked on an ad hoc basis. Although opinions occasionally take note of efficiency considerations, they also contain moral appeals,105 pragmatic observations,106 and epigrammatic flourishes.107 Such eclecticism hardly bespeaks a commitment to anything that could accurately be called an "objective."

Though unsupported by explicit acknowledgement, the view that judges intend tort doctrine to advance definable social goals may rest on inference. Although some decisions may

103. See infra text accompanying notes 110-11.
105. See, e.g., Li v. Yellow Cab Co., 13 Cal. 3d 824, 811, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975) (comparative negligence doctrine required by "all intelligent notions of fairness"); Eckert v. Long Island R.R., 43 N.Y. 502, 506 (1871) ("The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.").
106. See, e.g., Koenig v. Patrick Constr. Corp., 298 N.Y. 313, 318-19, 83 N.E.2d 133, 135 (1948) ("Workmen such as the present plaintiff, who ply their livelihoods on ladders and scaffolds, are scarcely in a position to protect themselves from accident. They usually have no choice but to work with the equipment at hand, though danger looms large.").
107. See, e.g., Palsgraf v. Long Island R.R., 248 N.Y. 339, 343, 162 N.E. 99, 100 (1928) ("Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct . . . .").
support such an inference, however, the inference is difficult to generalize. The very fact that most theorists are generally critical of existing tort law evidences the law's failure consistently to promote theoretical objectives. To attribute an objective to tort law by inference based on what the courts do, and then to criticize the law and the courts for not serving that objective, is manifestly circular.

3. The translation hypothesis: Do judges speak in code?

Although few negligence decisions explicitly invoke efficiency analysis, Judge Posner has maintained that, at least during the period of his most detailed study, 1875-1905, negligence law was best explained by the efficiency terms later enunciated by Judge Learned Hand. He concedes that courts rarely employ an economic vocabulary but argues that people can perform economic analysis intuitively and that "economic principles may be encoded in the ethical vocabulary that is a staple of judicial language." The strength of the economic thesis, according to Posner, is its explanatory power: "The common law is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation."

Posner's thesis can be understood in two ways. He may mean not that judges actually intend and understand economic efficiency to be the objective of tort law, but only that the law fits closely with what an economic analysis would prescribe. Thus, economic analysis "explains" the law but does not describe the actual thinking or objectives of judges. By this construction, of course, the thesis could have no prescriptive power; this position would hold that economic theory happens to match what judges have done. If judges decide to do something that does not match economic theory, then economic theory will no longer describe tort law. That is all. If this is what

108. Even Judge Hand's opinion in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), implies that the efficiency considerations expressed in the Learned Hand test are not the only category of factors that may bear on the determination of liability in negligence cases.

109. See Posner, Theory, supra note 3. The Learned Hand test is described supra note 5.

110. Landes & Posner, supra note 3, at 863.

111. Id. at 851 (emphasis added). Posner's contention that negligence doctrine is consistent with efficiency concerns has been widely questioned. See, e.g., Calabresi, Costs, supra note 3; Rizzo, Law Amid Flux: The Economics of Negligence and Strict Liability in Tort, 9 J. LEGAL STUD. 291 (1980); Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 YALE L.J. 691 (1978).
Posner means, then even if his thesis is correct empirically it would be misleading to describe efficiency as the "objective" of tort law, since judges do not intend it to be such.\textsuperscript{112}

A stronger construction of Posner's thesis is that economic theory describes not only what judges do but also what they think—that the goal of economic efficiency, though perhaps not fully articulated, is in some conscious or intuitive sense actually in the judges' minds. One test of this position is to examine more closely the vocabulary of negligence actually used by judges in opinions and jury instructions to see whether the doctrine might be serving as a "code" or "translation" for efficiency considerations.

An examination of judicial language does not support the "translation" thesis. For example, courts describe the requisite level of "reasonable care" as a point on a rising slope—extraordinary care above the level that is merely "reasonable" is both possible and laudable,\textsuperscript{113} and in a few instances may even be mandatory.\textsuperscript{114} Under the Posner-Hand test, by contrast, "reasonable care" represents a peak, with declines on either side. If ordinary care requires a person to avoid injuries up to the point at which the cost of avoidance equals the cost of the injury discounted by its probability of occurrence, then extraordinary care would entail avoidance costs that exceed injury costs and thus reduce efficiency. Consistent with this conception, Posner asserts that the notion of extraordinary care is economic "nonsense."\textsuperscript{115} Judicial language praising extraordinary care thus leads to the obvious conclusion that if extraordinary care is possible and desirable (even when not legally required), then ordinary care must mean something other than the Learned Hand test. Hence, an economist who was selected as a juror and listened conscientiously to a standard negligence instruction might wistfully conclude that although an efficiency test would be the most sensible way to

\textsuperscript{112} Posner might be content with this construction. He asserts at times that his theory is purely positive and that he is "interested in explaining rather than defending" tort law. Landes & Posner, \textit{supra} note 3, at 857. The overall tone of Posner's work, however, such as his use of modifiers like "disturbingly" to describe trends away from efficiency concerns, \textit{id.} at 919, seems to belie his profession of disinterestedness.

