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THE CRYSTALLINE STRUCTURE OF LEGAL THOUGHT

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I. INTRODUCTION

Chemistry teaches us that gemstones form single crystals. What makes these crystals interesting scientifically is their structure: the molecules in a single crystalline substance arrange themselves in an ordered and regular pattern which is repeated throughout the solid.[1] Moreover, the tiny molecular patterns taken together create the identical pattern on a larger scale, and this process continues at each succeeding level of size, so that the structure of the- solid is the same regardless of the level examined.[2] Finally, when a single crystal is cut into pieces (as, when a diamond cutter splits a diamond), each piece retains the same structure (and levels of structure) as the original.[3]

The thesis of this Article is that legal thought and legal argument have a crystalline structure. I mean by this not that legal doctrines have a self-replicating structure, but rather that legal *arguments* that people make in defense of legal doctrines share a common structure. This common structure is replicated throughout diverse areas of legal doctrine and at successive levels of doctrinal complexity.[4]

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[1] 1 THE CRYSTALLINE STATE 1 (L. Bragg ed. 1965).

[2] *Id.* at 3-4.

[3] *Id.*

[4]The basic idea that the same types of legal arguments recur indifferent areas of the law has been noted by several authors. E.g., D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 15 (1983) [hereinafter D. KENNEDY, LEGAL EDUCATION] ("[Law students] learn a list of balanced, formulaic, Pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation . . . ."); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960); Boyle, *Anatomy of a Torts Class,* 34 AM. U.L. REV. 1003 (1985); Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685. 1713 (1976) [hereinafter Kennedy, *Form and Substance]* ("My assertion is that the arguments lawyers use are relatively few in number and highly stereotyped, although they are applied in an infinite diversity of factual situations."); J. Boyle, Legal Mystification and Legal Argument (unpublished mimeographed materials); D. Kennedy, Torts (unpublished mimeographed materials) [hereinafter D. Kennedy,

If one attempts to view legal thinking as a coherent system of moral directives it becomes hopelessly complicated and confusing; however, if it is viewed dialectically as a continuing series of struggles between various sets of opposed ideas, its structure becomes relatively simple, and crystal clear. The play on words is deliberate. The structure of legal thought is "crystalline" both in its self-replicating nature and in its order and transparency. Thus, in the seemingly vast and confusing variety of legal rules and principles, I claim there is an underlying unity of great simplicity.

The existence of this structure is significant for several reasons. First, it has pedagogical importance. The analysis of structures of argument demonstrates that legal discourse is not as complex as it first appears-that in fact there are standard forms of argumentation which reappear in diverse doctrinal contexts. The most skilled students and practitioners grasp this instinctively. For the beginning law student, for the lawyer interested in sharpening his rhetorical skills, or for the merely curious, the explicit articulation of these principles may be of assistance in learning how to develop and respond to legal arguments. My admittedly brief experience has confirmed that teaching students to recognize and use the recurring structures of argument can assist them in the process of making arguments in widely varying doctrinal situations.[5]

The significance of this analysis is not, however, limited to a new technique of legal instruction. In essence, the study of the typology of legal argument is the study of legal thought itself. The discovery of recurring structures of legal argument raises important questions about the way that people reason when they engage in legal argument. Moreover, because the forms of legal argument I shall consider in this article are also forms of moral argument, these recurring structures raise issues in moral philosophy and epistemology as well.

A. *Rules and Rule Choices*

In order to see the crystalline structure of law, we must change radically the way we look at legal thought and doctrine. Legal doctrine as we normally understand it consists of a series of rules, policies, principles, standards, and tests. An example of a tort doctrine is "the test of negligence is what a reasonable person in defendant's situation would have done," or "the defendant takes the plaintiff as she finds her." We usually think of legal doctrine as the stitching together of all the various tests, rules, policies, principles, and standards into a more or less coherent whole. I would like to put that picture of legal doctrine as a quilt of rules aside in favor of a new one. Instead of looking at doctrine as a series of *rules,* I propose to look at it as a series of *rule choices.*

The notion of a rule choice is straightforward. Consider the familiar principle of tort law described above: "the test of negligence is what a reasonable person in defendant's situation would have done." This is an objective standard for negligence and for legal fault. Our law has *chosen* this test, and to say that it has chosen it implies that it was chosen over some alternative. What was that

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Torts].

[5] The fact that all legal argument cannot be grouped into one of the categories described in this Article does not diminish the importance of understanding and mastering the large array of legal arguments which can be so classified.

alternative? There are actually an infinite number, but one obvious alternative is a subjective test of negligence. This was how Holmes saw the issue posed in *The Common Law*;[6]

> Supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or blameworthiness in some sense, the question arises, whether it is so in the sense of personal moral shortcoming . . . . Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence judged by a moral standard which would take his personal characteristics into account. But supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was.[7]

Note carefully what Holmes has done. First he assumes that fault is the basis of tort liability. Then he asks, shall we have a subjective or an objective standard of negligence? Holmes goes on to argue for an objective standard,[8] but what is important for our purposes here is the doctrinal choice he poses. This choice can be illustrated by a simple diagram:

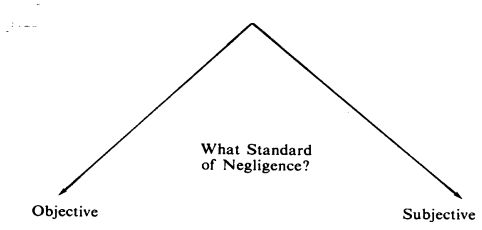

Figure 1

This diagram I call a "dyad," after Professor Duncan Kennedy, who in turn borrowed the word from various Structuralist thinkers.[9] It may seem at first rather a great deal of fuss to draw a diagram in order to make a relatively simple point, but the dyads will become surprisingly useful in explaining a number of more complicated ideas which follow.

For brevity's sake, I will call a rule choice which can be treated this way as a dyadic rule choice. Obviously these are not confined to tort law:

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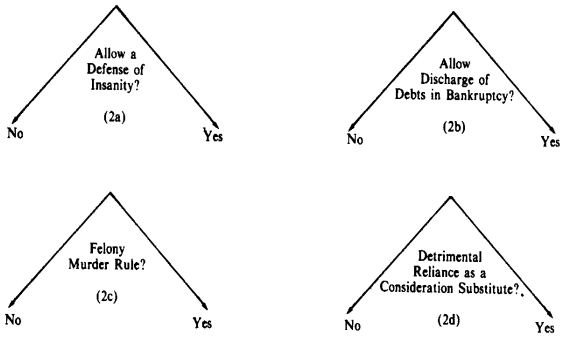
[6] O. HOLMES, THE COMMON LAW (1963).

[7] *Id*. at 85-86.

[8] *Id.* at 86-103.

[9] D. Kennedy, Torts, *supra* note 4, at 11-21. *See generally*, C. LEVI-STRAUSS, THE RAW AND THE COOKED (1969); 1 & 2 C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (1963,1976); T.K. SEUNG, STRUCTURALISM AND HERMENEUTICS (1982). Levi-Strauss does not use this particular kind of diagram, but the types of relations in which he is interested maybe classified as "dyadic." *Id.* at 104-12 (comparing Hegelian triadic logic with Levi-Straussian dyadic or binary logic).



Figures 2a-2d

These examples are designed to demonstrate that many, if not most, of the issues brought before courts and legislatures may be understood in terms of dyadic rule choices that could be similarly diagrammed. This broad claim, however, requires several important refinements:

(1) There is no one "necessary " or "correct " alternative to a given rule of *law to form a dyadic rule choice, although there are rules that cannot serve as alternatives.*

In the example given above, Holmes saw the issue of the proper standard of care as between objective or subjective standards of negligence-he had already assumed that a fault standard of some sort would be chosen. But imagine a court or decision maker faced with a case in which it must decide whether to use the preexisting negligence (objective) standard in products liability cases or adopt strict liability instead.[10] This could be diagramed as:

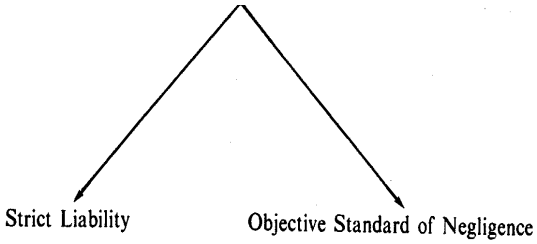


Figure 3

The reader can no doubt think of countless other standards of care to which an objective standard might be opposed: Custom of the Industry, Objective Standard but Taking Insanity into Account, No Duty to Exercise Care. The fact that no court would be likely to accept a given alternative (because it is considered a substantively bad rule) does not mean that an alternative cannot be articulated.

The analysis which follows does not assume that rules have a single, natural "opposite." Indeed, it explicitly assumes the contrary-that the arguments used to support a rule derive from the

[10] *E.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

context of what rule is offered as its alternative; it is the relation (or opposition) *between* things that gives them meaning.[11]

However, there are some "oppositions" that do not qualify as true dyadic rule choices:

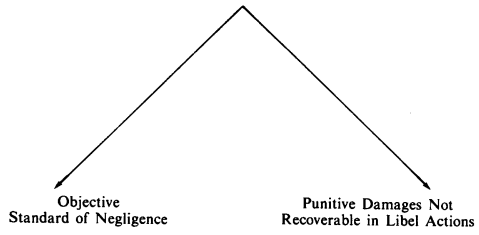


Figure 4

This is the jurisprudential equivalent of comparing apples and oranges. In normal contexts, the punitive damages rule does not appear to us as an alternative to an objective standard of negligence.[12] In addition, dyadic rule choices are choices between rules, and not the substantive merits of people, institutions, or other things.[13]

(2) *Even where a rule is seen as the result of a choice between many alternatives, it can be treated as a series of dyadic rule choices.*

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[11] This is a fundamental idea in structuralist and post-structuralist thought---that the *relation between* (here to opposition between) ideas, things, or cultural phenomena gives them meaning. STRUCTURALISM AND SINCE 10 (J. Sturrock ed. 1979) ("Structuralism . . . studies relations between mutually conditioned elements of a system and not between self-contained essences . . . . [Without difference there can be no meaning."). Thus, what it means to take a position in favor of a certain rule can only be understood in the context of the rule to which it is opposed.

[12]The caveat that we are considering only "normal contexts" is quite important to the discussion. In a dyadic rule choice, we are concerned not with relations of contradiction but of *opposition* between rules. A contradiction involves a relationship between two elements which are logically opposed, like "A" and "Not A." An opposition is a function of three elements: the two opposed objects and the relation or means by which they are opposed. *See* T.K. SEUNG, *supra* note 9, at 8-14. In order for us to feel the sense of opposition between rules, there must be a relational context which establishes that opposition between them. Seung gives the example of "odd" versus "even." The opposition between these concepts exists only in the domain of integers; our concept of numbering provides the relation which produces the opposition. Contrast this with a supposed opposition between "goal" and "goal." We do not see these concepts as opposed because we see no obvious contextual relation between them that would produce an opposition. *Id.* at 11-12. This is not to say that with sufficient ingenuity wecould notconjure upsuch a context, but rather that a context which created opposition between these two concepts would have no independent significance for us. In the case of rule choices, our understanding of how rules operate in specific contexts provides the relation of opposition between them. Such an opposition exists between an objective and a subjective standard of negligence, but not between an objective standard and a rule against punitive damages in libel actions.

[13]Levi-Strauss's structuralism, however, does involve oppositions between objects or concepts like sea and sky, heaven and earth, father and son, etc. *E.g.*, C. LEVI-STRAUSS, THE RAW AND THE COOKED (1969). The cultural phenomena I am concerned with here, however, are rules and arguments used to support them.

In the example above, we saw that Holmes had simply assumed that the standard of liability in tort was fault-based. There are many possible standards of due care, however, some of which are noted below:

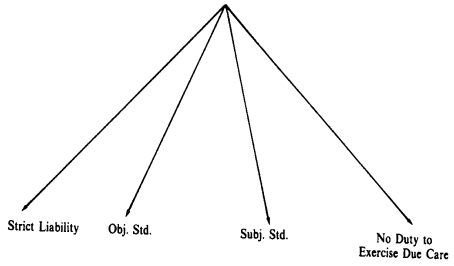

Figure 5

Holmes has simply considered the middle two standards of care. In so doing, however, he has made the prior assumption (actually a choice) that the law will impose some sort of duty of care, and he has dismissed strict liability out of hand. This recharacterization of Holmes's rule choice leads to the following diagram:

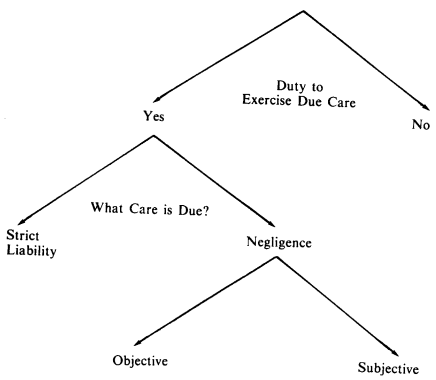

Figure 6

The diagram recasts the choice of four possible rules as a series of three dyadic rule choices.[14]

[14] The above diagram should not be confused with the actual decision procedure a decisionmaker might employ in choosing between a number of alternatives. It is merely a method of translating multiple choices into a series of choices of two. Here is an equally possible recasting:

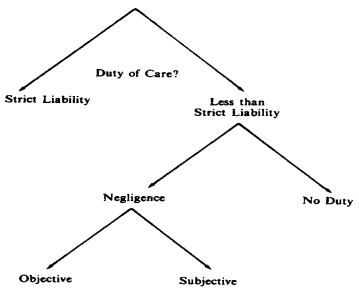

Figure 7

It follows from point (2) that rules or statutes containing many elements or requirements may in theory be broken down into dyadic rule choices, however cumbersome that might be in practice.[15]

(3) *A discrete body of legal doctrine can be viewed as a series of dyadic rule choices of ever increasing specificity.*

In the tort law example we began with, we noted that the choice between objective and subjective standards could be seen as preceded by prior choices of rules: We chose duty over no duty, then a duty of negligence over strict liability, and then an objective standard of negligence over a subjective standard. Of course, there is no reason to stop at that particular level of doctrine. We might consider whether under an objective standard of negligence, there is an exception for children, or a different standard for insane persons, or for those who are blind, or intoxicated, and so forth. This leads us to further rule choices, each of which leads to additional branches of doctrinal development. Assume, for example, that we follow one of these branches of doctrinal development and create an exception for children (which is now the majority rule).[16] We might consider if there is an exception to that exception when the child engages in an ad ult activity (this too, is the case now generally).[17] We might then go on to ask if operating a motorcycle is an adult activity within the meaning of that rule,[18] and if so, whether operating a motorscooter is also an adult activity.[19] Put together, we have a descending series of rule choices of increasing factual complexity and specificity:

[15] A statute which bans the playing of loud music in public parks between the hours of 11 p.m. and 8 a.m. might be seen as having no obvious opposite with which it might be contrasted. Legislators who debate complicated laws, however, are as likely to state their opposition to particular portions of a bill as they are to oppose the entire bill itself. One legislator might object to the ban of music but not other loud activities, while a second might object to the restriction to public parks and would extend the ban to all publicly owned property. Each of these legislators might offer an amendment which could be analyzed in terms of a dyadic rule choice. A third legislator might ask that the curfew begin at 10 p.m. instead of 11 p.m. As long as there is a different rule which could make a difference to someone. and which can be argued for in opposition to the alternative, there is the possibility of a dyadic rule choice.

[16] RESTATEMENT (SECOND) OF TORTS § 283A (1965).

[17] RESTATEMENT (SECOND) OF TORTS § 283A comment c (1965).

[18] *E.g.*, Daniels v. Evans, 107 N.H. 407, 409, 224 A.2d 63, 66 (1966).

[19] *E.g.*, Adams v. Lopez, 75 N.M. 503, 507, 407 P.2d 50, 52 (1965).

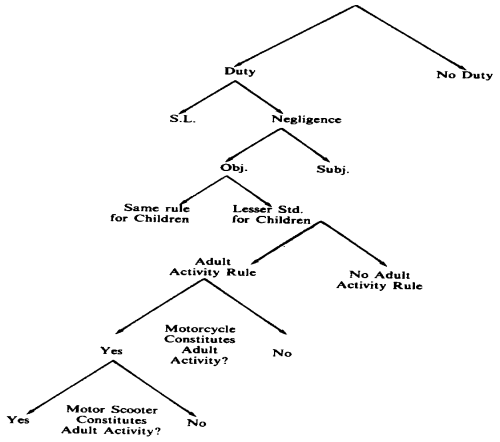

Figure 8

For ease of expression, when I speak of a series of rule choices I shall refer to the choices following a given choice as involving "subdoctrines" or "subrules" and the rule choices preceding it as involving "supradoctrines" or "suprarules." (Thus, I will speak of the Adult Activity Rule as a subdoctrine of the Objective Standard of Negligence Rule, and the choice of Negligence over Strict Liability as a supradoctrine of the Adult Activity Rule.)

Two points of clarification are in order. First, it is important to recognize that when one says that legal rules can be arranged in successive dyadic rule choices of increasing factual complexity and specificity, these terms are necessarily subjective evaluations; not everyone would agree that rule choice A is more factually complex and specific than rule choice B. Moreover, from point *(2)* above, it follows that there is no necessary way of getting to the "last" rule choice and no necessary starting point-I have simply produced a series of choices in an order that seemed logically coherent starting with the opposition between duty and no duty, which seemed the most "abstract." The reader may construct a different series of dyadic rule choices; the order in which the choices are made does not affect the analysis.

Second, I do not claim that it is possible to put all of the rule choices implicated in a given doctrinal area in a single dyadic chain or set of chains. There may be an infinite number of subdoctrinal choices which could follow "beneath" any given rule choice.[20]

[20]Thus under the objective/subjective rule choice there are not only the issues of special rules for children, but also for the blind, the insane, the elderly, etc. Although there are myriad of possible sub-rule choices which present themselves at each level, it is possible to follow a particular "chain" of dyads in a particular doctrinal area and study the forms of argument used at each level (for example, with respect to the rules regarding children). Another example would be the successive development of rules regarding the cause of action for negligent infliction

Our ability to recast legal doctrines into successive dyadic rule choices is important because it exposes the common structures of legal thought. Every dyadic choice between two opposed rules mirrors a larger choice between a pair (or between several pairs) of fundamentally opposed legal ideas. These pairs of opposed ideas, in turn, represent basic structures in our moral and legal thought.

Furthermore, each side of an opposition of ideas is associated with standard forms of legal and moral argument. These arguments justify the rule on one side of the dyad and militate against the opposite rule. For this reason, vast portions of legal doctrine (as expressed in dyadic rule choices) recapitulate the dialectic between the pairs of opposed ideas. This opposition is replicated at each level of doctrinal complexity (that is, in subdoctrinal rule choices and supradoctrinal rule choices), and throughout diverse areas of legal doctrine. The replication of argument forms gives legal thought its crystalline structure.

* * *

The remainder of this article proceeds as follows: In the second section of the article, I identify and describe what I consider to be the most important pair of opposed ideas in legal and moral thought. This pair of opposed ideas which consists of two competing visions of human responsibility in society. I refer to these ideas as individualism and communalism.[21]

In the third section of the article I classify and describe many of the most common forms of legal argument and demonstrate how they recapitulate the opposition between individualism and communalism.

In the fourth section of the article, I explain in greater detail how crystalline structures operate, and demonstrate the effects these structures have on legal thought and the development of legal doctrine. I also introduce a second set of opposed legal ideas, the opposition between Formal and Substantive Realizability,[22] and show how this opposition interacts with the opposition between individualism and communalism.[23] Finally, I discuss the importance of the analysis to legal and moral philosophy.

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of emotional distress. *See infra* text accompanying notes 88-110.

[21] See *infra* text at notes 28-31 for a definition of these terms.

[22] See *infra* text at notes 73-74 for a definition of these terms.

[23] As I mention *infra*, there are many other types of oppositions of ideas in legal discourse which create crystalline structures of argument. In a future article, I hope to discuss some of these other oppositions in more detail. However, it is more important at this point to develop the idea of a crystalline structure without undue complication. I consider the two sets of oppositions I have chosen to discuss as the most significant and pervasive in legal argument.

II INDIVIDUALISM AND COMMUNALISM

A. *The Basic Distinction*

Consider Figure 8 once again. It presents a series of doctrinal and subdoctrinal rule choices, which I will now lay out side by side:

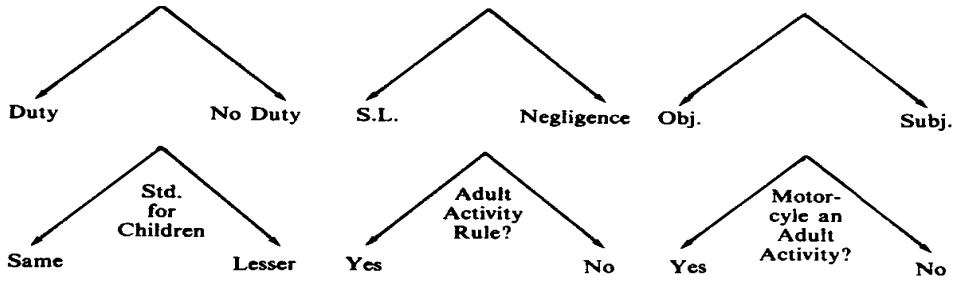

Figure 9

The orientation of the rules is the same as was used in the branching diagram in Figure *9.* The placement of the rules on the left hand and right hand sides of each dyad was not accidental. It was done to group similar choices together.

All of the rules on the left hand side of the dyads impose upon the defendant a higher degree of responsibility than those on the right. This convention was also followed in Figures 1, 2 and 3.