\textsuperscript{113} \textit{See, e.g., Committee on Standard Jury Instructions, California Jury Instructions Civil (BAJI) BAJI No. 3.10 (6th ed. 1977).}

\textsuperscript{114} Posner observes, for instance, that common carriers were traditionally held to a higher standard of care. He suggests this deviation from ordinary care was appropriate "[a]s an approximation to the likely understanding of the parties to the contract of carriage." Posner, \textit{Theory, supra} note 3, at 38.

\textsuperscript{115} \textit{Id.}
allocate liability, the jury was forbidden by law to adopt that approach.

Judicial vocabulary and economic analysis also diverge on the point of personification. Under economic analysis, the test of negligence is abstract and impersonal. The question is whether an action or decision is economically rational, and this question can be translated into the "reasonable person" formulation only on the assumption that a "reasonable person" is by definition one who always acts "rationally." The vocabulary used by courts, however, not only personifies the essential issue but rejects the assumption that a "reasonable person" will necessarily act rationally in every instance. A typical instruction concerning behavior in emergencies makes this clear: "It is not a question of what was the safest or best thing to do, but the question is what, under the circumstances, would a reasonably cautious and prudent person have done." Thus, instead of translating efficiency analysis, the vocabulary emphasizes a distinction that such analysis does not and perhaps could not even make.

Such verbal discrepancies might be explained by importing further complicating considerations such as information costs. Like the defense of the Ptolemaic universe, however, the effort to support the translation thesis, which defends the Learned Hand test as a description of existing negligence law, must eventually be cut off by Ockham's razor.

4. Smiling at noncompliance: The significance of silence and settlement

Perhaps the strongest evidence against the view that tort
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The law is intended by courts to serve extrinsic values lies in the manifest reluctance of courts to invoke substantive tort doctrines at all. This reluctance is evident in the willingness of courts to allow parties themselves to resolve disputes in virtually any way they choose. If an injured party chooses not to assert a grievance, the legal system is quite content to leave well enough alone. The system also allows, and in some instances even requires, the injured party to contact the tortfeasor before bringing an action in court, thus creating an opportunity for early settlement. If, after the commencement of a lawsuit, the parties settle and dismiss the action, the court will recognize the dismissal without even reviewing the terms of the settlement agreement. Indeed, the evidentiary exclusion protecting settlement discussions and the increasing use of the pretrial conference are designed to encourage settlements. Moreover, the array of pretrial pleading and discovery procedures is well-calculated to ensure both that the parties can obtain the information necessary to work out a settlement and that they will have ample time to do so. Finally, even when a case has been tried and substantive doctrine has been applied to resolve the dispute, the parties are


120. For instance, prelawsuit notification requirements have been imposed by statute in some states for medical malpractice claims. See, e.g., UT CODE ANN. § 78-14-8 (Supp. 1983); VA. CODE § 8.01-581.2 (1984).

121. FED. R. EvD. 408. The advisory committee's note acknowledges that the exclusion is based on "the public policy favoring the compromise and settlement of disputes." FED. R. EvD. 408 advisory committee note.

122. See FED. R. Civ. P. 16(a)(5) (expressly listing "facilitating the settlement of the case" as one of the purposes of pretrial conferences); see also C. WRIGHT, A. MILLER & M. KANE, supra note 92, § 1522, at 570 (noting even before amendment of Rule 16 that "many judges regard promoting settlement as one of the chief purposes of Rule 16").

123. Information that may facilitate settlement sometimes may be discoverable even though it has no apparent relevance to any issue to be decided in the case. See, e.g., Ellis v. Gilbert, 19 Utah 2d 189, 190-92, 429 P.2d 39, 40-41 (1967).

125. Available evidence shows that these devices and incentives are effective. For instance, the overwhelming majority of automobile accident cases are settled before trial. See H. Ross, SETTLED OUT OF COURT 20 (1970); see also Hunt, Negotiation and Settlement: An Insurer's View of Comparative Negligence, 82 W. Va. L. REV. 537, 537 (1980).
allowed to modify that resolution at will. A prevailing party, for example, may agree to accept partial performance of a judgment, to modify the terms of the judgment, or to release the judgment altogether. 126

In addition to actively promoting out-of-court settlements, the judicial system encourages private dispute resolution by failing to adopt measures that would promote the judicial determination of more grievances. For instance, courts could encourage the assertion of more grievances by liberalizing class action and standing requirements. 127 Once actions have commenced, courts could refuse to permit stipulated dismissals without reviewing the terms of the underlying settlement agreements to determine whether those agreements are consistent with the presumed objectives implicit in liability rules. 128 That the legal system adopts none of these measures merely confirms what few would question in any event: far from simply tolerating private resolutions of disputes, the law prefers and actively encourages such resolutions.