The comparative degree of responsibility imposed upon a defendant[24] is significant for several reasons. First, when the defendant is held to a higher standard of responsibility, more is expected of her by others in the community, and she is more subject to their requirements and expectations. Second, she is more likely to have the state's coercive power used against her, either in the form of penal sanctions, an award of damages, or injunctive relief. Third, even if she never chooses to cross the line established by the higher standard of responsibility, so that she never

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[24]Throughout this article, "defendant" and "plain tiff" are employed as terms of art. I use these terms because it is easier to visualize the competing forms of argument in the adversarial context of a lawsuit. A more accurate set of terms would be -the responsibility bearer" and the victim or "responsibility beneficiary."

In many situations legal rules do not give rise to private lawsuits between plaintiffs and defendants: (1) Government officials may debate the adoption of regulations which give no private cause of action, but nevertheless affect rights and responsibilities. (2) When the legislature debates any statutory rule which alters the responsibilities and duties of parties in society, there are not as yet plaintiffs and defendants. (3) In criminal cases. there is never a private plaintiff, although there may be a victim.

Nevertheless, the forms of arguments set forth in this article would still apply to rule choices in these situations. even if the rules would never give rise to a private lawsuit. Thus, when I speak of "defendants" in this article, I mean persons who may be assessed additional responsibility, duties or punishment as a consequence of a particular rule choice. whether or not there is ever any subsequent legal proceeding in which they are named as a party. By "plaintiffs" I mean those persons who would be the beneficiaries of the additional responsibility, duty, or punishment, again. regardless of whether there are any subsequent legal proceedings.

actually incurs remedial or punitive measures by the community, the very presence of the larger responsibility inhibits her freedom of choice and action.

Because each rule on the left hand side creates greater responsibilities and duties than the rule on the right, the arguments for and against each rule will be similar. The arguments for the stricter rules on the left side will emphasize that heightened responsibility is necessary to protect innocent victims or those who might otherwise be injured by the defendants' activities. The arguments for the opposite rules on the right side will emphasize that the stricter rules run the risk of imposing liability when there is no moral blameworthiness, or that these rules unduly restrict the freedom of action and rights of self-determination of the defendants.

The debate about the proper scope of individual responsibility to others appears throughout the whole of the law. It is the reverse side of the problem of the proper scope of individual freedom in society. The debate is recapitulated in rule choices at ever), doctrinal level. There are two polar positions or directions of emphasis one can take in this debate. What I shall term the individualist position seeks to de-emphasize or minimize the responsibilities and duties of individuals to others in society. The communalist position seeks to emphasize and extend the responsibilities and duties individuals owe to others .[25]

In each of the previous examples, the left side of the dyad corresponds to the relatively communalist rule, which expands individual responsibility, while the right side of the dyad corresponds to the relatively individualist rule, which limits individual responsibility. This convention will be observed throughout the article.[26]

The individualist and communalist positions are more than a way of dividing up and categorizing rule choices. They represent two very different views about the individual's relationship to others and to society as a whole. They are polar philosophical positions. They contradict each other, yet are simultaneously present in our moral consciousness. The tension between them

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[25]This familiar opposition has been noted by many writers, most of them relying on Kennedy's description in Kennedy, *Form and Substance, supra* note 4. *See, e.g.,* Dalton, *Deconstructing Contract Doctrine,* 94 YALE L..J. 997, 1006 (1985) (opposition between self and other): Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld,* WIS. L. REV. 975, 980 (1982) (opposition between individualism and collectivism). As this literature demonstrates, the opposition can be characterized in a wide variety of ways. I do not claim that my employment of these terms is completely consistent with the meaning of any of the authors above. Kennedy's term for communalism is "altruism," which I do not use for reasons discussed *infra,* text beginning at note 31.

[26] In adopting this left-right convention, it is essential that the reader not confuse the distinction between individualism and communalism with that between liberalism and conservatism. Both liberals and conservatives take relatively communalist positions on some issues and relatively individualist positions on others. In general, American liberals tend to be individualistic with respect to the rights of criminal defendants and the rights of free speech and sexual autonomy, while conservatives tend to be more communalist on these issues. On the other hand, in the area of economic regulation, liberals tend to be more communalistic and conservatives more individualistic. *See infra* notes 132-33 and accompanying text.

reappears at every step of our moral and legal decision making[27] and manifests itself in almost every legal rule choice we encounter.[28]

The next step in our exploration of the crystalline structure of legal doctrine, therefore, must be an explanation and description of these opposed social visions.

B. The Nature of *the Opposition Between Individualism and Communalism*

The problem of moral choice is, at its deepest level, a question of what duties we owe to others in society, or to society as a whole. Indeed, moral choice only becomes coherent in a social context; a solipsist need have no scruples. Two polar positions contend over the relationship of self to others. One position is responsibility denying-it argues that duty and responsibility exist only so far as they are voluntarily created, embraced, and imposed upon the individual by the individual herself. The other is responsibility affirming-it holds that duty and responsibility exist insofar as they are created, embraced, and imposed upon members of the community by the community itself.

In its purest form, individualism argues that no moral imperative is binding except a freely chosen moral imperative. No sanction, expectation, or command of others can have any moral claim on an individual unless the individual has acknowledged and consented to its moral force. Thus, for the individualist, the only valid legislation is self-legislation, the only true duties are self-imposed duties, and the only enforceable restrictions are those the self has placed upon itself.

The individualist conception of duty determines the individualist conception of freedom, for freedom and duty are two sides of the same coin. Freedom in individualist terms is the unrestricted exercise of individual will; it is liberty from the constraints, expectations, and duties imposed by and owed to others. The self is free insofar as it chooses by itself for itself, and insofar as it is not held to be responsible for the effects of its choices on others.

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[27] In his critique of the Critical Legal Studies Movement, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984), Professor Louis Schwartz describes Kennedy's project as identifying individualism with Liberalism and altruism (communalism) as an anti-Liberal “CLS Alternative." *Id.* at 418. That identification is just as incorrect, I think, as the identification of individualism with political conservatism. *See supra* note 26. Liberalism (the social theory, not the American political position opposed to conservatism) is composed of both individualist and communalist elements. There is a constant pull in our thought at every level of legal discourse between individualist and communalist forms of argument. This opposition occurs *within* Liberal society and is inextricably woven into the fabric of Liberal social thought I do not claim that Liberalism is the *cause* of the opposition, so that if we could transcend our Liberal institutions the tension would magically disappear. *See infra* text accompanying notes 144-49. I do claim that the opposition itself is manifested in Liberal thought, so that neither side is characteristically “Liberal" or "Anti- Liberal." If the principle of freedom of contract in common law doctrine is comparatively individualistic, the common law principle of compensation for harm without a showing of fault is relatively communalistic.

[28]There are dyadic rule choices which do not recapitulate the tension between individualism and communalism, but instead mirror other sets of opposed legal ideas. These oppositions create their own structures, as discussed *infra* at text accompanying notes 67-68.

An example may help to clarify this point. Freedom of speech may be seen, in comparison with community imposed censorship, as a relatively individualist position. To say that the individual has complete freedom of speech is to say that no matter what harm her speech causes to others in society, or to society as a whole (in terms of hurt feelings, political unrest, violent reaction, damaged reputation, etc.), the individual will not be held accountable for her choice to express herself. Thus, the more liberty of speech she enjoys, the less responsible she is for the effects of her speech on others. The individualist direction, therefore, is the direction of greater freedom and correspondingly smaller duty and responsibility for the consequences of one's actions.

The polar position opposite individualism is communalism. For the communalist, moral imperatives are binding because they reflect the will of the community, and not the individual. Members of a community owe allegiance to its mores, ideals, and goals. All members of the community have duties and responsibilities to all other members. These duties and obligations are not the result of voluntary choice but preexist the self. If for the individualist duty was inseparable from self-legislation, for the communalist, duty is inseparable from communal participation. Self-realization only is possible through embracing the shared values and goals of the community.

The fact that preexisting mores of the community are imposed upon the self does not negate the self's freedom, for the self is part of the community that creates these duties. Under the communalist vision, one is truly free only when one can share in the benefits of participation in the community and enjoy the protection and security which membership in the community offers.[29]

Because the members of the community are responsible to each other, they are responsible for the consequences that their actions have upon each other. Members must weigh these consequences in making personal choices. They must choose not only for themselves, but for others, and for the community as a whole, and they will be held responsible for their choices if others are hurt or injured.

As an example, consider a system of criminal law. The very existence of such a system is a relatively communalist position. Under a system of criminal law, individuals who violate community standards are held responsible to the community for the consequences of their actions. Individuals who transgress the commands of the community will be required to submit themselves to its judgment and suffer penal sanctions imposed upon them by the community. In contrast to the philosophy of individualism, the fact that an individual's act was freely chosen, and was true to a

[29]We normally think of freedom as freedom to *do* something, in the sense of an absence of governmental coercion as to our choices, but freedom can also be freedom *from* something, in the sense of being free from worry about where one's next meal is coming from, feeling free to leave one's front door unlocked when one goes to the grocery store, etc. This second sense of "freedom" relies on security and social cohesion it is usually a more communalist conception of freedom, while the first is more often than not an individualist conception. When Franklin Roosevelt spoke of the "four freedoms," two of them were individualist in conception (freedom of speech and freedom of worship) and two of them were communalist in conception (freedom from want and freedom from fear). Message to Congress (Jan. 6, 1941).

personal system of values, will not excuse her from responsibility.[30] The communalist direction, therefore, is the direction of greater responsibility for (and correspondingly lesser excuse for) the consequences of one's actions.[31]

C. Individualism and Communalism as Orientations

It is misleading to think of individualism and communalism as coherent positions with definable agendas like political party platforms or religious dogmas. For example, my students are often given to say, "individualists believe in freedom of speech, and subjective standards in tort and criminal law; communalists believe in censorship and objective standards in tort and criminal law." It is more correct to say that in a rule choice between an objective standard and a subjective standard, the objective standard is the relatively more communalist rule choice. Objective standards are not communalist per se; Figure *3* above demonstrates that in a rule choice between an objective standard of negligence and strict liability, an objective standard is the relatively more individualist position.

To put the point another way, consider a continuum of increasing duty:

Figure 10

[30] To the extent that principles of justification, excuse, and diminished capacity are present in a system of criminal law, the responsibilities and duties of individuals to each other are limited. These principles are therefore relatively individualist.

[31] Duncan Kennedy has called the position opposite individualism "altruism." His conception stresses sharing, mutual protection, and sensitivity to the needs of others. Kennedy, *Form and Substance, supra* note 4, at 1717-22. These attitudes also form part of what I call the communalist position. However, the idea of communalism is broader than notions of altruism. Consider four separate cases: (1) a convicted murderer is sentenced to life imprisonment; (2) a car manufacturer is held strictly liable for distribution of a defective product; (3) a promisor is held liable for breach of a promise made without consideration but which induced reasonable reliance: and (4) a contracting party is held liable for failure to perform her contract in good faith.

In the first two cases, we do not think that society is asking the criminal or the manufacturer to act altruistically toward their respective victims; rather society is asking them to accept responsibility for the consequences of their actions. The fourth case and perhaps the third as well may sound more like the defendants are being "forced" to act altruistically, *see id.* at 1719, but consider how strange that expression sounds.

In fact, all four cases involve the imposition of societal duties on individuals to make them conform with societally determined standards of responsibility to others. This forces individuals to consider how their acts will affect others, and curtails their freedom of action to that extent.

This is not to deny that altruistic values are an important part of the communalist ideal. For example, by imposing strict liability in the second case, the manufacturer may be forced to spread risk and to pass the costs of non-negligent accidents on to consumers, who will then share the burden together. Certainly this sounds more or less altruistic. Altruism, however, is only one aspect of this social vision; the central idea is responsibility for the effects of one's behavior on others in the community, judged according to communally imposed norms---hence the term communalist.

A, B, C, and D are possible rules. Even if B is very far to the left on the spectrum, it is still an individualist position in comparison with rule A, and even if C is very far to the right on the spectrum, it is still a communalist position in comparison with rule D. In a totalitarian regime in which all speech is proscribed except speech about baseball, that position is still more individualist than a complete ban on expressive activity.

Thus, because individualism and communalism cannot be identified with specific rules but only with relative positions in rule choices, I will speak of them as "directions" or "orientations." The continuum is therefore the natural analogy.

There is a further reason why individualism and communalism cannot be seen as well-defined sets of positions like the platforms of political parties. These orientations, taken as far as possible in their respective directions, become intellectually incoherent. As one travels further and further in the communalist direction, one assesses more and more responsibility on every member of the community. Finally, everyone is liable to everyone else for everything. In such a state no one has any particular responsibility because everyone has responsibility. Collective guilt is noguilt at all; collective duty is no duty at all. The fruits of security provided by increased protection are devoured by the absolute liability of each individual for every act or failure to act.

Similarly, as one moves further and further in the individualist direction, persons in society become increasingly free to act in any way they desire without accountability or responsibility. Ultimately, anyone can do anything anyone likes toanyone else with impunity. In such a nasty and brutish state, freedom is indeed short-lived, for there is no protection of activity from persons who may use any means to prevent that activity. Freedom of speech is no freedom if there is also freedom of assassination. The fruits of freedom provided by increasing license are destroyed by the lack of a minimal level of security necessary to facilitate individual choice.

The paradox that results is that the communalist ideal of community participation requires freedom of action for its fullest enjoyment. The individualist ideal of fulfillment of individual autonomy requires communally established security in order to protect freedom of action. Just as freedom and duty are two sides of the same coin, which cannot exist without each other, so individualism and communalism are mutually dependent visions of society; the total denial of one vision results in the destruction of the other.[32]

III. THE RECURRING STRUCTURES OF LEGAL ARGUMENT

Lawyers, judges, legislators, and commentators make legal arguments every day. These arguments are employed quite unselfconsciously in order to explain and to win others over to their point of view. Yet it is remarkable to what degree the diverse body of legal doctrine produced by

[32] This antinomy is another manifestation of what Professor Kennedy refers to as the "Fundamental Contradiction." Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 211-13 (1979) ("[T]he goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it . . . . [R]elations with others are both necessary to and incompatible with our freedom . . . . ").

these legal thinkers reiterates the same basic ideas. This similarity is not accidental-it reflects the underlying structures of our legal and moral thought.

As an example of a recurring form of legal argument, consider the following series of policy arguments; in each case the argument is designed to prove that the imposition of a more stringent duty will hinder the very social goals it was designed to achieve:

(1) "Imposing an implied warranty of habitability won't help the poor at all-landlords will just raise the rent or go out of business and the poor will be thrown out into the street."

(2) "Outlawing abortions won't save human lives. Abortions will continue because the rich can afford them and the poor will be left to the mercy of unlicensed butchers at enormous risk to their health and safety."

(3) "Affirmative action programs actually hurt minorities in the longrun by subjecting them to stigmas by their fellow students or employees and to a greater chance of failure when they are brought into demanding situations without proper preparation."

(4) "Gun control doesn't prevent crimes or save lives-it just guarantees that criminals will have guns and innocent citizens will be helpless to protect themselves."

(5) "Truth in Lending laws drive up interest rates and the price of consumer goods and make it harder for the poor and the middle class to afford loans or to purchase things they really need."

The reader can doubtless think of many other similar arguments. All are individualist in character; they militate against the imposition of extra responsibility by arguing that the proposed rule will create undesirable consequences.[33]

The opposed social visions of individualism and communalism animate a large number of standard legal arguments. The goal of this section is to identify some of the most common forms of legal argument and demonstrate how they recapitulate the dialectic of individualism and communalism.[34]

The vast majority of legal arguments fall into one of seven categories:

(1) Arguments of Moral Responsibility and Desert;
(2) Arguments of Moral, Legal, or Political Right;
(3) Arguments of Social Policy and Social Utility;
(4) Arguments of Formal and Substantive Realizability;
(5) Arguments of Institutional Competence and Authority;
(6) Arguments of Equality; and

[33] As explained below, these are classified as individualist Social Utility arguments.

[34] In the descriptions that follow, I use Duncan Kennedy's terminology, with some modifications. *See generally,* Boyle, *Anatomy of a Torts Class, supra* note 4; Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power,* 41 MD. L. REV. 563 (1982); Kennedy, *Form and Substance, supra* note 4; J. Boyle, Legal Mystification and Legal Argument, *supra* note 4; D. Kennedy, Torts, *supra* note 4.

(7) Arguments of Precedent and *Stare Decisis*.[35]

The first three types of arguments fall along the individualistcommunalist axis. That is to say, there are individualist and communalist versions of each argument; for every individualist argument there is a communalist rejoinder, and vice-versa. The last four types of arguments represent separate axes of opposition in our legal and moral consciousness. Of these four, only arguments of Formal and Substantive Realizability will receive extended discussion in this article.

What follows next is a relatively simple description of the first three groups, designed to give the reader the general sense of the recurring types of arguments.[36]

A. *Arguments of Moral Responsibility and Desert*

Arguments about fault, intention, causation, act, and injury are perhaps the most basic in the law. They are most prominent in tort and criminal law. To introduce these arguments, consider the well-known case of *Vosburg v. Putney*, [37] where a twelve year old boy kicked another child on the shin, leading to an infection of the plaintiffs leg and the eventual loss of its use. *Vosburg* announces the now familiar "egg-shell skull" rule, namely, that once an intentional tort is committed, the "wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him."[38]

Consider what arguments defense counsel might have made to convince the judge that damages should be limited to foreseeable injury, which would have allowed the recovery of only nominal damages. One argument that springs immediately to mind is based upon a lack of moral responsibility by the defendant:

> It is unfair that my client should have to pay for all of this damage. He did nothing wrong---he only gave his schoolmate a playful kick on the shin. He did not know of the preexisting condition of the plaintiff. The injury was not foreseeable and it is not his fault that this unfortunate but completely uncontemplated result occurred.

The plaintiffs attorney would no doubt respond with equal vehemence:

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[35] This list does not exhaust the different forms of arguments that have been or will ever be made. For example, in the nineteenth century, courts occasionally made what I would call "conceptualist" or "definitional" arguments: that a certain legal conclusion necessarily followed from the definition of a particular legal concept, like intent, jurisdiction, sovereignty, power, and so on. I do not consider these forms of argument in this article.

[36] For those skeptical about the pervasiveness of these recurring structures, a more systematic and detailed account of the various types of individualist and communalist argument forms is presented in the Appendix on The Typology of Legal Argument. The Appendix lists not only the different forms of legal arguments but also gives numerous examples from judicial opinions and the writings of legal commentators.

[37] 80 Wis. 523, 50 N.W. 403 (1891).

[38] *Id*. at 530, 50 N.W. at 404; *see also* RESTATEMENT (SECOND) OF TORTS § 16(l) (1965).

It may be true that the defendant did not know of my client's preexisting condition and is completely innocent of any malicious intent. But my client is without the use of a leg through no fault of his own and deserves compensation. Since the defendant caused the injury he should pay for it.

The attorney for the defendant has made a quintessential individualist argument---No Liability Without Fault (which I will abbreviate as NLWF). The plaintiffs attorney made the classic communalist rejoinder---As Between Two Innocents, Let the Person Who Caused the Damage Pay (ASB21). We may represent the debate schematically:

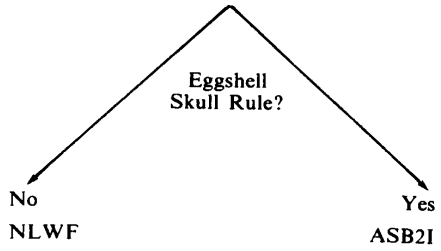

Figure 11

These two arguments are constant companions in the law of tort. The individualist argument is that responsibility should not be imposed without "fault." Here there is no fault because there is neither foreseeability nor bad intent. The communalist rejoinder is that the defendant must accept responsibility because the defendant's act caused injury to the victim, who deserves compensation.

At this point it may be objected that ASB21 is properly an individualist argument. After all, it is based upon the fact that the defendant has voluntarily acted and therefore assumed a duty. Thus, an argument for compensation might seem quite consistent with individualism. This objection is based on the incorrect assumption that individualism and communalism are coherent political positions rather than orientations. In context, the ASB21 argument is more responsibility-affirming than the NLWF argument. Thus, while the communalist ASB21 argument accepts the individualist notion that voluntary action of some sort is a prerequisite to liability, it denies that any more (i.e., fault) is required. Thus it is a *relatively* communalist argument. Similarly, the relatively individualist NLWFargument acceptsthe communalist conception that duty may be imposed in some circumstances (i.e., if there is fault), but denies that this essential element is present.

All individualist and communalist argumentsof Moral Responsibility and Desert share this contextual nature. The communalist arguments urge the imposition of liability because of the presence of some element X (whether fault, causation, intention, or injury), while the individualist responses argue for no liability because of the absence of some element Y. Thus, in tort law, the individualist argument of Moral Responsibility and Desert might take the following various forms:

The defendant is not responsible (should not have to pay) because:

(a) defendant did not cause any harm;
(b) it is not certain that defendant caused any harm;
(c) it is not certain how much harm the defendant caused;
(d) defendant did not intend to cause any harm;
(e) defendant did not intend to cause a particular kind of harm;
(f) defendant did not intend to cause a particular degree of harm;

(g) it was unforeseeable that defendant would cause the harm;
(h) the kind of harm defendant caused was unforeseeable;
(i) the degree of harm defendant caused was unforeseeable;
(j) defendant did not act;
(k) defendant did not act voluntarily;
(l) defendant took normal, natural, or customary precautions before acting;
(m) defendant has made what are (or what he believed in good faith to be) proper precautions before acting;
(n) plaintiff has suffered no harm;
(o) it is uncertain whether plaintiff hits suffered any harm;
(p) it is uncertain to "hat degree the harm plaintiff has suffered is attributable to defendant's acts;
(q) plaintiff was at fault; and
(r) plaintiff caused his own harm.