This conclusion is hardly remarkable to one who views tort law from an internal perspective. How better to ensure that a resolution will not offend the parties' sense of fairness than to let disputants resolve the controversy themselves? 129 The sys-


127. See generally Scott, Two Models of the Civil Process, 27 Stan. L. Rev. 937 (1975) (suggesting liberalization of class action, standing, and appealability requirements if purpose of procedure is behavior modification and not just conflict resolution).

128. The appropriateness of judicial scrutiny of the terms of dismissal is already recognized in class actions and shareholder derivative suits. See Fed. R. Civ. P. 23(e), 23.1.

129. This is not to suggest that parties will always be satisfied entirely with the results of settlement. Settlement requires compromises from both sides. Nor are settlements voluntary in the fullest sense; the unpleasant alternative to settlement, obviously, is litigation in a costly legal system. Thus, more perhaps could be done to facilitate voluntary and amicable resolution of disputes. See Recent Developments in Alternative Forms of Dispute Resolutions (ADR), 100 F.R.D. 512 (1983) (presentation in Judicial Conference for the Federal Circuit). The point is simply that by settling, the parties manifest their preference for a resolution on terms of their own making, and the law allows and encourages the parties to settle on their own terms rather than insisting on the application of substantive liability rules.

Another obvious reason for permitting settlements is the need to economize judicial resources. Although economy is no doubt a consideration that in fact underlies the legal system's encouragement of settlements, it cannot be regarded as the only consideration. Settlement of civil cases, though perhaps analogous to plea bargaining in the criminal process, is not an exact counterpart. Whereas plea bargaining is widely viewed with suspicion, and tolerated
tem's overwhelming preference for private resolution, however, is difficult to explain if its objective is to promote independent goals through the application of substantive tort doctrines. If these doctrines are crafted to promote efficiency or individual autonomy in society, their evasion should not be so freely permitted and promoted.130

An instrumentalist might respond that although the legal system formally decides only a miniscule portion of the universe of tort disputes under established liability rules, these rules nonetheless determine the content of the much larger number of private settlements. Parties may predict the probable outcome of formal adjudication and then settle on the same terms to avoid incurring the expense of litigation. Settlements thus would be consistent with the objectives encapsulated in the rules.131

If the predicted outcome were the only factor affecting the content of settlement agreements, this instrumentalist response would be cogent. Numerous other factors, however, enter into settlement decisions. Such factors include the desire of one or both parties to avoid the emotional and financial burdens of litigation, the parties' financial condition, the tax consequences of various settlement alternatives, pertinent insurance provisions and practices, the personalities and negotiating skills of the parties and counsel, the interest and fee arrangements of the parties' counsel, and the parties' innate sense of only because of necessity, see Comment, Constitutional Alternatives to Plea Bargaining: A New Waive, 132 U. PA. L. REV. 327 (1984), settlement is not generally viewed with similar suspicion or reluctance, see Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. ILL. L. REV. 37, 52 (“Compromise in plea bargaining is not analogous to compromise in settlement talks.”). But see infra note 130.

Professor Fiss criticizes the increasingly apparent movement towards settlement and nonjudicial methods of dispute resolution. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984). Fiss's criticisms are varied and need not be summarized here. Consistent with this Article, however, Fiss argues that a preference for settlement necessarily assumes that adjudication is primarily or wholly "a process to resolve disputes." Id. at 1075. Fiss opposes settlement precisely because he does not accept that assumption. See supra note 49. “[The law exists] not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to . . . [public] values and to bring reality into accord with them. This duty is not discharged when the parties settle.” Fiss, supra at 1085.

130. In an article appearing after this Article was submitted for publication, Posner, for example, discusses settlements as if they were probability-adjusted predictions of the results that would obtain under liability rules. See R. POSNER, supra note 50, at 337-42.
what is reasonable or fair. Thus, even though applicable liability rules may be one factor influencing a settlement, and perhaps even the single most important factor, the effect of other concerns nonetheless may cause the settlement to deviate dramatically from the result that a liability rule (and its presumed objective) might have prescribed.

An instrumentalist might also argue that private settlements are encouraged because they further the law's substantive objectives more effectively than do the liability rules themselves. This argument may seem especially congenial to efficiency theorists who view accident law as a substitute for the market, necessary only because lack of information and high transaction costs prevent the market from operating. These economic theorists might suggest that out-of-court settlements are properly favored because they more nearly approximate a market solution to the problem of accidents.

This position is similarly vulnerable, however, because settlement considerations between individual parties after an accident has occurred in no sense simulate the ideal market transactions that, in theory, would lead to an optimum level of accident prevention costs. In reality, settlements may be shaped by all of the factors already discussed, factors that are

132. One commentator has described the tendency of accident victims to settle for compensation well below the costs of an accident:

This pattern results from a combination of factors, including the victim's desperate and immediate need for money, the uncertainty of success in pursuing a tort remedy, the cost of processing a tort claim, and, above all, the amount of time required to obtain any compensation through judicial resolution of a contested claim. The victim (or the victim's survivor) often has little choice but to be content with a combination of benefits from external sources, such as social welfare and first party insurance, supplemented by a few thousand dollars in settlement of a disputed tort claim.

Pierce, supra note 119, at 1296.

133. Controlled experiments using simulated settlements appear to confirm this analysis. In one experiment, twenty pairs of practicing lawyers in Des Moines, Iowa, were assigned to represent the opposing parties in the same hypothetical personal injury case. The lawyers were given considerable time to prepare and to conduct settlement negotiations and were told that the results of the exercise would be published with lawyers' names attached. Thus, the participants had both the time and incentive to make reasonable efforts to settle on terms favorable to their clients. In fact, settlement figures ranged from $95,000 all the way down to $15,000, and the other settlements were described as "scattered almost randomly between the two extremes." G. WILLIAMS, LEGAL NEGOTIATIONS AND SETTLEMENT 5-7 (1983). Such apparently random results, occurring in cases based on identical facts and legal rules, hardly reflect a system in which settlement results are determined or strongly controlled by liability rules.

134. See, e.g., R. POSNER, supra note 50, at 325; Posner, Theory, supra note 3, at 52.
simply not based on the same concerns that animate theories of efficient resource allocation. Suppose, for example, that "Manufacturer" makes a product that causes one hundred injuries to consumers each year, of an average severity valued at $100,000, so that the sum of injury costs is $10 million. The incidence of injury is unaffected by the consumers' behavior, and there are no practicable substitutes for the product. Manufacturer, however, could eliminate all these injuries by adding a safety device to the product at a total cost of $9 million. Thus, from a societal standpoint the more efficient decision for Manufacturer would be to add the safety device.

Theoretically, in a perfect market, the consumers of Manufacturer's product would bargain with Manufacturer to add the safety device. Since transaction and information costs prevent such bargaining, however, assume that the legal system adopts a rule, such as negligence or strict liability, imposing liability for such injuries on Manufacturer, who theoretically now has a $10 million incentive to spend the $9 million necessary to make a safe product. Suppose, however, Manufacturer decides not to install the device, but instead negotiates settlements (costing Manufacturer $7 million) with injured consumers who are induced to accept such settlements because they need quick cash, dislike litigation, have timid lawyers, or for any number of other reasons. Thus, although paying out $7 million in settlements, Manufacturer nonetheless saves two million dollars by making what is, from a societal viewpoint, an inefficient decision.

In this illustration, as in similar situations, the considerations that influenced the settlement negotiations between Manufacturer and the injured consumers after the accidents occurred are not necessarily the same considerations that, in a perfect market, would have influenced negotiations before any accidents happened. Out-of-court settlements, therefore, do not approximate judicial solutions that economic tort theorists would view as furthering the tort law's substantive objectives by resembling true market solutions.

The example also illustrates that the encouragement of private tort settlements, such as those between Manufacturer and the injured consumers, may nullify the incentive to make safe products. Moreover, even assuming that insurance will spread the $3 million of loss now borne by individual consumers among all consumers, the same transaction and information costs that previously prevented the injured consumers from
uniting to negotiate with Manufacturer continue to exist. Whereas without a liability rule the consumers in the illustration would absorb all $10 million in loss, they now suffer less than a third of that loss, thanks to the combined effect of the liability rule and the availability of private settlements. Thus, the consumers now have even less incentive to find ways of overcoming or reducing the transaction and information costs that prevent them from bargaining with Manufacturer.

The conclusion is inescapable: if the legal system is truly committed to achieving efficiency through liability rules, it should forbid private settlements that deviate from those rules. The fact that the system has adopted precisely the opposite attitude toward such settlements seriously undermines the instrumentalist contention that the persons who make and administer the law intend it to serve such an objective in any systematic way.

As noted earlier, however, the express and inferential evidence suggests that at least some judges on some occasions are influenced in their decisions by extrinsic values such as efficiency. If this occasional influence does not elevate such values to the status of “objectives” that can support a general conception of instrumental rationality, it nonetheless poses a problem. What is the relation between tort law and the extrinsic values that the courts invoke, however erratically, in support of their decisions? The conception of rhetorical rationality suggests a plausible answer.

B. The Rhetorical Use of Extrinsic Values

From an internal perspective, substantive doctrine has a rhetorical function. It allows courts to justify decisions by giving reasons that are responsive to the litigants’ sense of fairness. Under negligence law, the central concept of “reasonableness” imposes no a priori standard dictating what kinds of reasons are admissible. The law, therefore, supports a diversity of reasons. One form of justificatory reasoning can be labeled “ethical generalization.” This form of reasoning is based on the notion that the correctness of an action or decision can be determined by projecting what the results would be if the action or decision became a general norm—what would the world be like if everyone acted this way?