This list can be extended with sufficient imagination, but by now the reader should grasp the general idea. Conversely, the forms that the communalist argument of Moral Responsibility and Desert might take in the law of torts are:

The defendant is responsible (should have to pay) because:

(a) defendant caused harm to plaintiff;
(b) due to the nature of defendant's act it is uncertain that defendant did not cause harm to plaintiff;
(c) due to the nature of defendant's act it is uncertain how much harm defendant caused plaintiff;
(d) defendant intended to cause some harm to plaintiff;
(e) the harm to plaintiff was foreseeable;
(f) defendant acted;
(g) defendant did not take proper precautions; and
(h) it is not certain that defendant took proper precautions.

In criminal law, the arguments are very similar, except that the individualist arguments include ideas that criminal liability should not be imposed upon the defendant unless the defendant acted with free will, with fair warning of the criminal nature of his conduct, or with criminal intent (mens rea). Conversely, the communalist arguments are based upon the fact or the imputation or assumption that the defendant acted with the requisite degree of free will, fair warning, or criminal intent.

In my tort and criminal law classes, I classify arguments of Moral Responsibility and Desert as falling into a small number of general argument forms. The individualist arguments are:

Individualist Tort Law Arguments

(1) No Liability Without Fault (including foreseeability) (NLWF);
(2) No Liability Without Causation (NLWC);
(3) No Liability Without an Act (NLWA);
(4) No Liability Without Harm (NLWH);
(5) As Between Two Guilty Persons, Let the Loss Lie Where It Falls (ASB2G).

Individualist Criminal Law Arguments

(6) No Liability Without Free Choice (NLWFC);
(7) No Liability Without Fair Warning (NLWFW);
(8) No Liability Without Criminal Intent (NLWCI).

The ASB2G argument is normally used in situations involving the plaintiff's contributory fault or assumption of risk.[39] Each of the individualist argument forms has a communalist counterpart:

Communalist Tort Law Arguments

(1) Defendant's Fault Requires Liability (F → L);
(2) As Between Two Innocents, Let the Person Who Caused the Harm Pay the Damage (ASB21);
(3)Act at Your Peril (AAYP);
(4)Plaintiff's Harm Requires Liability (H → L);
(5)An Innocent Plaintiff Should Not Forfeit Recovery (NFWF(Plaintiff)).

Communalist Criminal Law Arguments

(6) Free Choice Existed (FCE);
(7) Fair Warning Existed (FWE);
(8) Criminal Intent Requires Liability (C.I. →L).

Specific examples of each of these forms of argument may be found in the Appendix.

[39]The ASB2G argument includes all forms of arguments in which the plaintiff's own fault or actions are claimed to be the (partial) cause of her own misfortune. These arguments are responsibility-affirming, yet they are individualist, for the responsibility they affirm is that of the *plaintiff*, not the defendant. The idea of "Rugged Individualism" encompasses the notion that victims are responsible for themselves and that neither other parties nor the state are responsible for what befalls them.

Combining tort and criminal arguments, we derive the following dyad:

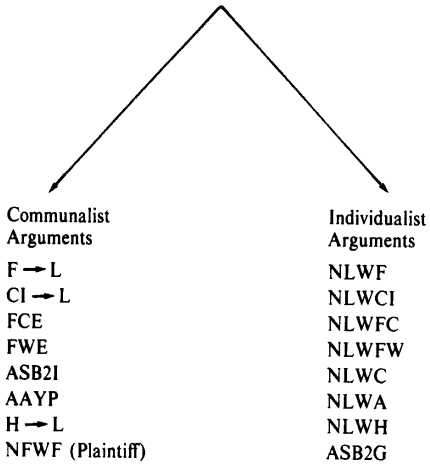

Figure 12

Two caveats must be made here. First, the "No Liability Without Fault" argument form includes arguments such as "Defendant was at fault to some degree but not to the degree that he should have to pay for all the damage." This is the argument used in *Vosburg v. Putney,* and is essentially an argument that liability should be proportionate to fault. Similarly, communalist argument forms such as "Fault Requires Liability" and "An Innocent Plaintiff Should Not Forfeit Recovery," include arguments of the form "The plaintiff was at fault to some degree, but the defendant should not escape liability for his degree of fault." This is the sort of communalist argument which might be used in opposition to the relatively individualist defense of contributory negligence. It, too, is an argument for proportionate fault, albeit in the opposite direction.

Second, it is important to understand that the argument forms presented above are not ideal types with an independent reality. Rather, they are merely heuristic devices for gathering together policy arguments which share certain features. Classifying them enables us to see how the same basic forms of thought are repeatedly utilized in policy arguments concerning notions of fault, act, causation, and the like.

Whenever a dyadic rule choice is presented in tort and criminal law that splits along individualist-communalist lines, the parties will make individualist and communalist arguments of Moral Responsibility and Desert described in the lists above. Given any such argument, there is a natural rejoinder among the arguments on the opposite side of the dyad.

As a first example, consider the case of *Rylands v. Fletcher,* [40]an early English precursor of modern strict liability doctrine. The opinion of Baron Martin in the intermediate court makes the following argument of Moral Responsibility and Desert against strict liability:

[40] 3 H.&C. 774, (Ex. 1865).

> To hold the defendants liable would therefore make them insurers against the consequence of a lawful act upon their own land when they had no reason to believe or suspect that any damage was likely to ensue.[41]

This argument is No Liability Without Fault (NLWF), an individualist argument.

In the House of Lords, Lord Carins responded that "that which the Defendants were doing they were doing at their own peril [42] (Act At Your Peril (AAYP)), while Lord Cranworth observed:

> [W]hen one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. [As Between Two Innocents (ASB21)][43]

This debate can be diagramed as follows:

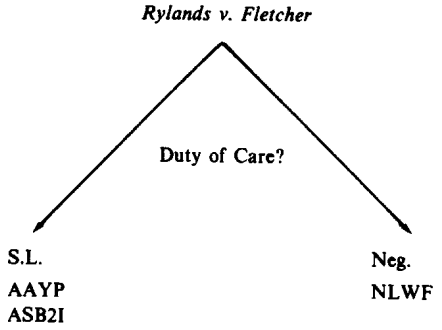

Figure 13

Note the similarity to the diagram of the arguments in *Vosburg v. Putney*. Using the dyads allows us to map the structure of the argument forms, and we can see that the debate over the eggshell skull rule has a similar structure to the debate over strict liability versus negligence.

A second example, this time from criminal law, is *Regina v. Prince*,[44] where the court held that a mistake of fact (the age of the victim) would be no defense to the crime of taking an unmarried girl less than sixteen years old out of the possession and against the will of her father.[45] Baron Bramwell argued that the defense of mistake of fact should not be permitted because what the defendant believed he was doing was "wrong in itself"[46] (Criminal Intent Requires Liability (C.I. -

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[41] *Id.*

[42] L.R. 3 H.L. 330 (1868).

[43] *Id.*

[44] L.R. 2 Cr. Cas. Res. 154 (1875).

[45] *Id.*

[46] *Id.*

L.)), and because "[t]he legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen."[47] (Act At Your Peril (AAYP)). Brett, J., dissented on the grounds that "if the facts had been as the prisoner . . . believed them to be . . . he would have done no act which has ever been a criminal offense in England."[48]

Brett's argument might be classified as either a No Liability Without Fair Warning (NLWFW) or a No Liability Without Criminal Intent (NLWCI) argument; hence the following diagram:

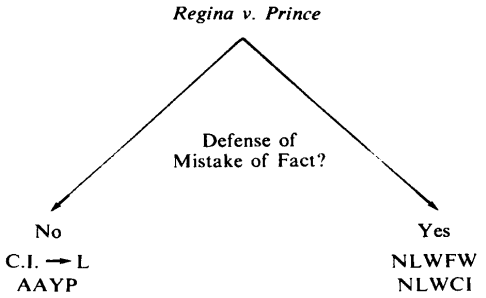

Figure 14

Although the specific arguments change, individualist arguments of Moral Responsibility and Desert will always be met with communalist arguments of Moral Responsibility and Desert, regardless of the nature of the issues involved.

B. *Arguments of Moral, Political, and Legal Right*

Rights arguments form a class of moral and legal rhetoric distinct from arguments of Moral Responsibility and Desert on the one hand ("defendant ought to do this"; "plaintiff deserves that"), and arguments of Social Policy and Social Utility on the other ("the best consequences would flow from this rule"). Rights arguments usually take the form: "the rule should be X because the party has a right, which a contrary rule would abridge." This is a distinct form of argument even though people differ about (1) the *source* of rights (political, legal, or moral) and (2) the philosophical justification of rights (deontological or utilitarian).[49]

The individualist conception of rights is based upon freedom from responsibility for the consequences that one's acts have upon other members of the community and freedom to exercise personal autonomy without community interference. Hence the standard individualist rights arguments are that the defendant-actor has a right to act as she pleases without incurring liability to

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[47] *Id.*

[48] *Id.*

[49] Thus, people who believe that rights only exist because they maximize the happiness of society may argue nonetheless that plaintiff or defendant has a right, and in the next breath add a social policy argument in support, as if these were two different things. I take no position on the "real" source of justification of rights; my concern here is with how arguments about rights are used.

the plaintiff (Rights as Freedom of Action-R.F.A.), or that the defendant-actor has a right to engage in activity free from governmental regulation (Rights of Individuals-R.I.).

The communalist vision of rights is grounded upon a wholly different premise. People have rights not in order to enjoy freedom of action, but to demarcate spheres of security. Moreover, the community itself has the "right" to safeguard its members through regulation of their activities. Thus the communalist rejoinders to the Rights as Freedom of Action and Rights of Individuals arguments take the form, "Plaintiff has a right to be secure from invasions of her interests by the defendant" (Rights as Security-R.S.), and "The State has the right to regulate the defendant's activities in order to protect the welfare of its citizens (Rights of the Community-R.C.)." In criminal law, the argument is most often seen as the rights of criminal defendants (individualist rights) versus the rights of victims, their families, law enforcement officials, and the community as a whole (communalist rights).[50]

Whenever an individualist rights argument is made, it is always possible to make an communalist rights argument in response. This response simply asserts that there are important rights on the other side. In addition, one can make arguments which are the denials of the R.F.A., R.I., R.S. and R.C. arguments; for brevity's sake, I shall demarcate as them as NoR.F.A., NoR.I., NoR.S., and NoR.C. The first two arguments are communalist, the second two are individualist. The Appendix describes the various forms of rights arguments in more detail, but I will point out the most common forms here:

(1) Trivialization---making the exercise of the right appear unimportant or otherwise unworthy of protection.

(2) Slippery Slope---the right once recognized would have no logical or principled stopping point.[51]

(3) No Violation or Adequate Alternatives Exist---even if the right exists, it is not abridged because there are other ways for the complaining party to achieve her goals.

One can respond to these arguments with more sophisticated forms of rights arguments:

(1) Detrivialization---recharacterizing the right to make it look important and worthy of protection.

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[50] Note that in the criminal cases, the rights argument for the defendant is usually not that she had the right to act as she did but that her prosecution violates some other right that she is guaranteed (for example. due process, or the right to be free of unreasonable searches and seizures). The argument that the criminal defendant had a right to do what she did normally arises only (1) when the issue is whether certain conduct (e.g., so-called "victimless" crimes like gambling) should be made (or can constitutionally be made) a crime, (2) when the issue is one of construction of a criminal statute, or (3) "when the defendant is in effect making a *jus tertii* (or overbreadth) argument--that the statute is invalid because it applies to the conduct of others which should not (or cannot) be made criminal.

[51] This is related to the Formal Realizability argument. *See supra* text accompanying notes 28-31.

(2) Anti-Slippery Slope---the existence of difficult cases does not negate the importance of protecting the right; reasonable boundaries can be drawn to demarcate its scope.[52]

(3) Alternative Remedies do not Exist---the abridgment of the right is substantial and the right cannot be meaningfully exercised in other ways.

We can summarize the various forms of rights arguments in the following diagram:

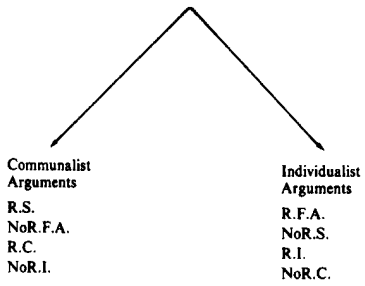

Figure 15

To see how these arguments interact in a specific doctrinal setting, consider a debate about abortion rights in the context of a state statute that makes abortion a crime. The relatively individualist position would oppose the statute because the statute would create an additional duty owed to others. The relatively communalist position would favor the statute because the statute increases the responsibilities or duties persons owe to each other.[53] Using the various forms of rights arguments described so far, a hypothetical debate might go as follows:

[52]This argument is related to the Substantive Realizability argument. *See infra* text accompanying notes 73-74.

[53]The claim that a pro-choice position is relatively more individualist is supported by the fact that recent defenses of the right to abortion have been made by analogy to the common law tort rule of no duty to rescue, also a relatively individualist position. *See* Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Thompson, *A Defense of Abortion*, I PHIL & PUB. AFF. 47 (1971). Similarly, a pro-life position is relatively communalist, since it argues that the mother is obligated to share her body with the fetus for the term of pregnancy.

(1) A woman has no right to an abortion on demand (NoR.F.A., NoR.I.).

(a) A woman has no right to murder an innocent human life for her own convenience. (Trivialization)

(b) If this right is recognized, women will be able to abort fetuses up to the time of birth. It is impossible to draw rational lines between the moment of conception and birth. The "viability" concept is too vague, artificial and imprecise. (Slippery Slope)

(c) If a woman does not wish to be saddled with an extra child, she can put up with the inconvenience of carrying it to term and put it up for adoption. Or she can decide to use birth control next time or abstain from sexual activity. (No Violation, Alternative Remedies Exist)

(2) The fetus has a right to life (R.S.).

(a) The fetus is a person and like anyone else has a right not to be

(1) A woman has a right to abort a fetus if she chooses (R.F.A., R.I.)

(a) A woman has the right to be able to control her body without interference from the government. (Detrivialization)

(b) The fact that no hard and fast lines can be drawn does not mean that some abortions, relatively early in the term of pregnancy, should not be permitted. Reasonable lines can be drawn based upon concepts like viability. (Anti-Slippery Slope)

(c) The issue is not only raising the child but being forced to carry it in the mother's body for nine months. This is hardly an "inconvenience" and may pose serious health hazards to the mother. Adoption is not an effective solution to the issue of the right of bodily control.

The use of birth control is not an effective alternative because no birth control method is 100% effective and many may pose health hazards to the woman. The choice to abstain from sexual relations altogether is an unreasonable one to expect from people and is itself an abridgement of rights of personal autonomy. (Real Violation of Rights; Adequate Alternative Remedies do not exist)

(2) The fetus has no rights to survive when placed in comparison with the woman's right. (NoR.S.)

(a) The fetus is not a person but only a clump of cells

murdered. (Detrivialization)

which relies on the mother's body for its existence and will only become a human being if it is carried to term. (Trivialization)

(3) The State has the right to protect the life of the fetus (R.C.).

(a) The State has a right to protect innocent life from destruction.(Detrivialization)

(b) Reasonable regulations can be drawn to permit abortions in narrowly selected circumstances, for example, where another innocent human life is endangered. (Anti-Slippery Slope)

(3) The State has no right to interfere with the mother's free choice (NoR.C.).

(a) The State has no right to force the woman to become an incubator against her will. (Trivialization)

(b) This principle would forbid abortions even in cases of rape, incest, or where the mother's life or health was endangered. (Slippery Slope)

The reader will recognize many familiar arguments in this hypothetical debate; some may seem convincing and others less so. The substantive worth of the arguments, however, is irrelevant here. The point of the example is that the *structure* of the rights debate about abortion is the same as that below:

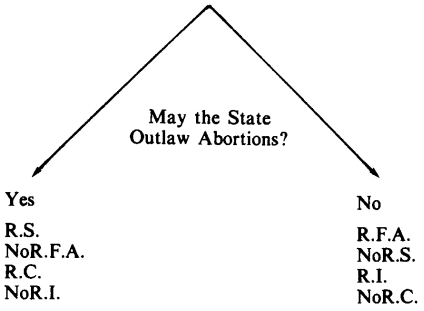

Figure 16

Whenever a dyadic rule choice divides along individualist-communalist lines, rights arguments will line up according to this structure: individualist arguments will be chosen from the group on the right, and the communalist responses from the group on the left. This is exactly the same structure we observed in arguments of Moral Responsibility and Desert, and which we will observe again in arguments of Social Policy and Social Utility.

C. *Arguments of Social Policy and Social Utility*

Arguments of Social Policy and Social Utility concern the practical consequences of a particular rule choice---that rule X would have better consequences than rule Y. These arguments

are often expressed in terms of broad social policies that their advocates believe the law should foster.

The communalist version of the Social Utility argument is that increasing duties and responsibilities that individuals owe to others will make everyone better off because people will feel more secure and protected. This, in turn, will lead to a more stable, productive, and happy society. On the other hand, the more license people are given to selfishly pursue their own narrow ends, heedless of the consequences of their acts, the more others will fear engaging in socially beneficial activities. Paradoxically, more freedom of action in the short run will lead to less freedom of action in the long run.[54]

The individualist version of the Social Utility argument is that by limiting duties and responsibilities owed to others in society and thereby increasing the scope of freedom of action, everyone will benefit. People will feel free to act without having to consider every possible effect that their actions may have on others. This will stimulate activity, self-reliance and competition; it will produce a wider range of alternatives for people, and everyone will benefit in the long run.[55] The more restrictions and regulations are placed upon people's activities, the less incentives they will have to produce, achieve, and accomplish things that are in the best interests of society as a whole.

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[54]Related to this is the "competitive pathology" argument. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L, REV. 563, 601-02 (1982). Unless there is some regulation of activities, the "bad will drive out the good" and freedom of choice will be restricted by the resulting impoverishment of social goods. These arguments are one form of the "Regulation" arguments discussed *infra* at text accompanying notes 225-35 in the Appendix. Examples:

(1) Strict liability for consumer products is necessary to ensure that manufacturers continually improve the safety of their products; otherwise unscrupulous manufacturers who do not test their products will be able to underprice conscientious businessmen and drive them out of business or else force them to cut corners to stay in the market; in either case, the ultimate loser will be the public. *See id.*

(2) Unless libel laws are enforced the level of public debate will be reduced to the gutter, and decent persons who are interested in serving the public will refrain from entering public life, leaving the country to the demagogues.

(3) Unless the government regulates the airwaves and allows only licensees to broadcast, everyone will drown everyone else out in competition for scarce airspace and only the people with the "loudest voices," i.e., the most powerful transmitters (and the most money) will be able to speak.

(4) Similarly, unless there is regulation of the type of programs shown on television the only shows which will survive the struggle for ratings will be those which appeal to the lowest common denominator of public taste.

[55]The classic statement of this position is Justice Brandeis'defense of free speech in Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They believed that freedom to think as you will and speak as you think are means indispensible to the discovery and spread of political truth~ that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression: that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy of evil counsels is good ones.

When economic rights are involved, this form of argument becomes a justification for *laissez-faire:* "No external force, no coercion, no violation of freedom is necessary to produce cooperation among individuals all of whom can benefit." M. FRIEDMAN, FREE TO CHOOSE 2 (1980). "We are again recognizing the dangers of an over governed society . . . that reliance on the freedom of people to control their own lives in accordance with their own values is the surest way to achieve the full potential of a great society." *Id*. at 309-10.

Restrictions on freedom of action discourage productive activity because the actors fear that they will be penalized for their actions or that they will be unable to enjoy the fruits of their labor. Paradoxically, then, the more security is protected in the short run, the less secure people will feel in the long run.[56]

There are many different versions of the Social Utility argument, ranging from deterrence arguments in criminal law to economic arguments in tort law. These are explained in more detail in the Appendix.[57] What is important for our purposes is that the structure of the Social Utility arguments in doctrinal rule choices is always the same:

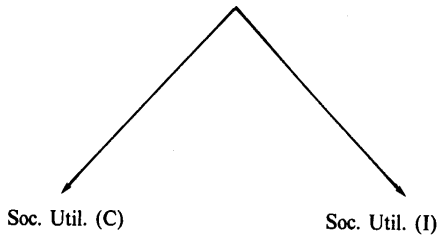

Figure 17

For an example of these arguments in a particular doctrinal context, consider a debate over whether landlords may be sued for negligence if they fail to exercise due care in inspecting and maintaining leased premises.[58] The individualist position will be against implying a duty of due care in the lease absent an express agreement to that effect, while the communalist position will favor the implication of such a duty regardless of whether it is explicitly assumed in the lease.

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[56] The antinomy between rights of security and rights for freedom of action is recapitulated in Social Utility arguments as competing claims that society *is better off* if security or freedom of action is increased. A special case of the individualist social utility argument is a call for free economic competition, while a special case of the communalist argument is a call for protection of property rights. The antinomy between property and competition is thus reflected in the antinomy between individualism and communalism.

[57] *See* Appendix text accompanying notes 194-244.

[58] *See* Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

Communalist:

(1) The court should imply this duty in order to ensure that rental property is safely maintained. Unless the landlord is held responsible, tenants may suffer serious physical injuries.

(2) The landlord is a cheaper cost avoider because he is in a better position to repair and maintain the premises due to the nature of his business.

(3) Without this duty, landlords will have insufficient incentives to repair and maintain the premises. Tenants lack the resources to perform such repairs themselves, and lack the incentives because they are renters and not owners.

(4) The landlord is better able to afford the extra costs the duty imposes and he can purchase insurance to spread the risk.

(5) Even if parties do not include this duty in their rental agreements the courts need to impose this duty in order to assist the tenants. The tenants may not have the duty included in their leases (even though it is socially desirable and in their best interests to do so) because

(a) the landlords have superior bargaining power.

(b) Tenants underestimate the dangers involved in not bargaining for this extra duty.