Perhaps the purest example of “ethical generalization” is Kant’s formulation of the “categorical imperative.” Kant advised: “Act as if the maxim of your action were to become
through your will a universal law of nature." Generalization is not confined, however, to philosophy. Reasoning by generalization is a common method of persuasion. Civic leaders often persuade citizens to vote by asking, "What kind of democracy would we have if everyone decided that it was not worthwhile to vote?" Moralists also resort to generalization when they disapprove of some seemingly private predilection on the ground that a society in which that predilection were widespread would be a bad society.

Generalization, however, does not operate by persuading an individual that one person's actions or decisions will actually have any general effect. If I tell you that you should vote because, "What if everyone decided that it is not worthwhile to vote?" I am not necessarily suggesting that what you do will have the slightest influence on anyone else's decision to vote or not. The generalization is purely hypothetical. The argument works by assuming that the generalization somehow illuminates the inherent correctness of your individual decision.

The concept of ethical generalization offers an explanation of the role of extrinsic values in adjudication. From an internal perspective, a judge's objective is simply to resolve a dispute in accordance with the litigants' sense of fairness. Even if the judge believes personally in the importance of extrinsic values, such as economic efficiency or individual autonomy, decisions in individual lawsuits between occasional litigants who fail to reach settlements seem an unlikely vehicle for implementing or imposing such values. Nonetheless, such values may provide a powerful tool for justifying particular results. If the judge can explain convincingly, for instance, the undesirable economic consequences that would follow if the defendant's

136. See, e.g., P. Devlin, supra note 45, at 113 ("[W]hile a few people getting drunk in private cause no problem at all, widespread drunkenness, whether in private or public, would create a social problem.").
137. Of course, if it is assumed that your action will influence others, then my argument to you is even more powerful.
138. See Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717, 1718 (1982) (arguing that the social consequences of common law tort and contract rules are negligible). Moreover, given the complexity of the out-of-court world, it is likely that if a decision does have a significant effect beyond the individual lawsuit, that effect may be much different than simple projection of the decision itself would indicate. See Henderson, supra note 10, at 1038 (arguing that safety-inspired imposition of strict liability on a product area may result in price increases, thus forcing marginal consumers to turn to substitutes that are even riskier).
conduct became pervasive, then a decision imposing liability on the defendant is justified. This is true not because anyone expects the decision necessarily to have an impact on conduct generally, but because the method of generalization is a common way of determining the correctness of an individual's conduct.

From this viewpoint, extrinsic values are not the objectives of tort law but are useful tools to courts in performing their primary function in tort cases, that of resolving disputes. There is, however, no reason to assume that disputants are committed to any one extrinsic value or to any single mode or style of rationalization. Moral, economic, and practical considerations may all be pertinent in justifying a decision. Thus, a court concerned with the litigants' sense of fairness might draw on any available rhetoric in supporting its results. From this perspective, extrinsic economic and moral values (and theories based on those values) may be significant not because they can supply any instrumental standard for evaluating tort law, but rather because they contribute to the variety of rationales available to courts in rendering decisions fair. The fertility of the negligence doctrine in absorbing the rhetoric of such theories may well be one of the doctrine's most important virtues.

V. NEGLIGENCE AND THE FORMAL VIRTUES

A. NEGLIGENCE AND LOGICAL RATIONALITY

According to Professor Henderson, negligence offends the ideal of rationality because it does not allow courts to apply law

139. Again, if the litigants or judge believe the decision will have an impact on conduct generally, then reasoning based on generalization will be even more persuasive.

140. Its rhetorical fecundity allows negligence law to develop and deploy vocabularies adapted to particular kinds of controversies. Cases involving product-related injuries, for example, commonly require that decisions be justified in terms comprehensible to business defendants who think in economic terms. It is not surprising, therefore, that the economic concepts of loss spreading and of allocating losses so as to create incentives to reduce accident costs are most conspicuously invoked in such decisions. See, e.g., Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 435, 440-41 (1944) (Traynor, J., concurring). One commentator has suggested that strict liability, as developed by the courts, is merely an adaptation of negligence concepts with a vocabulary more suitable for particular classes of cases. See Schwartz, supra note 7, at 970-77.
to facts and reach decisions that are logically necessary. The determination of whether a particular defendant's conduct was "reasonable" requires the judge or jury to exercise discretion. Assuming for a moment the validity of this assessment, the obvious question arises: Why should courts be restricted to necessary forms of reasoning?