Individualist:

(1) If we want to ensure that rental property is safely maintained, the best way to do so is to have less liability, because this will encourage tenants to locate problems and correct them if it is cheaper for them to do so.

(2) In fact the tenant, who lives in the building, is more likely to know what needs to be fixed; the landlord often lacks easy access to apartments that are currently being rented to tenants.

(3) If we imply this duty, tenants will have insufficient incentives to take care of their premises and prevent injuries from occurring.

(4) The tenant is free to purchase insurance to spread the risk himself. If the tenant wants the extra protection from the landlord, he is free to pay a higher rent to the landlord in exchange for a duty of care. The fact that most leases do not contain such provisions indicates that it is not worth it to the tenant (or to society).

(5) Imposing a duty will not help the tenants, because

(a) The landlord will raise the rent, consuming more of the tenants' disposable income or forcing tenants who cannot afford the increased rent to move into even worse housing. Some tenants will be forced to purchase extra protections they don't want or need.

(b) Some landlords will go out of business because of the extra expenses of maintaining their property, thus reducing the supply of housing and making housing even more expensive for tenants.

Now that we have discussed the three basic forms of individualist and communalist arguments, we can summarize the results. Whenever a dyadic rule choice is presented along the individualist-communalist axis, the debate between the opposing rules will look like this:

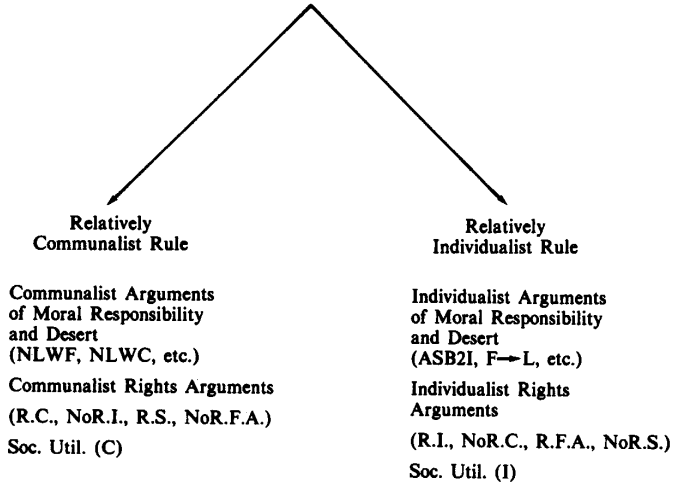

Figure 18

IV. THE CRYSTALLINE STRUCTURE OF LEGAL ARGUMENT

The thesis of this Article is that debates over the content of legal rules have a similar structure, regardless of the area of law or the level of doctrinal complexity. What follows now are demonstrations and examples of the crystalline structure of legal argument.

A. *A Simple Example of Crystalline Structure*

Let us again take up our example from Holmes's *The Common Law*. In his chapters on the foundations of tort law, Holmes argues both for a negligence standard over strict liability and an objective over a subjective standard of negligence. We may translate this discussion into dyads as before:[59]

[59]The following abbreviations are used for argument forms:
ASB21 = As Between Two innocents, Let the Person Who Caused the Damage Pay
NLWF = No Liability Without Fault
Soc. Util. (C) Communalist Social Utility Argument
Soc. Util. (I) Individualist Social Utility Argument
R.S. = Rights as Security
R.F.A. = Rights as Freedom of Action
No R.F.A. = Denial of Rights as Freedom of Action
No R.S. = Denial of Rights as Security

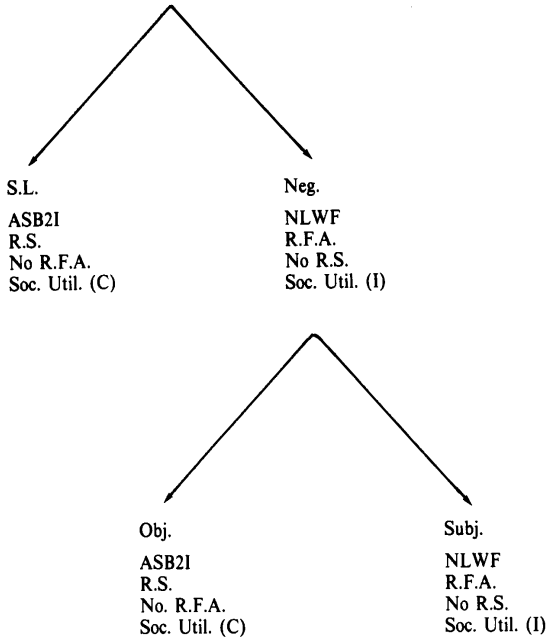

Figure 19

Consider the following arguments for a negligence standard over that of strict liability:

(1) Losses should not be shifted onto parties unless they are morally blameworthy. It is unfair to make a defendant pay for creating an injury that she could not have foreseen; it makes no more sense to make a defendant act at her peril than it would to make her indemnify the plaintiff if the injury was the result of an epileptic seizure. The defendant should not be made an insurer of the plaintiff's losses. (NLWF)

(2) The defendant has the right to act in anyway she wishes without interference by the state as long as she does not perform a morally blameworthy act. It is an abridgment of her rights to allow the state to redistribute income from the defendant to the plaintiff simply because the plaintiff has been injured. Social life would lose much of its value if defendants were liable for every accidental injury they caused, no matter how unforeseeable. We must each give up something to live in society together, and it is impossible to provide everyone with an absolute guarantee of security. (R.F.A., No R.S.)

(3) A rule of strict liability will not result in greater safety and fewer accidents, since under a negligence standard companies will already be making a socially desirable investment in safety. Instead of improving accident safety, strict liability will drive companies out of business due to the extra costs of compensation, and will make people too afraid to engage in socially desirable activities out of the fear that they will be held liable for the most unforeseeable accidents and even if they take all reasonable precautions. It is better to let people buy their own insurance against unforeseeable accidents than to force innocent defendants to shoulder the burden. (Soc. Util. (1))

The communalist responses are:

(1) Regardless of the fault of the defendant, her actions have caused injury to the plaintiff. The plaintiff is no less injured because the defendant's act was not blameworthy, and the plaintiff deserves compensation. Since the defendant caused the damage, she should pay. When a defendant acts in a way to cause damage to an innocent person, she acts at her own peril. (ASB21)

(2) The plaintiff has a right to be free from injuries inflicted on her. Social life would lose much of its meaning if people could injure each other with impunity. We must give up something to live in society together, and society cannot allow defendants who cause damage to others absolute immunity from the consequences of their acts, no matter how well motivated. (R.S., No R.F.A.)
(3) Strict liability will ensure that people take precautions before they act in a way that might cause danger to others. Companies will be more likely to invest in an appropriate amount of safety since they know that it will be more difficult for them to escape liability. Companies will not go out of business or overinvest in safety since they will invest in safety to the extent that it is profitable and pay money damages for all non-negligently caused accidents; they will continue to produce as long as they can make some profit, and they will simply pass the extra costs of non-negligent accidents along to their customers. Strict liability will spread the costs of accidents rather than having all of the costs fall freakishly on a few unfortunate victims. (Soc. Util. (Q)

However, after arguing in favor of a negligence standard, Holmes argues against the relatively individualist position of a subjective standard of negligence. Yet the arguments for a subjective standard will be of the same type (individualist) as those in favor of negligence as opposed to strict liability.[60] Similarly, the arguments in favor of an objective standard of negligence (which Holmes supports) are communalist arguments of the same type as those in favor of the strict liability standard that Holmes rejected.[61]

Going down a level of doctrinal complexity, the next dyadic rule choice concerns whether there should be a special standard for children. Again, the arguments for the relatively individualist

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[60] (1) Losses should not be shifted unless the defendant is at fault. If the defendant exercised all precautions to the best of her ability, an objective standard of negligence would hold her liable for dangers that she could not have foreseen. The particular level of understanding and ability Nature has given her is not her fault and she should not be punished for it. (NLWF)

(2) The state has no right to punish a person unless she acted in amorally blameworthy fashion. If a defendant acted to the best of his ability given her knowledge and understanding, it is unfair and an abridgment of her rights to take property from her simply because another person might have seen the danger. Plaintiffs do not have the right to expect that everyone in society will have the same level of understanding and ability. (R.F.A., No R.S.)

(3) An objective standard of negligence will not result in greater safety and fewer accidents. It will simply act as a trap for unwary defendants who cannot meet an artificial standard postulated after the fact by juries and lawyers. The objective standard of negligence either will have no effect on the level of investment in safety, since everyone thinks that they act reasonably, or else will cause people to overinvest in safety since they will have no way of knowing how much safety is considered "reasonable." They can only define reasonableness by their own standards, which is by definition insufficient. It is easier and more efficient for victims to self insure against the cost of accidents, than to shift losses in an arbitrary fashion based upon some ad hoc standard of reasonableness. (Soc. Util. (I))

[61] (1) If a person is born hasty or awkward, she may be blameless for the accidents she unwittingly causes, but the injuries she accidentally causes her neighbors are no less real than if they were caused by a blameworthy neglect. They deserve compensation, and as between the innocent parties, the person who is causally responsible should compensate the other. (ASB21)

(2) People have a right to walk about in society without fear of injury from stupid and incautious people, no matter how well-intentioned. People have to give up something to live in society, and imprudent people must recognize that they act at their own peril when they act rashly. (R.S., No R.F.A.)

(3) An objective standard of negligence will act as an incentive for people to live up to reasonable standards of caution and to make socially desirable investments in safety. (Soc. Util. (C))

position resemble the arguments in favor of negligence and a subjective standard,[62] while the arguments for the relatively communalist position resemble the arguments for strict liability and an objective standard .[63]

The similarity continues at the next level of doctrinal complexity. The issue is whether there should be an exception to the exception (that is, whether to apply the reasonable person standard) when the child is engaged in an adult activity, such as driving an automobile. The individualist position is that no subexception should be made,[64] while the communalist position supports the use of the reasonable person standard.[65]

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[62] (1) Children are incapable of the same degree of caution and foresight as adults. To hold them to a reasonable person standard is to hold them liable when they are without fault. (NLWF)

(2) Children have a right to grow and develop, and their parents have a right to raise them in the manner that they see fit. The state has no right to punish either the parent or the child for failing to conform to adult standards. Plaintiffs cannot rightfully expect that children will behave like adults. (R.F.A., No R.S.)

(3) If a reasonable person standard is applied to children, parenting will be inhibited because parents will be discouraged from allowing their children to experiment and learn about the world. Children cannot conform to adult standards so the rule will not have the effect of making them more careful. (Soc. Util. (I))

[63] (1) A person injured by a child is no less hurt because the person injuring is a child. (ASB21)

(2) People have a right to go about in the world without fear of being injured by children whose parents do not adequately supervise them. Children and their parents cannot expect to injure innocent persons with impunity and they have no right to jeopardize other lives so that children may "spread their wings." (R.S., No R.F.A.)

(3) An objective standard will encourage children to grow up with proper standards of behavior and will encourage parents both to supervise their children more effectively and to inculcate their children with proper respect for the rights of others. (Soc. Util. (C))

[64] (1) A child who drives a car to the best of her skill and ability should not be punished. Holding a child to an adult standard when driving an automobile will impose liability when the child was not at fault. (NLWF)

(2) If a child can pass a driver's exam she is as entitled to drive a car as an adult, and should not be held to an artificial standard of behavior. Motorists should not expect that children will behave exactly like adults. (R.F.A., No R.S.)

(3) Holding children to an adult standard will not increase traffic safety since children cannot be expected to conform to adult standards. Instead, it will simply make it more difficult for people to learn how to drive effectively by discouraging children from practicing their driving skills. (Soc. Util. (I))

[65] (1) A motorist is no less harmed because the car which crashes into him was driven by a child. When a child engages in an adult activity (or her parents permit her to engage in such an activity), she does so at her own peril and should be judged by adult standards. (ASB21)

(2) An innocent motorist has a right to expect that the persons who are driving on the same streets will conform to and be held to reasonable standards of safety. This is especially so since a motorist has no way of knowing the age of the drivers in other automobiles. A license to drive is not a license to engage in reckless behavior, and a licensing scheme is in fact evidence that the state regards the activity as potentially dangerous. (R.S., No R.F.A.)

(3) The adult activity rule will reduce traffic accidents and ensure that parents will teach their children how to drive properly and that parents will not let their children drive unless the children are responsible. (Sec. Util. (C))

This crystalline structure will be found at each succeeding level of doctrinal complexity.[66] Equally important, the same structure will appear if we shift our focus to other areas of doctrine.[67]

Although the examples just considered have come exclusively from tort law, the same principles apply in other areas of the law as well.[68]

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[66] In fact, even at the level of application of law to fact there should, in theory, be communalist and individualist forms of argument. Because lawyers are able to disagree about how facts are to be characterized, or how facts are to be applied to preexisting legal standards, the same oppositions which are present concerning the choice of rules will reappear (albeit in disguise) in legal arguments about facts. This is especially true in the case of ultimate facts like the presence or absence of causation, intent, or negligence. The communalist arguments will be used to characterize factual situations so as to increase defendant's responsibility; the individualist arguments will be used to characterize factual situations so as to minimize defendant's responsibility.

[67] Consider a debate over whether there should be a complete or an incomplete defense of necessity in intentional tort. Under a complete privilege, an intentional tort committed against a chattel in order to preserve a valuable legally protected interest (a person's life or a more valuable chattel, for example), does not give rise to liability, while under an incomplete privilege, compensation must be made, although the tortfeasor may not legally be interfered with. RESTATEMENT (SECOND) OF TORTS §§ 262, 263 (1965).

The relatively individualist position is for an expanded principle of justification or excuse, and hence for the absolute privilege, while the relatively communalist position is for an incomplete privilege.

In favor of a complete privilege:

(1) I There should be no duty to pay when it is necessary for the defendant to destroy property in order to save something more valuable. The defendant is doing the socially desirable thing and cannot be considered morally blameworthy for so acting. Therefore it is unjust to punish her. (NLWF)

(2) A person has a right to save her own life or a very valuable piece of property ifthe only way to do it is to destroy less valuable property. The owner of the property cannot expect the plaintiff to surrender her interests to save a less valuable one. This is especially the case where the defendant's life is at stake. (R.F.A., No R.S.)

(3) Unless an absolute privilege is given, people will be less willing to do the more socially desirable act, that is save the more valuable interest, because of fear that they will have to pay for the damage. Even ifit is clear that the defendant's interest is more valuable, defendants may hesitate in emergency situations because they are unsure that an emergency exists that will justify their actions, with the result that more valuable interests will be destroyed. (Soc. Util. (I))

In favor of an incomplete privilege:

(1) Although defendant may have acted in the face of a real emergency, she has still destroyed the plaintiff's property and it would be unjust not to require her to make compensation. (ASB21)

(2) The plaintiff has a right to the security of her possessions and to compensation if they arc destroyed, even in the interest of a socially desirable result. The defendant has no right to unjust enrichment by using the plaintiffs property to save her own without compensating the plaintiff. (R.S., No R.F.A.)

(3) Even with an incomplete privilege, people will still protect more valuable interests, simply because they are more valuable. No one who finds herself in an emergency will allow herself to perish for fear that she will have to pay damages later. In any case, an incomplete privilege will actually save more lives and property because plaintiffs will be less likely to interfere with defendants if they know that they will be compensated no matter whether the emergency is real or not. (Soc. Util. (C))

[68]Consider, for example, the dyadic rule choices listed in Figures 2a-d, *supra*. The reader may protest that legal rules in highly technical areas like taxation cannot display a crystalline structure. This might appear to be the case because the opinions of courts in tax cases normally make arguments concerning congressional intent. They do not appear as concerned with public policy as opinions concerning questions of common law. In reality, these arguments are highly complex combinations of structures created by several different axes of opposition, including axes of opposition which produce various forms of institutional argumentation.

At the level of tax policy, however, where Congress decides what and how much to tax, individualist and communalist positions are readily identifiable. For example, a classic individualist Social Utility argument is that

B. *Complicating the Model-Other Axes of Opposition*

Not every choice of legal rules can be aligned along the individualist-communalist axis. Here is an example:

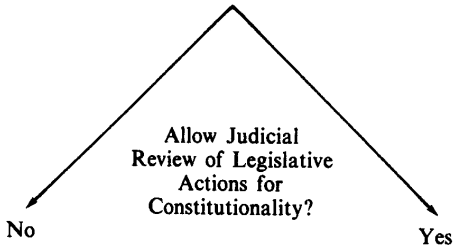

Figure 20

Try as one might, it is impossible to position all of the arguments regarding judicial review along the individualist-communalist continuum. Instead, the dyad represented in figure 20 involves a different axis of opposition. The arguments associated with each side of the opposition concern who is the proper or competent group in society to create, implement, or interpret legal rules. I shall refer to these types of arguments as Arguments of Institutional Competence and Authority. In the above dyad, for example, we have an opposition between the concepts of Judicial Power and

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higher taxes will discourage the formation of capital and stifle desirable economic initiative; the communalist rejoinder is the Social Utility argument that taxes are needed to fund social programs and achieve redistributional goals. For a recent example consider the individualist argument for a value added (consumption) tax as opposed to an income tax: "[T]he value-added tax does not discourage saving the way an income tax does. Assuming any increased saving is absorbed by higher real investment spending, a value-added tax may be superior to an income tax in fostering capital formation and economic growth." *Tax Reform for Fairness, Simplicity, and Economic Growth- Value-Added Tax* 19 (Report of the Treasury Department to the President, 1984).

Traditional justifications of the power of governments to tax their citizens involve the antinomy between the individualist and communalist orientations. A relatively individualist position would deny the individual's responsibility for inequitable income distribution and would oppose surrendering the fruits of individual activity for an alleged "common good." A preference for progressive tax rates would normally be a relatively communalist position, since it would stress the social creation of property and the obligations that all members of society have to each other to share wealth:

> Progressivity is criticized . . . by those who view a taxpayer's income as essentially the fruit of his or her own labor and resources. Under this view, the government should have very little role in equalizing the amounts with which individuals are left after taxes, since individuals arc entitled to whatever income arises from their own labor or property. This view is, in turn, contested by those who contend that labor and property have value only because society establishes laws and regulations which allow each individual to engage in economic activity with relatively little interference from others . . . . Thus, because society establishes the framework which allows labor and property to be valuable resources, it can also establish a progressive income tax system and other mechanisms to achieve a more equitable distribution of income.

Analysis of Proposals Relating to Comprehensive Tax Reform (prepared by the staff of the Congressional Joint Committee on Taxation, Sept. 21, 1984).

Legislative Power which, in turn, produces its own standard forms of argument,[69] and its own distinct crystalline structure.

On the other hand, a subdoctrinal rule choice of the above dyad does present opposed individualist and communalist positions:

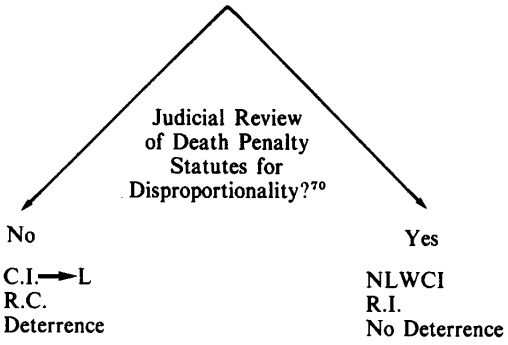

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Figure 21

Although only the institutional axis of opposition is represented in Figure 20, the dyad in Figure 21 presents both axes of opposition. This means that not only do individualist and communalist arguments appear on opposite sides of the second dyad, but so do the Institutional arguments found on either side of the first dyad.

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[69] Although a more complete discussion of these arguments is beyond the scope of the present article, I will briefly outline a few common types of argument forms produced by the opposition of Judicial Power and Legislative Power. The following forms of argument can be made on behalf of Judicial Power:

(1) Judicial Authority: The judiciary has appropriate (or greater) authority to decide this type of issue.

(2) Judicial Competence: The judiciary has sufficient (or greater) competence to decide this type of issue.

(3) No Legislative Authority: The legislature lacks appropriate (or possesses less) authority to decide this type of issue.

(4) No Legislative Competence: The legislature lacks appropriate (or possesses less) competence to decide this type of issue.

The arguments made in favor of letting the legislature decide the issue (Legislative Authority, Legislative Competence, No Judicial Authority, No Judicial Competence) are mirror images of the above.

In addition, there are similar sets of Arguments of Institutional Competence and Authority if the opposition is between Judicial Power and Executive Power, between Federal Power and State Power, and so on.

[70] For examples of debates concerning proportionality using the argument forms listed in Figure 21, see Solem v. Helm, 463 U.S. 277 (1983); Rummell v. Estelle, 445 U.S. 263 (1980); Coker v. Georgia, 433 U.S. 584 (1977).

The following abbreviations of argument forms are used:

C.I. ➜ L = Criminal intent Requires Liability

NLWCI = No Liability Without Criminal Intent

R.C. = Rights of the Community

R.I. = Rights of the Individual

Deterrence = Communalist Social Utility (Deterrence) Argument

No Deterrence = Individualist Social Utility (No Deterrence) Argument

Thus, instead of saying that there is a single crystalline structure to legal thought, it is more correct to say that legal thought has a group of crystalline *structures,* created by different axes of opposition. The interplay of the various axes of opposition gives legal argument great depth and richness. The next section describes one of the most important axes of opposition in legal thought after the opposition between individualism and communalism.

C. *The Opposition of Formal and Substantive Realizability*

One of the most common forms of argument that lawyers make in favor of choosing a doctrine is unrelated to the substantive fairness of the doctrinal choice but concerns instead whether a rule is a better choice because it is easier to administer.

These arguments are called "Formal Realizability" arguments.[71] The arguments made in response to these arguments I call "Substantive Realizability" arguments.[72] Formal and Substantive Realizability arguments cannot be classified as exclusively individualist or communalist because they lie upon a different axis of opposition. That separate axis concerns the opposition between a desire for certainty, predictability and easy application of legal doctrines on the one hand, with a desire for substantively just results on the other.[73] The result is that although individualist versions of Rights, Social Utility, and Moral Responsibility arguments always line up together on the same side of the dyad, Formal Realizability arguments sometimes support the individualist position and sometimes the communalist.

The Formal Realizability argument is that a rule should be adopted because it is easier to administer and apply and presents fewer problems of proof. This is usually joined with claims that the opposite rule would lead to fraudulent or frivolous claims or defenses, an undesirably large amount of litigation, or arbitrary and inconsistent verdicts in successive lawsuits. The familiar "slippery slope" argument is also a type of Formal Realizability argument: a particular rule should be rejected because the principle it stands for has no logical stopping point, and will lead to disastrous results in future cases.

The Substantive Realizability argument takes the position that a rule should be adopted because it will be fairer on an individual or case-by-case basis. The seemingly more "bright line" rule will either lead to *sub rosa* manipulation by judges and juries to achieve substantively just results, or a confusing complex of rules, exceptions, and counterexceptions. A simple standard worked out through case-by-case adjudication will be more predictable and less arbitrary in the long run.

The Substantive Realizability argument normally includes a rejoinder to the Formal Realizability argument that the less rigid rule cannot be applied in a consistent or predictable fashion:

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[71] *See* Kennedy, *Form and Substance, supra* note 4, at 1687. The phrase is borrowed from 3 R. VON IHERING, DERGEIST DES ROMISCHEN RECHT (THE SPIRIT OF ROMAN LAW) §4, at 50-55(1883) (available.- in French translation as R. VON IHERING, L'ESPRIT DU DROIT ROMAIN (Meulenaere trans. 1877)).

[72] *See* Kennedy, *Form and Substance, supra* note 4, at 1688; R.VON IHERING, *supra* note 71.

[73] *E.g.,* R. UNGER, LAW IN MODERN SOCIETY 203-16 (1976): Kennedy, *Form andSubstance, supra* note 4, at 1687-89.

(1) Judges and juries will be able to decide the proper scope of the rule's application through case-by-case adjudication and the normal common law development of doctrine. (This form of response may be called an "Anti-Slippery Slope" argument.) (2) The fact that some claims before courts are not meritorious does mean that courts will not be able to separate the wheat from the chaff.[74]

D. *The Relation Between Form and Substance*

Professor Kennedy argued in *Form and Substance in Private Law Adjudication* that there was a correlation between Formal and Substantive Realizability arguments and the individualist-communalist division of arguments. In particular, he argued that Formal Realizability arguments (and a preference for rules in legal doctrine) were usually allied with an individualist position, and Substantive Realizability arguments (and a preference for standards or case by case adjudication) were usually allied with a communalist (or in Kennedy's terms, an altruistic) position.[75] Kennedy's point was that arguments about form are related to and can in effect disguise disputes about substantive visions of justice.[76]

The problem with Kennedy's identification of arguments about form and those about substance is that the alliance that he describes-Formal Realizability arguments and individualism---is not consistently found in the law. The alliance frequently appears in contract law, the area on which Kennedy focused in his famous article. However, Formal Realizability arguments are allied more often with communalist arguments in tort and criminal law. Consider, for example, the following dyad and its associated argument forms:

[74] Examples of these arguments are given in the Appendix at text accompanying notes 245-53.

[75] Kennedy, *Form and Substance*, *supra* note 4, at 1685.

[76] *Id.* According to Kennedy: "There *is* a connection, in the rhetoric of private law, between individualism and a preference for rules, and between altruism [communalism] and a preference for standards. The substantive and formal dimensions are related because the same moral, economic and political arguments appear in each." *Id.* at 1776 (emphasis in original). That is to say, the two ideas (individualism and Formal Realizability) spring from similar sources of moral and legal consciousness which produce similar forms of argument.

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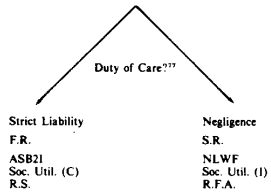

Figure 22

In this instance, strict liability is a more Formally Realizable rule than the reasonable person standard, and thus the Formal Realizability arguments are aligned with the communalist arguments. This alliance continues down through the next two levels of subdoctrine:

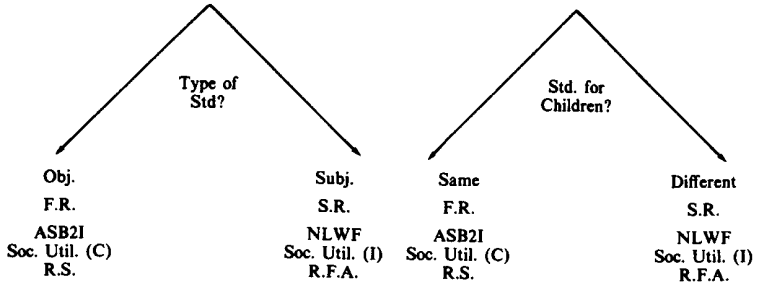

Figure 23

Yet if we go "up" to a supradoctrinal choice, for instance, the issue of whether there is any duty to rescue absent a special relationship, this curious result appears:

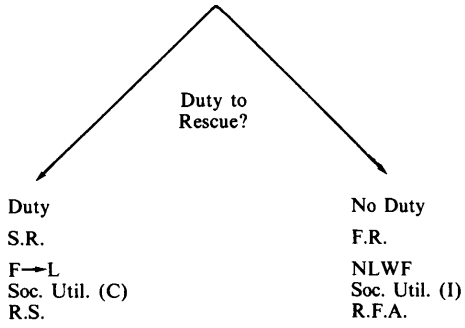

Figure 24

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[77] The following abbreviations are used for argument forms:
F.R. = Formal Realizability
S.R. = Substantive Realizability
ASB21 = As Between Two Innocents, Let the Person Who Caused the Damage Pay
NLWF = No Liability Without Fault
Soc. Util. (C) = Communalist Social Utility Argument
Soc. Util. (I) = Individualist Social Utility Argument
R.S. = Rights as Security
R.F.A. = Rights as Freedom of Action

Similarly, the reader will note that while in the following dyads, the Formal Realizability arguments are allied with the relatively individualist position:

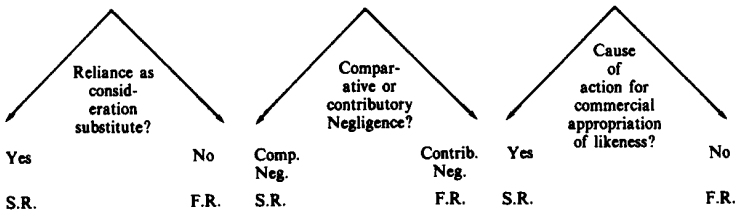

Figure 25

in others the Formal Realizability arguments are allied with the communalist position:

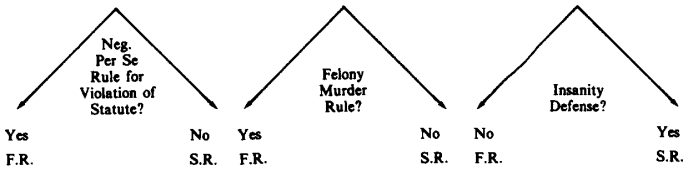

Figure 26

Finally, there are some individualist-communalist dyads where it is not clear on which side the Formal Realizability argument belongs, or where it is possible to make such arguments on both sides:

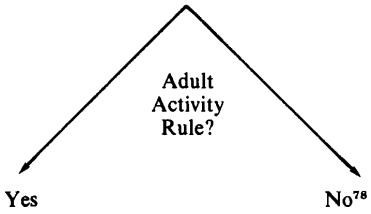

Figure 27

Thus the Formal Realizability and Substantive Realizability arguments seem to float between the individualist and communalist positions, switching their alliances depending upon the particular rule choice involved.

[78] In one sense, the Adult Activity Rule is m ore Formally Realizable because it increases the number of cases in which the more Formally Realizable objective standard of negligence will be applied. On the other hand, it maybe less Formally Realizable because it requires the courts to decide what are or are not "adult activities." *See* Purtle v. Shelton, 251 Ark. 519, 522, 474 S.W.2d 123, 126 (1971) ("If we should declare that . . . hunting deer with a high-powered rifle [is an adult activity] . . . we must be prepared to explain why the same rule should not apply to a minor hunting deer with a shotgun, to a minor hunting rabbits with a high-powered rifle, to a twelve-year-old shooting at crows with a .22, and so on down to the six-year-old shooting at tin cans with an air rifle.").

The reason this occurs is that these arguments are not, as Professor Kennedy thought, deeply connected to the antinomy between individualism and communalism. They represent instead another axis of opposition in our moral and legal thought, one of rules or mechanical classification versus standards or case-by-case adjudication.[79] This opposition does not concern the extent of the duties owed to others (the individualist-communalist opposition), but rather the form of the duties already postulated. Because these arguments spring from a different axis of opposition in our thought, there is no *a priori* reason to expect that individualist arguments will always be accompanied by arguments of Formal Realizability, or vice versa.

E. *The Alignment of Axes*

There are a few general rules that will describe the alignment of the individualist-communalist axis with the Formal Realizability-Substantive Realizability axis. Generally speaking, the most Formally Realizable rule is "The defendant always wins." This is Formally Realizable because it is very easy to apply---the court simply refuses to recognize any causes of action, and losses always lie where they fall. This position is equivalent to a complete absence of legally cognizable duties owed by individuals to each other in society, and thus is an extremely individualistic position. In fact, it is anarchy.

Similarly, it is usually more Formally Realizable for a court not to recognize or create a particular cause of action. This position relieves the courts of any need to find facts or apply rules or standards to particular disputes. It is also a relatively individualist position because it relieves the defendant of a duty she might otherwise owe to others. Thus, whenever a dyadic rule choice is posed between the recognition or denial of a particular duty, the individualist arguments will always line up with and color[80] the Formal Realizability arguments.[81]

However, whenever the issue involved is whether or not to permit a complete defense, justification, or excuse which would relieve the defendant of responsibility, the relatively individualist position is to create or recognize the defense, justification, or excuse. Of course, this choice is not more Formally Realizable, because it is usually easier to apply a rule of liability without any defenses, justifications, or excuses. In these cases, the Formal Realizability arguments will line up with and be colored by the communalist arguments which accompany them.[82]

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[79] Kennedy, *Form and Substance, supra* note 4, at 1687-1701.

[80] For a discussion of the phenomenon of argument forms "coloring" each other, see *infra* text accompanying notes 85-87.

[81] Examples of rule choices with this alignment (the communalist position is given first):

(1) Duty to rescue a stranger vs. No duty to rescue. Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959).

(2) Duty of landlord to keep premises in safe condition vs. No duty in absence of contractual promise. Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cit. 1970).

(3) Cause of action for commercial appropriation of likeness vs. No cause of action. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[82] Examples of rule choices with this alignment:

(1) No defense of insanity vs. Defense of insanity. McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937).

(2) No state-of-the-art defense in products liability vs. State-of-the-art defense. Beshada v. Johns-Manville

When the issue involves a choice between a *partial* defense, justification, or excuse, or a *complete* defense, justification, or excuse, the individualist position will be aligned with the more Formally Realizable position, since this is analogous to a choice between some duty and no duty at all.[83]

When the issue involves a choice between a *partial* defense, justification, or excuse, or *no* defense, justification, or excuse, the communalist position will be aligned with the more Formally Realizable position, since this is analogous to a choice between duty and a lesser standard of duty.[84]

To sum up, if the rule choice is between some duty and no duty, the individualist position will be the more Formally Realizable position. If the rule choice is between some duty and a higher standard of duty, however, the communalist position will normally be the more Formally Realizable position.

With this in mind, we can understand Kennedy's conclusion that Formal Realizability arguments and a preference for rules over standards will be allied with the philosophy of individualism in contract law. Most doctrinal issues in the law of contracts involve a choice between some duty and no duty, that is, between contractual obligation or no obligation. This follows from the fact that in the law of contracts, no duties are imposed upon the parties unless they have assumed them through contractual agreement. For this reason debates about contractual liability usually focus on whether a change in the status quo has been effected, or an enforceable promise has been formed; that is, whether the defendant owes the plaintiff any duty. Consider the following dyads, each of which displays an alliance between individualist and Formal Realizability arguments:

Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982).

(3) No defense of mistake of law vs. Defense of mistake of law. United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).

[83] Examples of rule choices with this alignment:

(1) Comparative negligence defense vs. Contributory negligence defense. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

(2) Good faith exception to the exclusionary rule vs. No good faith exception. United States v. Leon, 468 U.S. 897 (1984).

(3) Spouse's sexual attack may constitute rape vs. Spousal rape exception. State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981).

[84] Examples of rule choices with this alignment:

(1) "Eggshell skull" rule vs. Only foreseeable damages recoverable. Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970).

(2) No imperfect self-defense doctrine vs. Imperfect self-defense doctrine (i.e., subjective but unreasonable belief that life is threatened reduces homicide from murder to manslaughter). Commonwealth v. Colandro, 231 Pa. 343, 80 A. 571 (1911).

(3) No defense of intoxication vs. Defense of intoxication only to specific intent crimes. State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979).

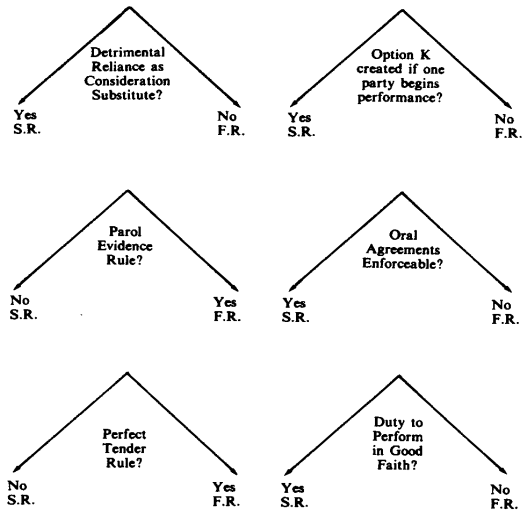

Figure 28

This is not to say that there are not some dyadic rule choices in the law of contracts where the alignment is reversed;[85] the point is that the idea of contractual obligation (as opposed to obligation in tort) starts from a highly individualist position where no duty is owed to others. This is also a more Formally Realizable position; hence the natural alliance which Kennedy identified.

There is a still further explanation of Kennedy's result: this has to do with the effects that different axes of opposition have upon each other when they are in a particular alignment.

F. *The Coloring Phenomenon*

Consider the following two opposed sets of arguments concerning whether the law should recognize a cause of action for negligent infliction of emotional distress in the absence of physical contact with the plaintiff. Because the question involves one of duty or no duty, the individualist position (no cause of action) is also the more Formally Realizable position.

> (1) If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation . . . a wide field would be opened for fictitious or speculative claims.[86] (FR.)

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[85] Examples:

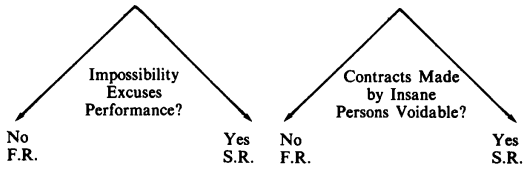

Figure 29

[86] Mitchell v. Rochester Ry., 151 N.Y. 107, 119, 45 N.E. 354, 354-55 (1896).

(2) I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than on weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time.[87] (S.R.)

The above examples share an interesting feature. In each case, the arguments are a mixture of the argument forms produced by the Formal-Substantive Realizability axis and the individualist-communalist axis. The Formal Realizability argument has a distinctly individualist tinge to it: we are concerned that spurious claims might be filed because we are afraid that liability will be extended too far and that defendants will have to pay compensation when they are not at fault (No Liability Without Fault (N LW F)) or when the plaintiffs have not really been harmed (No Liability Without Harm (NLWH)).

Similarly, the Substantive Realizability arguments take on the flavor of the communalist arguments with which they are aligned. Judicial administrability alone does not justify either denying compensation to victims who have really suffered harm or allowing defendants to escape responsibility (Plaintiffs Harm Requires Liability (H → L), Defendant's Fault Requires Liability (F→ L)). The judicial system will be able to assign responsibility effectively.

This phenomenon I call the "coloring" of argument forms by each other. To see how the Formal Realizability and Substantive Realizability arguments may be "colored" differently when their alignments are reversed, consider the following debate about the defense of diminished capacity in the criminal law. In this dyad the Formal Realizability arguments are aligned with the relatively communalist position that there should be no defense, while the Substantive Realizability arguments are aligned with the relatively individualist position in favor of the defense:

Communalist: The courts should not create a diminished capacity defense because it can too easily be used by defendants to escape responsibility by feigning psychological disorders. If the defense is allowed, it will be routinely offered by criminal defense attorneys and it will inject psychological expert testimony into virtually every criminal trial. The result will be additional burdens on an already overburdened criminal justice system and an increased number of guilty criminals escaping just punishment. (F.R., Criminal Intent Requires Liability (C.I.→ L), Soc. Util. (C))
Individualist: The fear that some guilty criminals may go unpunished should not excuse the court's duty to ensure that only those found to possess criminal intent are punished. The jury system is designed to determine the extent of the defendant's criminal responsibility for his acts. The fact that testimony as to the existence or absence of *mens rea* may be in conflict is no justification for refusing to consider the issue. If the defense is not allowed, defendants who were not responsible for their actions will be subject to undeserved criminal penalties, or juries will engage in nullification; either result will be detrimental to the judicial process. (S.R., No Liability Without Criminal Intent (NLWCI), Soc. Util. (I)).

Just as the colors a crystal displays when sunlight hits it may vary, so the "coloring" of an axis of opposition (whether the arguments on one side seem individualist or communalist in nature)

[87] Dulieu v. White & Sons [1901] 2 K.B. 669, 681.

depends on the position of the observer. The alignment (and coloring) of the arguments depends on what type of dyadic rule choice is presented to the decisionmaker.

This insight gives us further understanding into Kennedy's identification of individualism and Formal Realizability in the law of contracts. Dyadic rule choices in contract law generally present an alliance between Formal Realizability and individualist arguments. Because of the alignment of axes, Formal Realizability arguments in contract law have an individualist flavor, and individualist arguments have a Formal Realizability flavor.[88]" However, the above examples demonstrate that this alliance is not a necessary one, as Kennedy assumed, but may change from rule choice to rule choice, or among different bodies of legal doctrine.

G. *Combination of Crystalline Structures*

The previous examples might suggest that the presence of different axes of opposition in successive rule choices and their alignment is purely random. In fact, this is not so. We have already noted that in contract law there seems to be a natural alliance between individualist and Formal Realizability arguments. Very often, within a particular area of legal doctrine, the alignment of different axes will remain constant as one moves from supradoctrinal to subdoctrinal choices.

We can see an invariant combination of structures at work in the historical development of the tort of negligent infliction of emotional distress. The tort developed as a series of successive rule choices presented to common law courts.[89]

The most fundamental doctrinal choice for this cause of action was whether or not to allow recovery for emotional distress in a negligence action at all. Common law courts decided very early on that plaintiffs could recover such damages if they simultaneously sustained physical injury.[90] A schematic representation of the debate appears below. Note the alignment of the Formal Realizability argument with the individualist position:

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[88] Kennedy, *Form and Substance*, *supra* note 4, at 1737-45.

[89] The reader should not confuse the arbitrary representation of doctrine as a series of dyadic rule choices with the doctrine's historical development. In the case of this particular tort doctrine, the two simply happen to coincide.

[90] PROSSER & KEETON ON THE LAW OF TORTS § 54 (W. Keeton 5th ed. 1984).

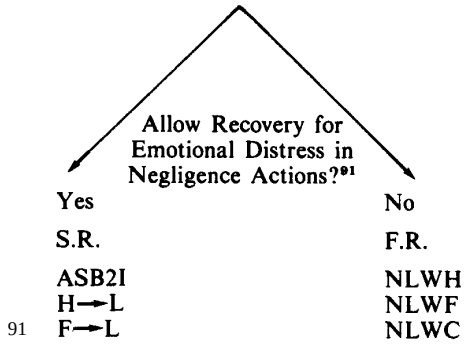

Figure 30

The next step in the development of the doctrine was whether a plaintiff could recover damages for mental suffering if there had been no actual physical injury caused by an impact with the plaintiff; that is, where the physical injury was caused only by the mental anguish that resulted from the act of negligence.

The older position was taken in *Mitchell v. Rochester Railway Co.,*[92] which followed the "impact rule"; i.e., that no action for negligent injury would lie without some physical impact to the plaintiff which caused injury.

Mitchell involved a pregnant woman who was waiting at a crosswalk to board one of the defendant's cars when a team of defendant's horses "came so close to the plaintiff that she stood between the horses' heads when they were stopped." She claimed that as a result of this shock she lost consciousness, became ill, and suffered a miscarriage.[93]

The impact rule was rejected in *Dulieu v. White & Sons,*[94] which instead required that the plaintiff have been in the "zone of danger" of physical impact caused by the defendant's negligence. *Dulieu* involved a woman who gave premature birth to an infant after a two-horse van crashed into her husband's public house as she worked behind the bar.

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[91] The following abbreviations of argument forms are used:
S.R. = Substantive Realizability
F.R. = Formal Realizability
ASB2I = As Between Two Innocents, Let the Person Who Caused the Damage Pay
NLWF = No Liability Without Fault
H→ L = Plaintiffs Harm Requires Liability
NLWH = No Liability Without Harm
F→ L = Defendant's Fault Requires Liability
NLWC = No Liability Without Causation

[92] 151 N.Y. 107, 45 N.E. 354 (1896).

[93] *Id*. at 108-09, 45 N.E. at 354.

[94] [1901) 2 K.B. 669.