One answer Henderson suggests focuses on institutional competence. Although problems not conducive to logical resolution may be amenable to managerial solutions, the legal process is ill-equipped to provide such solutions. This answer, however, encounters serious obstacles. Why the legal process is unsuitable for developing managerial solutions is not clear. In a lawsuit, all interested parties argue for the solution they think advisable, and courts routinely hear expert testimony on issues where expertise is needed. Henderson concedes that courts can deal with managerial problems and that they are increasingly doing so. Given that such problems may often be difficult for any decision maker, it is unclear why the legal process is especially ill-adapted for the task.

Regardless of the managerial competence the law may or may not have, however, a concern for limiting the law to its area of competence moves away from the purely formal conception of rationality and toward a more pragmatic inquiry regarding the kinds of problems courts are actually equipped to resolve. The inquiry has little to do with the necessary character of the reasoning involved. As noted earlier, no purely logical method can be devised to move from observation, "Mary was zigzagging from lane to lane," to the conclusion, "Mary was driving unreasonably." Yet a typical judge or juror not only would reach that conclusion, but would feel that the conclusion

141. Henderson's position and its difficulties in interpretation are discussed more fully supra notes 4-8.


143. Henderson, supra note 7, at 476-77.

144. Henderson concedes that "judicially-implemented management decisions . . . might be legitimate when they are limited to suits seeking injunctive relief in the public law sector." Henderson, supra note 10, at 910 n.41. Thus, Henderson admits that courts are capable of rendering managerial-type decisions, that they are increasingly doing so, that such decisions may be rational in some sense, and that such decisions may be legitimate in some kinds of cases. In view of these concessions, the assertion that a deviation from logical rationality in private tort cases would be illegitimate hardly seems obvious.

145. Some scholars have argued that courts are quite capable of dealing with such problems. See, e.g., Fiss, supra note 36, at 2-4, 17; see also Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1307-10 (1976). For a recent and more skeptical assessment, see Resnick, supra note 85, at 399-400, 409-408, 414-16.
was not in any sense "discretionary." There are, of course, cer-
tain problems to which single inexorable answers can be
given, but such problems may be well beyond the compre-
hension of the ordinary judge or juror. From the standpoint of
institutional competence, the critical question is whether a
problem is in fact amenable to solution through the judicial
process, not whether it has certain formal characteristics.

This analysis may misconstrue Henderson's point. Hender-
sen implies that necessary reasoning is imperative because it is
part of the essence of the legal process. Adjudication means
making decisions through a process in which the affected par-
ties are guaranteed the opportunity to offer reasons and in
which the decision must be based on reasons. Thus, Hender-
sen's argument may mean that regardless of whether courts
are capable of dealing with problems in nonformal, managerial
ways, they should not do so because if they did they would not
be acting like courts.

Thus restated, however, Henderson's argument simply re-
turns to the question that the first formulation failed to answer.
Granting that courts should act like courts and that adjudica-
tion is in its essence a process which assures parties the right
to give and obtain a decision based on reasons, there still is no
apparent basis for requiring such "reasons" to have any partic-
ular formal character. Indeed, Henderson's insistence on the
necessary character of legal reasoning turns his own argument
against itself. His definition of adjudication actually contains
two elements: assured participation and rationality. Although
Henderson states these elements as if they were a sin-
gle descriptor, they clearly are not. Trial by battle provides
assured participation but not rationality, and an inquisitorial
system might strive for rationality without guaranteeing partic-
ipation. To be sure, the two elements may be mutually sup-
portive. Participation may include giving reasons. Under

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146. For example, problems involving mathematical equations may fall
within this limited category.
147. Henderson, supra note 7, at 469.
148. See id.
149. See S. MILSM, HISTORICAL FOUNDATION OF THE COMMON LAW 111 (1969)
("[T]he battle is a magical test of the demandant's right.").
150. For a brief description of the inquisitorial system, see P. DEVLIN, supra
note 45, at 57. The point is that an inquisitorial system could operate without
assuring participation by the persons affected, not that such systems must or
do in fact operate in that way. Cf. J. MERRYMAN, THE CIVIL LAW TRADITION 124
(1969) (arguing that characterization of civil law as "inquisitorial" is misleading
and that in civil law systems the parties, not the judge, usually determine the
issues, evidence, and arguments).
Henderson's conception of rationality, however, the elements become not only distinct, but antagonistic.

Imagine, for example, a dispute involving a problem that cannot be solved through the logical application of a rule, either because the problem is intrinsically not susceptible of a logical solution or because an adequate rule has not yet been formulated. In that case, which of the elements of adjudication takes priority? If a court recognizes the parties' right to present their dispute for resolution, it commits itself to a process that, in Henderson's view, will not be rational. If, however, the court refuses to consider the dispute because it cannot be resolved rationally, the parties will be denied their right of participation.\textsuperscript{151} The problem is not exceptional. Negligence law is applicable precisely to those disputes in which more definite statutory or contractual guidance has not been provided.