In the debate between the *Mitchell* and *Dulieu* courts over the impact rule, *Dulieu* takes the relatively communalist position and *Mitchell* takes the relatively individualist position, which is also the more Formally Realizable position. The court in *Dulieu* justified the abandonment of the impact rules on the following grounds:

> (1) I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time.[95] (S. R., H → L)
>
> (2) If. . . the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence in damages which caused the fear are as measurable as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact?[96] (ASB21)

The *Mitchell* court defended the impact rule by noting:

> (1) If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation . . . a wide field would be opened for fictitious or speculative claims.[97] (F.R., NLWH)
>
> (2) [I]t cannot properly be said that the plaintiffs miscarriage was the proximate result of the defendant's negligence . . . . The injuries to plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control . . . . [98] (NLWF)

The limitation of recovery in *Dulieu,* the "zone of danger" rule, was abandoned in *Dillon v. Legg.*[99] *Dillon* involved a suit by a mother who witnessed her child being struck and killed by a negligently driven automobile. The mother was not in the zone of danger of physical injury from the accident, although the child's sister was. Nevertheless, the court permitted both the mother and the sister to recover on a theory of negligent infliction of emotional distress on the grounds that it was foreseeable that the mother would be in close proximity to the child when the accident occurred:

> (1) The mere assertion that fraud is possible, "a possibility [that] exists to some degree in all cases". . does not prove a present necessity to abandon the neutral principles of foreseeability, proximate cause and consequential injury that generally govern tort law. . . . [W]e cannot let the

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[95] *Id*. at 681.

[96] *Id.* at 675.

[97] *Mitchell,* 151 N.Y. at *110,* 45 N.E. at 354-55.

[98] *Id.* at *110,* 45 N.E. at 355.

[99] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.[100] (H → L, S.R.)

(2) Because it is inherently intertwined with foreseeability [the existence of the defendant's] duty or obligation must necessarily be adjudicated only upon a case-by-case basis. . . . We can, however, define guidelines which will aid in the resolution of such an issue as the instant one.[101] (S.R.)

However, several states have considered the question since the decision in *Dillon,* and, like the New York Court of Appeals in *Tobin v. Grossman,*[102] have retained the zone of danger rule. The *Tobin* court reasoned that:

(1) [F]oreseeability [of injury], once recognized, is not so easily limited. Relatives, other than the mother, such as fathers and grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected. Hence, foreseeability would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders.[103] (F.R., NLWF)

(2) The . . . most difficult factor is any reasonable circumscription, within tolerable limits required by public policy, of a rule creating liability, Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma, with the added risk of consequential physical harm. Any rule based solely on eyewitnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident. Moreover, the instant advice that one's child has been killed or injured, by telephone, word of mouth, or by whatever means, even if delayed, will have in most cases the same impact.[104] (F.R.)

The most recent step in the development of the tort was the holding by the California courts that in certain cases, no physical injury at all was required to recover for mental suffering. The leading case is *Molien v. Kaiser Foundation Hospitals,*[105] in which a plaintiff husband sued doctors who negligently performed medical tests on his wife and erroneously informed her that she had contracted venereal disease. Ultimately as a result of the wife's suspicions of the plaintiffs infidelity, their marriage fell apart.

The majority opinion gave the following justifications for the extension of liability:

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[100] *Id.* at 737, 441 P.2d at 918-19, 69 Cal. Rpm at 78-79 (quoting Klein v. Klein, 58 Cal. 2d 692, 695, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962)).

[101] *101. Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court also quoted the language of the court in *Dulieu v. White,* listed above as argument (I). Not only do the same types of arguments resurface in later debates, but often the same words as well. In fact, Justice Tobriner, who wrote the majority opinion in *Dillon,* clearly recognized that the same tensions were present in both cases, and indeed in all of the cases which concerned limits on the scope of the tort of negligent infliction of emotional distress. *See infra* text accompanying note *110,*

[102] 24 N.Y.2d 609, 249 N.Ud 419, 301 N.Y.S.2d 554 (1969).

[103] *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

[104] *Id.* at 617. 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

[105] 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

(1) Courts which have administered claims of mental distress incident to an independent cause of action are just as competent to administer such claims when they are raised as an independent ground for damages.[106] (S.R.)

(2) In our view . . . the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof, whether the plaintiff has suffered a serious and compensable injury should not turn upon this artificial and often arbitrary classification scheme.[107] (H → L)

The dissent argued that such an expansion of liability was a proper subject for the legislature and not the courts,[108] and that in any case the extension was undesirable from a policy standpoint:

(1) The requirement of a concurrence of physical injury with claimed emotional distress is a safeguard eliminating spurious claims for negligently inflicted mental distress. That safeguard is now abandoned in favor of newly declared standards designed by the majority opinion to limit recoveries under their new, independent tort. A plaintiff claiming his or her mental tranquility has been disturbed can now recover " 'where proof of mental distress is of a medically significant nature,' " or the claim of mental distress is supported by "'some guarantee of genuineness in the circumstances of the case.'". . . Such standards are nonstandards, opening wide the door to abuse.[109] (F.R., NLWH)

Putting the three debates together, we can see that the development of the doctrine shows a crystalline structure with respect to both the individualist-communalist and the Formal-Substantive Realizability axis. Moreover, because the alignment of the two axes remains invariant, the two crystaline structures are identical:

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[106] *Id.* at 928,616 P.2d at 819, 167 Cal. Rptr. at 837 (quoting Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 519 (1970)).

[107] *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

[108] *Id.* at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841 (Clark, J., dissenting). This is an example of an Institutional Competence and Authority argument.

[109] *Id.* at 934-35, 616 P.2d at 823, 167 Cal. Rptr. at 842 (Clark, J., dissenting).

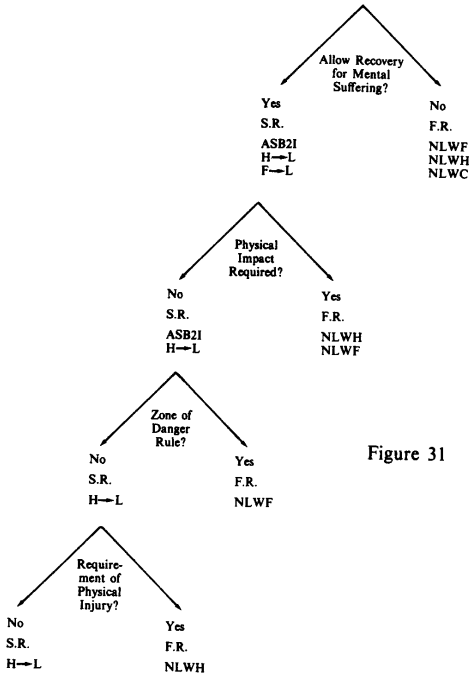

Figure 31

Justice Tobriner actually noted this phenomenon in his opinion in *Dillon v. Legg:*

> [T]he history of the cases does not show the development of a logical rule but rather a series of changes and abandonments.. . . [T]he argument [is made] in each situation that the courts draw a Maginot Line to withstand an onslaught of false claims . . . .
>
> The successive abandonment of these positions exposes the weakness of artificial abstractions which bar recovery contrary to the general rules [of tort liability].[110]

It is important to understand, however, that what makes the argumentary structures crystalline is not, as Justice Tobriner suggests, that the doctrine has been steadily headed in one direction. After all, the court in *Tobin v. Grossman* declined to extend the tort cause of action in New York. The point is rather that as each new debate arises about whether or not to extend the doctrine, the same types of arguments arise anew.[111]

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[110] 68 Cal. 2d at 746-47, 441 P.2d at 924-25, 69 Cal. Rptr. at 84-85 (1968).

[111] The debate over the extension of this tort continues, as courts grapple with the question of how closely related the plaintiff must be to the defendant in order to recover for emotional distress under the theory of *Dillon v. Legg.* In Ledger v. Tippitt, 210 Cal. Rptr. 814 (Cal. Ct. App. 1985), the court extended the *Dillon* theory to a plaintiff who witnessed the man she was living with stabbed to death by the defendant. Only four days after the decision in *Ledger,* another California appeals court affirmed a dismissal of a cause of action for negligent infliction of emotional distress when the plaintiff witnessed her]over killed in a car accident. Recovery was denied because the plaintiff and her]over had only lived together and had not married. Elden v. Sheldon, 210 Cal. Rptr. 755 (Cal. Ct. App. 1985). The debate in these two decisions raised what should be by now familiar issues of Formal Realizability in opposition to the need for compensation of tort victims. *Compare Elden,* 210 Cal. Rptr. at 760 *with Ledger,* 2 10 Cal. Rptr. at 826. The argumentary structure of this debate is the same as that in *Dillon* and its forebears; only the battleground of contention has changed.

H. *The Contextual Nature of Legal Argument*

One of the consequences of the crystalline structure of legal thought is that the alignment of arguments with the two sides of a given doctrinal choice is wholly contextual. That is to say, it is not the rule itself but the rule which is placed *in opposition* to it which determines the arguments in its favor. In the diagram below, note that the arguments in favor of an objective standard of negligence in opposition to strict liability are the same as the arguments against an objective standard when the alternative is a subjective standard.

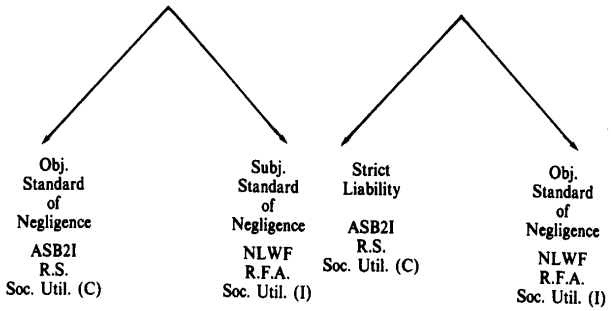

Figure 32a

Figure 32b

To put the point in more general terms, consider the following diagram, which displays a spectrum of increasing standards of care in tort:

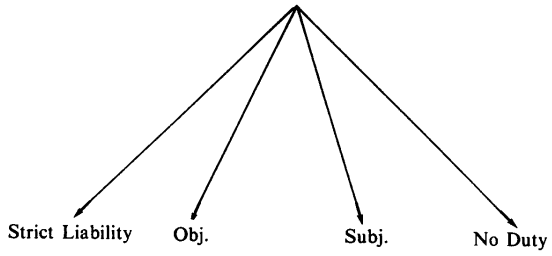

Figure 33

If the reader picks any two of the four and considers a dyadic rule choice between them, the communalist arguments will always line up with the relatively more communalist position, no matter what combination of rules is chosen to form the dyad.[112]

One more point should be made about the "contextual" nature of doctrinal rule choices. Whether individualist or communalist arguments are made for a particular position depends not only

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[112] This is another manifestation of the fact that individualism and communalism are orientations along a continuum of increasing societal duty to others.

The same analysis does not operate with respect to the Formal /Substantive Realizability axis because the rule choices do not lineup in increasing order of Formal Realizability. The most Formally Realizable rule is No Duty; the next most Formally Realizable rule is Strict Liability. This is a reason why separate and distinct axes of opposition might not align with each other in the same fashion throughout a body of doctrine.

on the rule which is opposed to the position but how the opposition is itself perceived. As explained earlier, principles ofjustification and excuse in criminal law are normally relatively individualist; the insanity defense is a paradigmatic individualist rule choice (in opposition to the lack of the defense). Yet if one considers that after acquittal by reason of insanity, the defendant can be held indefinitely by the state in conditions which may be little better (or perhaps even worse) than penal confinement, the position may no longer seem relatively individualist. Thus, some commentators on the insanity defense have made individualist arguments against it.[113] Consider the following diagram:

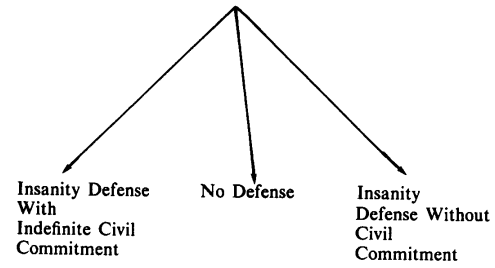

Figure 34

The position on the right is still the most individualist. Most of the rhetoric concerning the insanity defense has assumed that the acquitted defendant is better off; this *perception is* what gives rise to the individualist arguments in favor of the defense. Thus, it is important to remember that the factual or institutional context in which the rule choice is made will often decide which side of the dyad presents the relatively individualist or communalist position.

I. *Arguments That Prove Too Much and Too Little*

It follows from the above examples that an argument for a relatively communalist position is also an argument for an even more communalist position, and an argument for a relatively individualist position is also an argument for an even more individualist position. This result explains the efficacy of two commonly used rhetorical devices in legal argument. The first device is an argument that the justifications for a rule choice show that, although preferable to the alternative, the rule choice does not go far enough. The second device has precisely the opposite goal. It involves the assertion that arguments in favor of a given rule choice prove too much, and therefore that these arguments are discredited by a sort of *reductio ad absurdum.* The two strategies are mirror images: in the first case the advocate claims that the rule does not go far enough, and in the second the advocate argues that it goes too far.

Two excellent examples of these tactics are given by Epstein, Gregory, and Kalven in their casebook on the law of torts:[114]

(1) *The rule choice does not go far enough.* The authors consider the common law rule that insanity is not a defense to the application of an objective standard in negligence. They quote the justification offered by Thomas Cooley in his treatise on the *Law of Tort* (1879):

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[113] *E.g.*, Goldstein & Katz, *Abolish the "Insanity Defense"---Why Not?*, 72 YALE L.J. 853 (1953).

[114] R. EPSTEIN,C. GREGORY& H. KALVEN, CASES AND MATERIALS ON TORTS (4th ed. 1984).

> [There is] no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose.[115]

The authors then ask: "Why is this not an argument for strict liability in tort?"[116] Why not indeed? Cooley's argument is a classic As Between Two Innocents argument for corrective justice. If it is accepted, it is an equally good argument for holding an insane person's estate liable whenever that person causes injury to another's person or property:

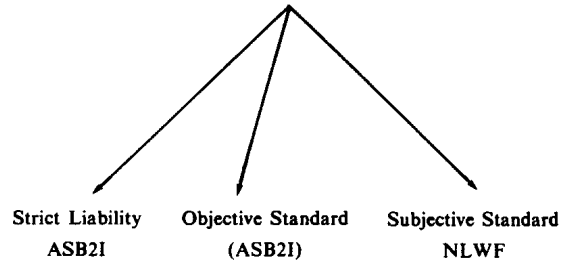

Figure 35

Cooley might respond that other principles make a negligence standard preferable; thus, it is true that an insane person's lack of moral fault will not excuse him from liability, but that is only because people have a right to expect reasonable behavior from others in society. They have no right, however, to expect any more than the behavior that a reasonable person would engage in, and if the injury is one that even a sane and reasonable person would have caused, it is unfair to hold the insane person liable because she has done nothing wrong when judged by normal societal expectations. These, of course, are individualist arguments (No Rights as Security (NoR.S.), No Liability Without Fault (NLWF)), and they are now used in favor of an objective standard because it is opposed by the choice of the relatively more communalist position of strict liability.

Of course, this ploy works both ways. The principles that one should not be held liable if he is not at fault, and that people should not expect that they will be protected from injuries which are no one's fault are equally as good arguments for a subjective standard of negligence in opposition to strict liability as they are for an objective standard in opposition to strict liability.

(2) *The argument proves too much.* Epstein, Gregory, and Kalven consider and criticize the standard justifications for strict liability in products liability cases, including loss spreading. They ask: "On this rationale, why does it matter if the plaintiff was injured by a defective product, or indeed the defendant's product at all? Does this rationale require strict liability in all occupiers

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[115] *Id.* at 135.

[116] *Id.*

liability, automobile accident and medical malpractice cases, at least where there are institutional defendants?"[117]

The point is that the spreading argument for strict products liability proves too much, since it is an equally good argument for the more relatively communalist position of general strict liability and, indeed, for the even more communalist position of enterprise liability:

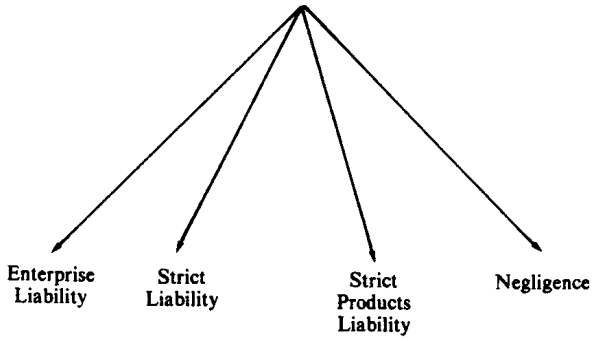

Figure 36

Of course, the argument only works as a *reductio ad absurdum* if it is assumed that general strict liability or enterprise liability are undesirable alternatives. It is this assumption which differentiates the first example from the second.

J. *Extending and Cutting Back on Doctrinal Rules*

Another interesting result of using dyads to represent the crystalline structure of doctrinal rule choices is that one can see graphically what lawyers mean when they speak of judges "cutting back on" or "extending" preexisting doctrine. In general, a doctrinal choice has been extended in a new case when the subdoctrinal choice follows the same direction (individualist or communalist) as the original choice and, conversely, the doctrine has been "cut back" when the subdoctrinal choice is in the opposite direction from the original doctrinal choice:

[117] *Id.* at 644.

118 119 120 121 122

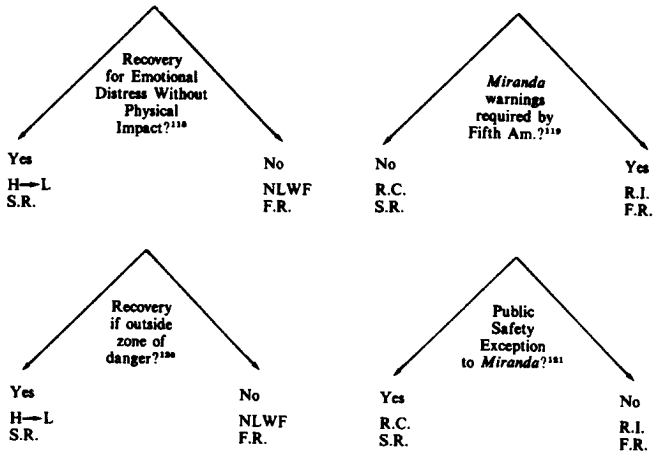

Figure 37[122]

In the first example, the cause of action for negligent infliction of emotional distress has been extended to plaintiffs who are outside the "zone of danger" created by the defendant's negligence.[123] Graphically, this looks as if the direction of the first dyad was being extended in the communalist direction by means of the second rule choice. Therefore, it should not be surprising that the arguments for the original rule choice are of the same form as the arguments for its extension, and the arguments against the extension are of the same form as the arguments against the original rule choice.[124]

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[118] *See* Dulieu v. White, [19011 2 K.B. 669; *supra* text accompanying notes 92-98.

[119] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[120] *See* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *supra* text accompanying notes 99-104.

[121] *See* New York v. Quarles, 467 U.S. 649 (1984).

[122] The following abbreviations of argument forms are used in the above dyad and in the discussion that follows:

S. R. = Substantive Realizability
F. R. = Formal Realizability
ASB2I = As Between Two Innocents, Let the Person Who Caused the Damage Pay
NLWF = No Liability Without Fault
H → L = Plaintiffs Harm Requires Liability
NLWH = No Liability Without Harm
F → L = Defendant's Fault Requires Liability
NLWC = No Liability Without Causation

[123] Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *supra* text accompanying notes 92-99.

[124] See *supra* text accompanying notes 92-104.

In the next example, the prophylactic rule of *Miranda v. Arizona,*[125]that particular warnings be given to every accused criminal defendant before lawful interrogation can begin, is modified by an exception in cases where expeditious pre-warning interrogation is necessary to protect public safety.[126] Graphically, the second rule choice indeed seems to "cut back" against the direction of the first rule choice. Nor is it surprising that the reasons offered by the majority in *New York v. Quarles* were the same forms of argument which had motivated the dissent in *Miranda,* [127] while the

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[125]384 U.S. 436 (1966).

[126] New York v. Quarles, 467 U.S. 649 (1984).

[127]Compare the following:

Communalist Arguments Against the Miranda Rule:

> The Fifth Amendment . . . has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. [No R.I.]

Miranda v. Arizona, 384 U.S. 436, 512 (1966) (Harlan, J., dissenting).

> [The Court's] rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. . . . [T]he Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation. [Soc. Util. (C), R.C.]

Id. at 516-17 (Harlan, J., dissenting).

> More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideraturn; society's interest in the general security is of equal weight.

Id. at 537 (White, J., dissenting).

> In some unknown number of cases the Court's rule will return a killer, a rapist, or other criminal to the streets . . . to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. [R.C., No R.I.]

Id, at 542 (White, J., dissenting).

> Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the confessions which are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned, Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernable coercion will produce an inadmissible confession.
>
> . . . .
>
> I see no sound basis . . . for concluding that the present rule against receipt of coerced confessions [requiring case-by-case inquiry into voluntariness under the specific circumstances] is inadequate for the task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. [S.R., No R.I.)

Id. at 535, 538-39 (White, J., dissenting).

Communalist Arguments in Favor of the Public Safety Exception:

> [T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. [Soc. Util. (C), No R.I.]

New York v. Quarles, 467 U.S. 649, 657 (1984) (Majority opinion of Rehnquist, J.).

> We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they recover inadmissible, or for them

arguments used by the dissent in *Quarles* were of the same form which had motivated the creation of the prophylactic *Miranda* rule in the first instance.[128]

> to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them. [Soc. Util. (C), R.C.]

Id. (footnote omitted).

> The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect. [S.R.]

Id.

[128]Compare the following:

Individualist Arguments in Favor of the Miranda Rule:

> Unless a proper limitation upon custodial interrogation is achieved . . . there can be no assurance that [coercive police] practices . . . will be eradicated in the foreseeable future.
> . . . [W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. [Soc. Util. (I)]

Miranda v. Arizona, 384 U.S. 436, 447, 467 (1966) (Majority opinion of Warren, C.J.).

> A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege . . . . [But] the Constitution has prescribed the rights of the individual when confronted by the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. (R.I., No R.C.]

Id. at 479 (citation omitted).

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is the clearcut fact. [F.R., R.I.]

Id. at 468-69 (footnote omitted).

Individualist Arguments Against the Public Safety Exception:

Miranda was not a decision about public safety; it was a decision about coerced confessions. Without establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the "public-safety exception" and remain faithful to the logic of *Miranda v. Arizona.*

. . . .

. . . [B]y deliberately withholding *Miranda* warnings, the police can get information out of suspects who would refuse to respond to police questioning were they advised of their constitutional rights. The "public-safety" exception is efficacious precisely because it permits police officers to coerce criminal defendants into making involuntary statements. [Soc. Util. (I), R.I.]

New York v. Quarles, 467 U.S. 649, 685 (1984) (Marshall, J., dissenting).

Though the majority's opinion is cloaked in the beguiling language of utilitarianism, the Court has sanctioned *sub silentio* criminal prosecutions based upon compelled selfincriminating statements. I find this result in direct conflict with the Fifth Amendment's dictate that "No person . . . shall be compelled in any criminal case to be a witness against himself."

The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. [R.I., No R.C.]

K. *The Doctrinal Conundrum*

Although individualist and communalist arguments reappear at every level of doctrinal complexity, neither the relatively individualist nor relatively communalist position is chosen by courts in every case; the arguments which are persuasive in some doctrinal choices fail to persuade in others. In our previous discussion we noted that Holmes made a No Liability Without Fault (NLWF) argument for Negligence over Strict Liability, and rejected an As Between Two Innocents (ASB21) argument for compensation.[129] Yet only a few pages later in *The Common Law*, Holmes rejects a NLWF argument for a subjective standard and embraces an ASB2I argument for an objective standard.[130] Clearly Holmes did not believe that he was contradicting himself in making these two arguments, and there is in fact no *logical* contradiction, since they are made in different contexts. The tension between the two positions he takes, however, is undeniable. There is, if not a logical contradiction, at least a rhetorical one.

We could go further and note that the general common law rule that a special standard of care applies to children involves accepting the NLWF argument that was rejected at the previous level of doctrinal choice between objective and subjective standards. Going down one level further, the acceptance of the adult activity rule is an acceptance of an ASB21 argument which was rejected at the previous level of doctrinal choice, i.e., between a special standard for children and no special standard. Similarly, in creating a "public safety exception" in *New York v. Quarles*, the Supreme Court's majority opinion accepted forms of argument which were rejected by the majority in *Miranda*.[131]

This successive acceptance and rejection of identical forms of argument at different levels of doctrine I call the "doctrinal conundrum." It is a conundrum, or puzzle, because there is no predictable way of telling which way a rule choice will go (and which arguments will be accepted) by examining the rule choices which preceded it. In the tort law examples just given, the successive rule choices alternated between individualist and communalist positions.[132]

Id. at 686 (Marshall, J., dissenting).

> [A] public safety exception destroys forever the clarity of *Miranda* for both law enforcement officers and members of the judiciary . . . .
>
> . . . .
>
> . . . Not only will police officers have to decide whether the objective facts of an arrest justify an unconsented custodial interrogation; they will also have to remember to interrupt the interrogation and read the suspect his *Miranda* warnings once the focus of the inquiry shifts . . . to ascertaining the suspect's guilt. Disagreements of the scope of the "public-safety" exception and mistakes in its application are inevitable. [F.R.]

Id. at 680 (Marshall, J., dissenting) (footnote omitted).

[129] 0. HOLMES, *supra* note 6, at 107.

[130] 0. HOLMES, *supra* note 6, at 108-11.

[131] *See supra* note 127.

[132] The precise alternation was merely fortuitous. Had the majority rule been that there was no adult activity rule, as was previously the case in several jurisdictions, *e.g.*, Lehmuth v. Long Beach Unified School Dist., 53 Cal. 2d 544, 348 P.2d 887, 2 Cal. Rptr. 279 (1960); Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931), there would have been no such illusion of symmetry. The point is that the acceptance of individualist or

The doctrinal conundrum is also present across doctrinal areas, as seen in the following dyads:

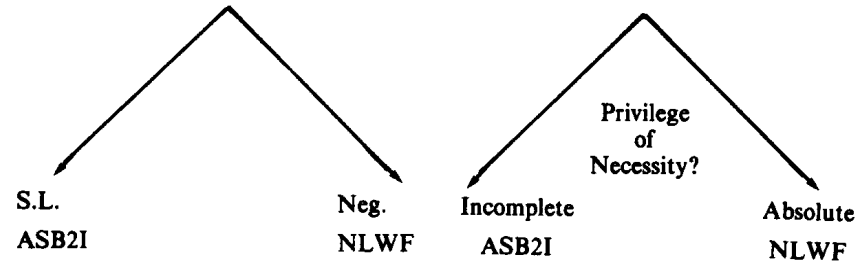

Figure 38

The law in general accepts the No Liability Without Fault argument when a person preserves his life or property by creating a small risk of injury to the property of another (which is therefore classified as an unintentional injury if it occurs), while rejecting the NLWF argument when the injury is intentional.[133]

American political ideology manifests one of the most interesting large scale illustrations of the doctrinal conundrum. As noted earlier, individualism and communalism cannot be identified with American liberalism and conservatism because the relatively individualist position is sometimes the liberal position and sometimes the conservative position. Another way of putting this is that American liberalism and conservatism contain "doctrinal conundrums" within themselves.

I will try to give a large-scale picture of the conundrums without being too simplistic. In general, American liberals take relatively individualist positions in areas of free speech, reproductive freedom, and criminal law, while taking relatively communalist positions with respect to economic regulation and accident compensation. The position of American conservatives tends to be exactly the reverse: They tend to take relatively communalist positions on issues of free speech, reproductive freedom, and criminal law, while taking relatively individualist positions on issues of economic regulation and accident compensation.[134]

What is especially interesting about this symmetrical pattern is that neither liberals nor conservatives seem to view their choice of positions on such diverse issues as involving

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communalist styles of argument in one rule choice has no effect on how any other rule choice will be resolved.

[133] This apparent inconsistency between the law of intentional and unintentional tort was pointed out in Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 308 n.3 (1926); and Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 410-18 (1959).

[134] *Compare* Lochner v. New York, 198 U.S. 45 (1905) (judicial intervention to protect liberty interest in freedom of contract) *with* United States v. Carolene Products, 304 U.S. 144 (1938) (judiciary will not intervene to protect rights threatened by economic regulation but may intervene where liberties afforded by the Bill of Rights are threatened).

contradictions: Liberals who see market failure and externalities as justifications for economic regulation dismiss the need to correct any failures or externalities in the "marketplace of ideas"; conservatives who decry regulation of economic freedoms by an overzealous and intrusive government are complacent about government restrictions on private sexual conduct in the name of preserving morality and family values. Liberals may be more willing to accept liability without fault to achieve deterrence against unsafe manufacture of consumer products than to achieve deterrence against criminal activity; conservatives who argue for the felony murder rule as a deterrent to crime are unimpressed by calls for liability without fault in tort law.[135]

L. *The Doctrinal Conundrum and the Struggle of Doctrinal Development*

One consequence of the doctrinal conundrum is that the fleshing out or development of a legal doctrine of law will usually repeat the same debate that initially led to its creation. We have already seen that the debate over negligence and strict liability is recapitulated in the extension and development of the negligence standard. This phenomenon is not confined to tort law. Each new application of the exclusionary rule by the Supreme Court recapitulates the debate over the propriety of the exclusionary rule, as each succeeding Supreme Court case concerning the right to an abortion recapitulates the debate about the importance of that right.

These conclusions are no doubt intuitively obvious to people who have observed that judges who dislike a prior precedent use every available means to cut back on its force, while those who support it often try to extend it further. If Justice Brennan and Chief Justice Rehnquist are on opposite sides of an issue in a constitutional case, it will come as no surprise that they continue to be on opposite sides in the next case construing the scope of the first precedent.

That judges are so predictable, one might think, is merely due to human nature. But the doctrinal conundrum is not merely a theory about the stubbornness of judges. The doctrinal conundrum is evidence of the dialectical nature of human moral consciousness: the opposed social and moral ideas that human beings share and the arguments that they use to defend them. The doctrinal conundrum shows us that when a subdoctrinal issue is presented, the clash of opposed social visions in previous debates will reemerge with renewed vigor and the arguments which supported those visions will do battle once again, with no guarantee that the result will be the same.

The existence of the doctrinal conundrum is another way of stating that doctrinal battles are neverending. The argument forms which were routed in the first level of struggle are rejuvenated and

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[135]The liberal-conservative split of individualist-communalist positions explains why campaign financing laws pose such difficult theoretical problems for both liberals and conservatives. They present the intersection of regulations of speech and economic power; they are thus on the "fault line" of the individualist-communalist split for both ideologies.

It is beyond the scope of this article to investigate why American liberalism and conservatism have embraced the particular combinations of relatively individualist and communalist positions that they have or why the combinations chosen by the two sides are mirror images of the other. For further discussion, see Balkin, *Federalism and the Conservative Ideology*, 19 URB. LAWYER 459 (1987).

reemployed as each new application of precedent arises; they may yet carry the day in another battlefield.[136]

M. *The Doctrinal Conundrum and the Rationality of Legal Thought*

The existence of the doctrinal conundrum raises the question about whether legal thought is in fact rational. Obviously, the fact that practicing attorneys and academics are able to manipulate and categorize legal decisions and doctrines in the context of rule choices means that legal thought must be a rational enterprise at some level. This "rationality" is a very weak form of the word and might mean only that there are no overt logical contradictions between rule choices. The most interesting contradictions, however, are rarely logical ones. They are contradictions of style, of tendency, and of flavor.[137]

The real issue raised by the doctrinal conundrum is not whether legal thought is rational in that it avoids logical contradiction. We may rest assured that it does. The real issue is whether there is any coherent set of principles that explains the erratic "zigzagging" nature of rule choices within and across bodies of legal doctrine.[138] In other words, is there any principled metatheory which tells us why the individualist arguments carry the day in some cases while the communalist arguments prevail in others?

Kennedy describes the doctrinal conundrum in this fashion:

> Given that individualism and [communalism) are sets of stereotyped pro and con arguments, it is hard to see how either of them can ever be "responsible" for a decision. First, each argument is applied, in almost identical form, to hundreds or thousands of fact situations. When the shoe fits, it is obviously not because it was designed for the wearer. Second, for each pro argument there is a con twin. Like Llewellyn's famous set of contradictory "canons on statutes," the opposing positions seem to cancel each other out [citing K. Llewellyn, *The Common Law Tradition: Deciding Appeals 521-35 (1960)).* Yet somehow this is not *always* the case in practice. Although each argument has an absolutist, imperialist ring to it, we find that we are able to distinguish particular fact situations in which one side is much more plausible than the other. The difficulty, or mystery, is that there are no available metaprinciples to explain just what it is about these particular situations that make them ripe for resolution. And there are many, many cases in which confidence in intuition turns out to be misplaced.[139]

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[136] Professor Kennedy has summed up the notion of the doctrinal conundrum nicely when he stated that "there are no 'killer' arguments." That is, no argument is guaranteed to win every doctrinal battle.

[137] Purely logical contradictions are only one small subset of things which "speak against" each other, to use the etymology of the word. The opposition or contrariness of objects and ideas has since Aristotle's time been recognized as distinct from purely logical contradiction. Aristotle, *Categoriae,* ch. 10, in 1 THE WORKS OF ARISTOTLE (W.D, Ross ed. 1966).

[138] By "zigzagging," I mean simply the choice of the individualist position in the first rule choice, the communalist in the next, and so forth. In a dyadic diagram such as Figure 9 supra, the path of doctrinal development does indeed appear to zigzag.

[139] Kennedy, *Form and Substance, supra* note 4, at 1723-24 (footnote omitted) (emphasis in original).

Professor James Boyle takes an even less sanguine attitude towards the doctrinal conundrum. As he puts it: "The policy arguments ... are merely formal symbols, like + or -. They alone cannot tell us what is the right decision

One possible explanation of the doctrinal conundrum would be a "center of gravity" theory. As doctrinal choices move the courts farther and farther toward the extremes of either individualism or communalism, a "gravitational pull" exercised in the opposite direction brings rule choices back towards the center of the continuum. This gravitational pull exists because the conflicted nature of our thought does not permit us to embrace either individualism or communalism completely. Thus the "zigzagging" we see in successive rule choices is nothing more than our attempts at balancing or mediating the contradictory moral impulses we find within us.

It is no doubt true that we find a need to mediate the contradictions in our moral consciousness, but however tempting the center of gravity theory is at a metaphorical level,[140] it does not explain why the shifts occur when they do or how two different courts can come out differently on the same issue. Moreover, there seems to be no predictable general pattern which explains the erratic course that doctrinal rule choices take.[141]

Another possible answer comes from the fact that I have not attempted within the scope of this article to cover all of the various types of argument which are used in legal discourse. There are many other axes of opposition which inhabit our legal thought. Thus, although individualist and communalist principles cannot by themselves explain the body of legal doctrines, other principles, for example institutional considerations, when taken together, may achieve that goal. Thus, the doctrinal conundrum may be a puzzle only because it is observed from too narrow a viewpoint.

Although this answer is plausible, it does not meet the deeper issue raised by the doctrinal conundrum: the dialectical structure of legal thought in general. There are other principles at work in the construction of legal thought, to be sure, but each of these has its own counterprinciple, and each of the oppositions between them creates its own crystalline structures and its own doctrinal conundrums. It would be marvelous indeed if the summing of all of these conundrums made them vanish altogether.

Instead of searching aimlessly for an Archimedean point at which all doctrinal choices become coherent, we should simply acknowledge the conflicting and conflicted nature of our moral and legal consciousness. The tools of argument that we use are by their nature dialectical; it is not surprising that what we construct with them retains much of their antinomal character. Thus, the proper answer to the question "Is legal thought rational?" is "Yes, but it is also dialectical."

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although they appear to if you are only given one side of the pairs." J. Boyle, *supra* note 4, at 7 (emphasis in original).

Professor Boyle's imaginative comparison of individualist and communalist arguments to formal symbols reveals an explicitly structuralist analysis of the problem. For the discussion of the structuralist interpretation of the doctrinal conundrum, see *infra* text accompanying notes 142-48.

[140] The metaphor is one of a pendulum or see-saw, which oscillates back and forth under the pull of gravity.

[141] Thus, the "pendulum" or "see-saw" analogy is flawed because the "zigzagging" of these mechanical devices is predictable, uniform, and ordered. With a pendulum of given physical dimensions and degree of initial displacement, it is possible to predict the timing, shift, and displacement of each succeeding swing. The point of the doctrinal conundrum is that the shift from individualist justifications to communalist justifications follows no perceivable pattern and may differ among different courts or legal thinkers.

N. *The Structuralist Interpretation of the Doctrinal Conundrum*

It is possible to recast the discussion above in terms of an explicitly structuralist [142] analysis of legal argument. Claude Levi-Strauss's great insight in the field of anthropology was the idea that cultural phenomena could be compared to linguistic symbols, by themselves arbitrary and devoid of meaning, yet made meaningful in the context of their relations to other symbols.[143] By comparing the relationships between cultural phenomena, Levi-Strauss was able to demonstrate what he considered to be universal structures of mental operation.[144]

The analysis of this article is structuralist in the sense that it proposes that the relationships between arguments for various rule choices share a common structure. The doctrinal conundrum and the crystalline structure of thought suggest that the arguments people use to defend rule choices are by themselves indeterminate in the scope of what they prove. Every argument proves too much and no argument is a "killer" argument which promptly ends debate.[145] In that special sense the arguments we use are arbitrary as are Sassure's linguistic signs or Levi-Strauss's cultural phenomena.[146] They take their meaning (their persuasive impact in the social act of defending and creating doctrinal rule choices), however, in the context of the rule choice in which they are employed and the positions they oppose. The relationships between the arguments used to defend opposing positions in some rule choices are identical to the relationships between the arguments used to defend opposing positions in other rule choices. The "universal" or "deep" structure is formed by the identity of the relationships of argumentary opposition. As Levi-Strauss expresses it in discussing the cultural phenomenon of totemism, "it is not the resemblances, but the differences, which resemble each other."[147]

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[142] For an introduction to the problems that structuralism seeks to address, see generally H. GARDNER, THE QUEST FOR MIND (2d ed. 1981); P. PETTIT, THE CONCEPT OF STRUCTURALISM: A CRITICAL ANALYSIS (1975); STRUCTURALISM AND SINCE, *supra* note 11.

[143] C. LEVI-STRAUSS, 1 STRUCTURAL ANTHROPOLOGY 31-36 (1963, 1976). This view of linguistic symbols had been proposed by Ferdinand de Sassure. *See generally* F. DESASSURE, COURSE IN GENERAL LINGUISTICS (1966). Levi-Strauss also relied heavily on Roman Jakobson's theory that binary oppositions were the basis of the organization of the distinctive features of phonetics. *See generally* R. JAKOBSON & M. HALLE, FUNDAMENTALS OF LANGUAGE (1960). Jakobson's theory and Levi-Strauss's reliance upon it have been Criticized, E. LEACH, CLAUDE LEVI-STRAUSS (1970), but the principles (1) that relational context (here opposition) creates meaning and (2) that thought is dialectical (that is, structured in oppositions) do not cease to be valid simply because the linguistic theories which suggested these principles to Levi-Strauss are now out of fashion.

[144] C. LEVI-STRAUSS, THE SAVAGE MIND 95 (1966); C. LEVI-STRAUSS, 1 STRUCTURAL ANTHROPOLOGY 58-59 (1963, 1976).

[145] *See supra* note *136.*

[146] The word "arbitrary" is unfortunate but I can think of no better term. I do not mean to suggest that, when we take moral or legal positions, what we say is meaningless or that moral and legal persuasion is fruitless. Rather, I mean that the *scope of the extension* of our moral and legal principles is not determined by our expression of them. Hence that scope---how far the principle is to extend, how much the argument proves---is what is indeterminate and therefore "arbitrary."

[147] C. LEVI-STRAUSS, TOTEMISM 77 (1963) (emphasis omitted).

Levi-Strauss's position is that human thought is structured in oppositions and that these oppositions are the bedrock of the meaning and association of ideas.[148] An explicitly structuralist version of my thesis, then, is that the dialectical structure of moral consciousness is a precondition to moral thought.

I do not claim that the particular forms of moral argument found in Western cultures are universal. For example, other cultures may have no forms of moral argument equivalent to the rights arguments discussed above because they have no conception of rights as Westerners understand them. Moreover, since the forms of institutional argument discussed above are based upon particular historically contingent institutions (for example, judicial power versus legislative power), there is no reason to expect the oppositions they represent to be universal.

The hypothesis I propose is more modest; I assert that moral thought is structured in oppositions, or antinomal ideas, and that antimonal ideas by their nature create crystalline structures of moral argument, regardless of the forms the arguments take and the substantive content of the opposed ideas which the arguments represent. The oppositions which create crystalline structures of moral argument may vary from culture to culture. Thus the oppositions that we see in Liberal thought reflect our Liberal consciousness. I do not attribute, however, the existence of oppositions to the Liberal nature of our consciousness, but to the tendency of human beings to think in antinomies.

On the other hand, I do think it reasonable to assume that in any society where there is more than one individual the antinomy of self and other will appear in moral discourse. This antinomy, however, may not be identical to the individualist-communalist dichotomy we see in Western thought, and the tensions it produces may not be felt with the same sense of urgency that modern westerners experience.

0. *A Reply to Cynicism*

Once a person recognizes the recurring forms of legal arguments, it is relatively easy to learn how to generate standard individualist and communalist arguments on both sides of any dyadic rule choice. There is a danger that this newfound power will lead both to a loss of legal innocence and an unfortunate plunge into cynicism. The former is not so terrible a fate, but the latter deserves refutation. The cynical position takes this form: if the same arguments appear over and over again, and if for every argument there is a counter-argument, isn't the exercise of legal and moral persuasion pointless? What is the persuasive force of legal and moral argument if one can mechanically generate arguments in support of any position? More importantly, what is the value of legal and moral argument if it is so easily manipulable?

What is intriguing about these questions is their unstated premise that we have always believed that one *could not* argue for any legal position. After all, in a country in which people have,

[148] *See* C. LEVI-STRAUSS, THE SAVAGE MIND (1966); C. LEVI-STRAUSS, TOTEMISM (1963); Kennedy, *Form and Substance*, *supra* note 4, at 1712-13.

at various times, defended racial segregation,[149] involuntary sterilization on eugenic grounds,[150] life sentences for the theft of less than $200 of property,[151] and child labor in sweatshops,[152] it would seem obvious that one *can* argue for just about anything. The fact that one can construct arguments for any legal position, however, does not mean that all legal rules are equally good, just, or right. Just because many different buildings could be constructed out of the same materials, one would not expect that they would all be equally useful, stable, or desirable.

The fact that "one can argue for anything" is a justification for neither cynicism or nihilism. It is rather the very reason why every human being, and especially every lawyer, bears a heavy responsibility for the ways in which she employs moral argument. The moral and legal positions we take are not merely meaningless moves in an adventitious game; they affect human lives and fortunes. Thus, the existence of mechanically generable counter-arguments for every position does not mean that arguments about values are pointless. Legal persuasion (and more generally, moral persuasion) is neither futile nor pointless; it is essential to civilization and the only antidote to its destruction. If we cannot persuade each other, we cannot live with each other.