The dilemma underscores the futility of seeking to confine the legal process to any formal conception of rationality. If the insistence on logical rationality is relaxed, however, the dilemma dissolves. The parties may raise their dispute and present any reasons, whether or not founded on formal logic, pertinent to it. Since most people in their daily experience are accustomed to giving and receiving reasons without subjecting such reasons to review under the canons of formal logic, there is little risk that such a process will be seen as a breach of "rationality."\textsuperscript{152}

151. Henderson might argue that no right has been denied if there is no proceeding in which the parties might participate, but this would trivialize the participation right. Certainly that right means at least that the parties are assured of a forum to which they can bring their disputes for peaceable resolution.

152. Indeed, the rigidly rule-based legal system is itself likely to be perceived as offending rationality. The spectacle of harried pro se litigants who, innocent of legal concepts and categories, attempt to go to court and simply explain their positions emphasizes the problem. To the lay person, the law may often seem to focus on technicalities that do not matter while systematically refusing to consider the factors that do. Consider, for example, the following observation in Swift's Gulliver's Travels:

In pleading, they [lawyers] studiously avoid entering into the Merits of the Cause, but are loud, violent, and tedious in dwelling upon all Circumstances which are not to the Purpose. For instance, in the Case already mentioned; they never desire to know what Claim or Title my Adversary hath to my Cow, but whether the said Cow were Red or Black, her Horns long or short, whether the Field I graze her in be round or square, whether she was milked at home or abroad, what Diseases she is subject to, and the like; after which they consult "Precedents," adjourn the Cause from Time to Time, and in Ten, Twenty, or Thirty Years come to an issue.

J. SWIFT, GULLIVER'S TRAVELS, Part IV, ch.5, at 352-53 (Oxford Univ. Press 1926)
B. NEGLIGENCE AND THE RULE OF LAW

Henderson also endorses a variant version of rationality that can be described as "rule of law." This conception requires that the law be clear and comprehensible so that individuals can understand and conform to it.¹⁵³ Negligence doctrine is suspect in this view because it is apparently too indeterminate to allow individuals to understand what is required of them and to make intelligent decisions consistent with those requirements.¹⁵⁴ Although this criticism focuses on the need to promote rationality in individuals' out-of-court conduct, its implications may also be important for an internal perspective. If disputes are decided by imposing liability on individuals for conduct that they could not have known was unlawful or improper, their sense of fairness will likely be violated.

Unlike the conception of logical rationality, the "rule of law" conception properly focuses on the actual ability of human beings to comprehend and comply with a rule, rather than on the rule's formal characteristics. Once this shift in focus occurs, however, the criticism of negligence doctrine loses much of its force. Everyone who lives in a community has an opportunity to form an impression regarding the kinds of conduct that are considered ordinary and appropriate. By contrast, few people trouble themselves to become acquainted with the formal law.¹⁵⁵ And however indefinite the concept of "reasonableness" may be from a purely analytical standpoint, it probably is more comprehensible to the lay person than a legal specification of criteria of liability. Consequently, the ability of most individuals to understand and conform their conduct to societal requirements would probably be reduced rather than enhanced if the negligence concept of reasonableness were replaced by a more formalized definition of the conditions of liability.¹⁵⁶

Moreover, even if negligence doctrine involved a sacrifice of comprehensibility, Henderson's attempt to import "rule of law" analysis into tort law seems questionable. Fostering certainty is a task that is more urgent in some spheres of activity than in

¹⁵³. See supra notes 32-42 and accompanying text.
¹⁵⁴. See Henderson, supra note 7, at 478-80.
¹⁵⁵. See Schwartz, supra note 111, at 710-11.
¹⁵⁶. Fuller himself suggests that the concept of "due care" is satisfactory because it incorporates "common sense standards of judgment." L. FULLER, MORALITY, supra note 31, at 64. He adds: "A specious clarity can be more damaging than an honest open-ended vagueness." Id.
others. Tort law by its nature is primarily concerned with the accidental and the unexpected, with happenings that are not the anticipated result of any deliberative decision.\textsuperscript{157} The case for requiring clear rules to enable individuals to determine with precision what occurrences will or will not lead to liability seems weakened when those occurrences are by hypothesis unanticipated.\textsuperscript{158}

In addition, the "rule of law" philosophy is most compelling against the backdrop of conflicts pitting the individual against the potentially oppressive state. This backdrop is apparent in the contrasts that Fuller frequently draws between the rule of law and the practices of Nazi Germany.\textsuperscript{159} In such conflicts, the rule of law not only allows the individual to avoid punishment by understanding and conforming to the law, but also protects against abuses of legal mechanisms by the state. Tort law, however, is far removed from that context. The litigants in tort cases are typically private parties, and the state, if involved at all, will likely as not be a defendant. Moreover, the source of controversy is usually an accident or injury that the parties would have preferred to avoid altogether. As the threat of systematic oppression of defendants is negligible in tort cases, the need for strict formal safeguards to prevent such oppression is accordingly diminished.

This is not to say that the rule of law has no place in tort actions. From an internal perspective, the idea of law is a powerful tool in rendering decisions palatable to opposing litigants. The fundamental concept that decisions must be rendered in

\textsuperscript{157} Cf. Schwartz, \textit{supra} note 111, at 717 (observing that contributory negligence typically arises in situations in which the victim was oblivious to the risk).

\textsuperscript{158} Manufacturers of products, or other potential defendants engaged in large-scale activities, may constitute an exception to this assertion. Though such entities may not anticipate injuries in connection with any particular product or action, they realize that a certain number of injuries will result from their activities. The Fuller-Henderson conception of "rule of law," however, is not attuned to the problems of large-scale or organizational injurers in any event. That conception is concerned with protecting the individual who wishes to \textit{avoid} liability, not the corporation that wishes to \textit{estimate} the cost of liability as a business expense. \textit{See} Fiss, \textit{supra} note 36, at 43-44 (criticizing Fuller's analysis for ignoring the fact that individuals have largely been replaced as litigants by corporations and bureaucracies). Moreover, insofar as the business corporation's calculations merely require probabilistic estimates of future liability costs, an indeterminate rule simply adds another factor to the already uncertain calculus. \textit{But cf.} Rodgers, \textit{supra} note 2, at 14-20 (arguing that rational injurers should be subject to an objective standard and strict liability, whereas nonrational injurers should be judged under a subjective standard).

\textsuperscript{159} L. FULLER, \textit{MORALITY}, \textit{supra} note 31, at 40 n.2, 54-55, 123, 158.
accordance with law works to ensure that all persons will be treated in the same way and in accordance with principles that are open to public scrutiny, rather than being subject to the unguided will of individual officials.\textsuperscript{160} Law also creates the possibility of conflict with other components of dispute resolution, however. Thus, the application of general principles of law may prevent consideration of the unique circumstances and equities of individual cases.\textsuperscript{161} Moreover, a rigid system of laws may be unresponsive to variations in popular values and beliefs that may occur from one period or community to another.\textsuperscript{162}

The doctrine of negligence seeks to resolve this dilemma by creating a rule of decision that can be applied uniformly but that is sufficiently open-ended that its actual content can be filled in for each particular case. As a prospective defendant, every person must always act under the same "reasonable person" standard. The meaning of that standard is not fixed, but must be established for each case. Thus, the negligence doctrine permits disputes to be resolved in a way that has at least the form of law, and yet avoids any glaring divergence between the law and the values of litigants and the community.

The "reasonableness" concept thus seeks to satisfy the general requirements of rule of law while remaining responsive to the need to resolve individual disputes. In a different area of the law, such as criminal law, this accommodation might well be unacceptable.\textsuperscript{163} However, given the efficacy of "reasonableness" as a practical guide for individual behavior, and in view of the attenuated demands of rule of law in tort law disputes, the accommodation seems satisfactory in that context.

\textsuperscript{160} The idea that decisions are made in accordance with "law" has been a powerful legitimating force in the Anglo-American legal culture. See generally F. HAYEK, THE CONSTITUTION OF LIBERTY (1960); see also P. DEVLIN, supra note 45, at 85. The critical importance of subjecting governmental institutions to law is reflected in many of the most celebrated of our constitutional protections, including the "due process" guarantees of the fifth and fourteenth amendments and the equal protection clause of the fourteenth amendment.

\textsuperscript{161} The conflict between law and equity has long and often been noted. See, e.g., ARISTOTLE, Nichomachean Ethics bk. V, ch. 10, in THE NICHOMACHEAN ETHICS OF ARISTOTLE 132-34 (D. Ross trans. 1925); P. DEVLIN, supra note 45, at 84; R. WASSEKSTRÖM, supra note 29, at 84-117.

\textsuperscript{162} The problem of adapting law to changing needs and values occupies a substantial portion of scholarly legal discourse. For a recent innovative consideration of this problem, see G. CALABRESE, supra note 84.

CONCLUSION

Much recent tort scholarship can be viewed as a quest to subject tort law to a precise conception of rationality. The burden of this Article is that the quest is futile. In law, as in philosophy and science, rationality breaks out of conceptual prisons. Thus, the most useful conception—what this Article has called “rhetorical rationality”—is hardly a conception at all. It simply means that in law, as in life, decisions and deeds should be based on reasons. The reasons, however, may come in any variety of forms.

For the legal scholar, this conclusion is perhaps disappointing. Scholarship seeks to understand and to expound, and it is a happy circumstance when the subject of study has an inherent solidity that is susceptible to refined understanding and eloquent exposition. For the judge, however, whose job is to apply the law in resolving real disputes between real people, precision in the law may be less imperative; in some instances, it may even be a hindrance. And when disputes raise problems that have not been brought under statutory or contractual governance, an elemental “reasonableness” may well be the most useful judicial artifact thus far devised.