V. CONCLUSION: THE DIALECTICAL NATURE OF LEGAL AND MORAL THOUGHT

Systems of law and standards of moral conduct are founded upon and defended by the tools of moral and legal argument. These tools are imperfect, as is the language in which they are phrased. Every moral or legal argument stands for a principle much broader than that which is necessary to decide a particular case, and indeed each principle "proves too much" in that it also supports results we find unpalatable. This fact is symptomatic of the dialectical structure of our moral consciousness; it is a corollary of the doctrinal conundrum. *Yet these tools of persuasion, imperfect as they are, are the only tools we have.*

If I try to persuade you that abortion or capital punishment is a bad thing, I will find myself using arguments of the types that I have catalogued above. I will make those arguments knowing that each has a rejoinder. Yet I must make them anyway, for they are the only way I can communicate to you morally. The dialectical structure of legal and moral thought is a *precondition* to its exercise.

One might try to avoid this conclusion and explain the crystalline structure of legal argumentation as a semantic phenomenon. Thus, our moral and legal arguments "prove too much" not because the principles overextend themselves but because the words we use to express our thoughts point only crudely at what we mean. If language could equal the precision of our moral and legal thought, so this argument goes, the tensions and conflicts described in this article would evaporate.

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[149] *E.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

[150] *E.g.*, Buck v. Bell, 274 U.S. 200 (1927).

[151] *E.g.*, Rummel v. Estelle, 445 U.S. 263 (1980).

[152] *E.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U-S. 20 (1922).

Language, however, does not after some imagined pure presence of thought. It forms the structure of thought itself. We necessarily think in symbols. Thus, the dialectical structure of legal argument is not a distortion of our thought by an imperfect medium, but reflects the structure of legal and moral thought itself and the tendency of the human mind to think in oppositions. To paraphrase the poet, the fault lies not in our words, but in ourselves.

Nor can we place the blame for the dialectical structure of our moral and legal thought on antinomies peculiar to Liberal social thought and western legal systems. I do not believe that our moral and legal consciousness is dialectically structured because it is Liberal consciousness, so that if we could free ourselves from Liberal institutions our moral and legal debates would no longer display a crystalline structure. Our legal institutions and our system of moral values are Liberal, but the contradictions of our thought are not Liberal contradictions, but are only manifested in our Liberalism. They appear to us in a "Liberal flavor" not because of their inherently Liberal character but because of the Liberal character of our institutions.

We must not confuse the dancer with the dance. The oppositions within our thought may have contributed to the character of our historically contingent institutions but they are not themselves simply creations of them. Thus, a transformation of our social and political institutions might lead us to different sorts of antinomies in our moral and legal thought, but if my hypothesis is correct, we would not escape the human tendency to think in antinomies.[153]

The crystalline structure of our legal and moral thought is cause for neither resignation nor rejoicing. It simply reflects the way that we are. Can this knowledge be useful to legal and moral thinkers? I believe that it can. The doctrinal conundrum reveals hidden tensions in our moral justifications. Becoming aware of these tensions or potential contradictions can liberate us because it forces us to reevaluate our justifications. It shows us that what we thought were dissimilar moral issues are really alike. It urges us to consider transferring our moral intuitions from one area of our life to another, and seeing whether the results of that transfer comport any better with our developing visions of justice.[154]

If, as a result of this challenge to our preconceived intuitions, we reevaluate our moral and legal positions, we know that the doctrinal conundrum will not disappear. But that is not really the point. Although the doctrinal conundrum tells us that some doctrinal choices will rest upon justifications which are in tension with justifications supporting other doctrinal choices, *it does not*

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[153] This hypothesis about the source of the contradictions in our moral consciousness may be disproved, if we could discover non-liberal cultures whose moral and political discourse did not reflect antimonal types of thought. The problem comes in establishing how a different culture's forms of moral argument could be compared to our own. We cannot expect every culture to have those conceptions of the state or of the rule of law which are the hallmark of Western legal systems. Testing this hypothesis would also require more than a superficial understanding of the meaning of the self and the community in different cultures. Thus, the problems of translation are formidable, even if we can identify notions of "right" and "wrong" in a given culture.

[154] *Cf.* Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561, 580 (1983) ("Legal doctrine rightly understood and practiced is the conduct of internal development through legal materials."); J. RAWLS, A THEORY OF JUSTICE 48-51 (1971) (sense of justice comes from matching initial convictions with proposed preconceptions in an attempt to achieve reflective equilibrium).

tell us where the tension must lie. The progressive refinement of our moral and legal intuitions remains a viable goal, even though their dialectical nature cannot be transcended. In fact, the presence of the doctrinal conundrum virtually begs us to engage in that process of refinement.

Thus we see at last the most important difference between moral and legal reasoning and the purely logical reasoning of a formal system. In a formal system of logic, one contradiction, anywhere in the system, is enough to make the entire system worthless, for in such a system any theorem is provable. Thus, the location of the antinomy is irrelevant to the value of the system. Yet in a system of moral and legal thought, contradiction is not only inevitable but essential, and I mean "essential" in both senses of the word. Contradiction is essential because it reflects the essence of thought, and essential because it is a necessary spur to the continuing development of our moral and legal intuitions.

APPENDIX

THE TYPOLOGY OF LEGAL ARGUMENT

I. INDIVIDUALIST AND COMMUNALIST ARGUMENTS

A. *Arguments of Moral Responsibility and Desert*

1. Individualist Arguments of Moral Responsibility and Desert

Tort Law Arguments
(1) No Liability Without Fault (including foreseeability) (NLWF)[155]
(2) No Liability Without Causation (NLWC)[156]

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[155] Examples:

> The only rational basis for allowing recovery in tort seems to be blamableness . . . . Granting that we cannot have a division of misfortune, it is useless simply to shift it unless for good reason. It is better, then, where neither party is to blame, to let the loss lie where it happens to fall.

Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335, 335 (1902) (arguing for defense of mistake in intentional torts).

> The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away . . . . Nothing in the situation gave notice that the failing package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do."

Palsgraf v. Long Island R.R., 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) (quoting POLLOCK, TORTS 455 (11th ed.)) (majority opinion of Cardozo, J.) (arguing for "foreseeable plaintiff" rule).

> Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences not of danger but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business.

Titus v. Bradford, B.& K.R.R., 136 Pa. 618, 626, 20 A. 517,518 (1890) (arguing that custom should be a defense to defeat liability of an employer for unsafe working conditions).

[156] Examples:

> [T]he problem with the rule stated by the majority is that] a particular defendant maybe held proportionately liable *even though mathematically it is much more likely than not that it played no role whatever in causing plaintiffs' injuries* . . . . In adopting the foregoing rationale the majority rejects over 100 years of tort law which required that before tort liability was imposed a "matching" of defendant's conduct and plaintiff's injury was absolutely essential.

Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 616, 607 P.2d 924, 939, 163 Cal. Rptr. 132, 147 (1980) (Richardson, J., dissenting) (emphasis in original) (arguing against the market share theory of liability advanced by the majority).

> [T]here is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time, . . . or, if she had, that she would have thrown it so that her husband could have seized it, or, if she did, that he would have seized it, or that, if lie did, it would have prevented him from drowning.

New York Central R.R. v. Grimstad, 264 F. 334, 335 (2d Cir. 1920) (rejecting theory that defendant was liable for negligence in failing to provide life buoys).

(3) No Liability Without an Act (NLWA)[157]
(4) No Liability Without Harm (NLWH)[158]
(5) As Between Two Guilty Persons, Let the Loss Lie Where It Falls (ASB2G)[159]

Criminal Law Arguments
(6) No Liability Without Free Choice (NLWFC)[160]

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[157] Example:

> The law does not punish men for their guilty intentions or resolutions in themselves. Nor does it commonly punish them even for the expression, declaration, or confession of such intentions or resolutions. That a man's unfulfilled criminal purposes should be punishable they must be manifested not by his words merely, or by acts which are in themselves of innocent or ambiguous significance, but by overt acts which are sufficient in themselves to declare and proclaim the guilty purpose with which they are done.

The King v. Barker, 1924 N.Z.L.R. 865, 875 (opinion of Salmond, J.) (arguing for equivocality test of criminal attempt).

[158] Examples:

> Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self estimation which constitutes the material element in an action for verbal slander.

Sheffill v. Van Deusen, 79 Mass. 304, 305 (13 Gray) (1859).

> Women have occasionally sought damages for mental distress and humiliation on account of being addressed by a proposal of illicit intercourse. . . . If there has been no incidental assault or battery, or perhaps trespass to land, recovery is generally denied, the view being, apparently, that there is no harm in asking.

Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033, 1055 (1936).

[159] Examples:

> One who suffers from the terrible tendency to bleed on slight contact, which is denoted by the term "a bleeder," cannot complain if he mixes with the crowd and suffers severely, perhaps fatally, from being merely brushed against.

Bourhill v. Young, 1943 A.C. 92, 109 (opinion of Lord Wright).

> A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right.

Butterfield v. Forrester, 11 East 60, 61, 103 Eng. Rep. 926, 927 (1809) (opinion of Lord Ellenborough, C.J.) (arguing for defense of contributory negligence).

[160] Examples:

> [W]e think a different situation is presented if the claimed excuse is based upon the incapacity of men in general to resist the coercive pressures to which the individual succumbed. . . . [L]aw is ineffective in the deepest sense, indeed . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.

MODEL PENAL CODE § 2.09commentat7 (Tent. Draft No. 10, 1960) (arguing for defense of duress).

> [A] drug addict, who, by reason of his use of drugs, lacks substantial capacity to conform his conduct to the requirements of the law may not be held criminally responsible for mere possession of drugs for his own use.

(7) No Liability Without Fair Warning (NLWFW)[161]
(8) No Liability Without Criminal Intent (NLWCI)[162]

2. Communalist Arguments of Moral Responsibility and Desert

Tort Law Arguments
(1) Defendant's Fault Requires Liability (F → L)[163]

United States v. Moore, 486 F.2d 1139, 1209- 10 (D.C. Cir. 1973) (Wright, J., dissenting).

[161] Examples:

> I must advert to the consequences of holding that this very general offence [conspiracy to corrupt public morals] exists. It has always been thought to be primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved.

Shaw v. Director of Pub. Prosecutions [19621, A.C. 220, 281 (H.L. 1961) (opinion of Lord Reid) (arguing against creation of common law crime of "conspiracy to corrupt public morals").

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Lanzetta v. New Jersey, 306 U.S. 451,453 (1939) (arguing that the Due Process Clause requires that penal statutes not be vague).

[162] Examples:

> It has been argued . . . that absolute liability [in criminal law] is necessary for enforcement in a number of areas where it obtains. But if practical enforcement cannot undertake to litigate the culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgement unless it can declare that the defendant's act was wrong.

MODEL PENAL CODE, § 2.05 comment at 140 (Tent. Draft No. 4,1955) (arguing against prison terms in strict liability offenses).

> In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken . . . . To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber's conduct happened to induce.

People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130,133, 44 Cal. Rptr. 442, 445 (1965) (arguing against application of felony murder rule where accomplice is killed by robbery victim).

[163] Examples:

> The one shot that entered the plaintiff"s eye . . . could not have come from the gun of both defendants. It was from one or the other only.
>
> . . . .
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> . . . [A] requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers-both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if be can.

Summers v. Tice. 33 Cal. 2d 80, 84-87, 199 P.2d 1, 3-4 (1948) (arguing for theory of alternative liability).

> The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

Palsgraf v. Long Island R.R., 248 N.Y. 339, 350, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (arguing

(2) As Between Two Innocents, Let the Person Who Caused the Harm Pay the Damage (ASB21)[164]
(3) Act At Your Peril (AAYP)[165]
(4) Plaintiffs Harm Requires Liability (H → L)[166]
(5) An Innocent Plaintiff Should Not Forfeit Recovery (NFWF (Plaintiff)).[167]

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against "unforeseeable plaintiff" rule of majority).

[164] The ASB2I argument can be an argument for compensation or for corrective justice. Examples:

> I may not do a trespasse to one for fear of threatenings of another, for by this means the party injured shall have no satisfaction . . . .

Gilbert v. Stone, Style 72, 82 Eng. Rep. 539 (K.B, 1648) (arguing against defense of duress in intentional tort).

> We need not recanvass the reasons for imposing strict liability on the manufacturer. The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63-64, 377 P.2d 897,900-01, 27 Cal. Rptr. 697, 700-01 (1963).

In addition, the ASB21 argument may simply focus on the fact that the defendant has caused harm to the plaintiff and therefore should be liable. In this case the argument might better be called Defendant's Causation Requires Liability (C → L).

Examples:

> [The rescuer's) right of action depends not upon the wrongfulness of the defendant's conduct in its tendency to imperil the person whose rescue is attempted, but upon its tendency to cause the rescuer to take the risk involved in the attempted rescue."

F. BOHLEN, STUDIES IN THE LAW OF TORTS 569 n.33 (1926) (explaining why a rescuer is permitted a cause of action against a defendant whose negligence endangered a third party).

> That the design defect does not cause the initial collision should make no difference if it is a cause of the ultimate injury.

Volkswagen of America, Inc. v. Young, 272 Md. 201, 215, 321 A.2d 737, 744 (1974) (holding manufacturer has a duty to design a crash-worthy vehicle).

[165] Examples:

> A person who inflicts a serious wound upon another, calculated to destroy or endanger his life, will not be relieved of responsibility, even though unskilled or improper medical treatment aggravates the wound and contributes to the death. Every person is held to contemplate and be responsible for the natural consequences of his own acts, and the criminality of an act is not altered or diminished by the fact that other causes co-operated in producing the fatal result.

Hall v. State, 199 Ind. 592, 608-09, 159 N.E. 420, 426 (1927).

> As the purpose [of the criminal law] is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law.

HOLMES, THE COMMON LAW 57 (1923) (arguing for objective standards in criminal law).

[166] Example:

> The damage done by negligent reporting . . . can be just as devastating to the individual as that resulting from false reporting done maliciously or in reckless disregard of truth . . . .

Gobin v. Globe Publishing Co., 216 Kan. 223, 232-33, 531 P.2d 76, 83 (1975) (arguing for a negligence standard in defamation actions brought by private parties against media defendants).

[167] This argument is a response to the defendant's ASB2G argument that the plaintiff should be denied liability because he is (to some degree) at fault. The argument is that the plaintiff should not forfeit recovery because he is not at fault, has not caused his own injury, etc.

Example:

Criminal Law Arguments
(1) Free Choice Existed (FCE)[168]
(2) Fair Warning Existed (FWE)[169]
(3) Criminal Intent Requires Liability (C.I. → L)[170]

> We believe the cases in those jurisdictions rejecting the "seat belt defense" [a defense of contributory negligence barring recovery for increased damages caused by plaintiff's failure to wear a seat belt] are the better reasoned cases. It seems extremely unfair to mitigate the damages of one who sustains those damages in an accident for which he was in no way responsible, particularly when, as in this jurisdiction, there is no statutory duty to wear seat belts.

Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 171, 492 P.2d 1030, 1036 (1972).

Rebuttals of this type are all communalist in nature, even though they are responsibility denying arguments. What makes them communalist is that they emphasize the *defendant's* responsibility to pay by denying the *plaintiff's* responsibility for his own predicament. The positions of the plaintiff and the defendant are thus symmetrical: individualist arguments like ASB2G deemphasize the *defendant's* responsibility for plaintiffs injury by emphasizing the *plaintiff*s responsibility for his own predicament. This symmetry continues throughout the other forms of individualist-communalist arguments: Rights, and Social Utility. *See supra* text accompanying notes 49-53 and 54-58, respectively; *infra* note 210.

[168] Examples:

> [W]e cannot accept a thesis that responsibility in law for a criminal act perpetrated by a legally sane defendant, can be considered nonexistent . . . because his act was motivated by subconscious influences of which he was not aware, and which stemmed inevitably from his individual personality structure. A criminal act of that nature is nothing more than the consequence of an impulse that was not resisted.

State v. Siokora, 44 N.J. 453, 472, 210 A.2d 193, 203 (1965) (citations omitted) (affirming trial court's refusal to admit psychiatric testimony relating to defendant's capacity to premeditate murder).

> There is no reason . . . always to make this protest [of no free choice] when someone who "just didn't think" is punished for carelessness. For in some cases at least we may say "he could have thought about what he was doing" with just as much rational confidence as one can say of any intentional wrongdoing -he could have done otherwise" . . . .

H. HART, PUNISHMENT AND RESPONSIBILITY 154 (1968) (rejecting argument that mere unawareness of nature of risk should negate *mens rea* in negligent homicide cases (a pure subjective standard)).

[169] Examples:

> Defendant was aware of the penal statute enacted by the Legislature. He knew what he wanted to do, and he did the thing he intended to do. He claims merely that he was given advice [by the State Attorney General] regarding his legal rights. If there was any mistake, it was a mistake of law and not of fact.

Hopkins v. State, 193 Md. 489, 499, 69 A.2d 456, 460 (1950) (arguing against defense of mistake of law).

> [W]here, as here, . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.

United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (arguing that defendant's knowledge that its action violates specific provision of regulations is not required for violation of 18 U.S.C. § 834(f), regulating transportation of corrosive liquids in interstate commerce).

[170] Examples:

> One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime.

People v. Camodeca, 52 Cal. 2d 142, 147, 338 P.2d 903, 906 (1959) (arguing against defense of impossibility in

B. *Arguments of Moral, Political, and Legal Right*

Basic Rights Arguments

Individualist:

(1) Rights as Freedom of Action (R.F.A.): The defendant has a right to act as he pleases without incurring liability to plaintiff.[171]

(2) Rights of the Individual (R.I.): The defendant has a right to engage in an activity free from governmental regulation .[172]

Communalist:

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attempt case).

> If a defendant can be convicted as an accomplice for advising or counseling the perpetrator, it likewise seems fair to impose vicarious liability upon one who, in alliance with others, has declared his allegiance to a particular common object, has implicitly assented to the commission of foreseeable crimes in furtherance of this object, and has himself collaborated or agreed to collaborate with his associates, since these acts necessarily give support to the other members of the conspiracy.

Developments in the Law---Criminal Conspiracy, 72 HARV. L. REV. 920, 999 (1959) (arguing for vicarious liability of conspirator for overt acts done by co-conspirator in furtherance of the conspiracy).

[171] Examples:

> There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

RESTATEMENT (SECOND) OF TORTS § 46 comment d (1966) (arguing that recovery for intentional infliction of emotional distress must be predicated upon outrageous conduct by the defendant).

> We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. "It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."

Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 F. 46, 49 (2d Cir. 1915) (arguing for freedom of contract) (quoting COOLEY ON TORTS 278).

[172] Examples:

> Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer, Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Erznoznick v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) (quoting Cohen v. California, 403 U.& 15, 21 (1971)) (striking down a city ordinance which prohibited the showing of nudity in films by a drive-in movie theatre when its screen could be seen from a public street or place).

> There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.
>
> . . . .
>
> . . . Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual.

Lochner v. New York, 198 U.S. 45, 57, 61 (1905) (striking down maximum hour law for bakers on grounds that law violated freedom of contract).

(3) Rights as Security (R.S.): Plaintiff has a right to be secure from invasions of her interests by the defendant.[173]

(4) Rights of the Community (R.C.): The State has the right to regulate the defendant's activities in order to protect the security of its citizens.[174]

No Rights Arguments

Denials of Individualist arguments (NoR.F.A., NoR.I.) are communalist; denials of communalist arguments (NoR.S., NoR.C.) are individualist.

Each NoR argument can take four basic forms:

(1) Basic "No Rights" arguments: This form of argument is the denial that the right asserted in the R.F.A., R.I., R.S., or R.C. argument exists. It can be either

(a) a simple denial that the right asserted exists,[175] or

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[173] Examples:

> Security of person is as necessary as the security of property; and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain.

Roberson v. Rochester Folding Box Co., 171 N,Y. 538, 563, 64 N.E. 442, 450 (1902) (Gray, J., dissenting) (arguing in favor of recognition of cause of action for commercial appropriation of the plaintiff's name or likeness).

> [A] subjective standard of negligence] would leave the genera) security unprotected against that vast amount of dangerous and harmful conduct which results not from inadvertence or indifference but from deficiencies in knowledge, memory, observation, imagination, foresight, intelligence, judgment, quickness of reaction, deliberation, cool ness, self-control, determination, courage, or the like.

Edgerton, *Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 867 (1926).

[174] Examples:

> [U]tterances inciting to the overthrow of organized government], by their very nature, involve danger to the public peace and to the security of the State . . . . And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale . . . . [I]t may, in the exercise of its judgment, suppress the threatened danger in its incipiency.

Gillow v. New York, 268 U.S. 652,669 (1925) (upholding statute which criminalized advocating the overthrow of organized government by violent means).

> [T]he Eighth Amendment does not prevent the State from taking an individual's "well-demonstrated propensity for life-endangering behavior" into account in devising punitive measures which will prevent inflicting further harm upon innocent victims. . . . [D]eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not."

Coker v. Georgia, 433 U.S. 584, 610 (1977) (Burger, C.J., dissenting) (arguing for constitutionality of the death penalty in rape cases) (quoting Roberts v. Louisiana, 428 U.S. 325, 354 (1976) (White, J., dissenting)).

[175] Examples:

> The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not.

Griswold v. Connecticut, 381 U.S. 479, 508 (1965) (Black, J., dissenting).

> No American decision has been cited, and independent research has revealed none, in

(b) a denial that the right exists to the degree asserted .[176] Two common ways to do this are by trivialization and slippery slope.

(i) Trivialization is the recharacterization of the right so that it seems unimportant, ludicrous or otherwise unworthy of protection.[177]

(ii) Slippery Slope arguments assert that the right as announced would have no recognizable limiting principle.[178]

(2) "No Violation" arguments concede that a right exists but deny that there is any infringement of the right. The most common versions of this line of reasoning are:

(a) The right is not abridged because it can be exercised in other ways.[179]

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which it has been held that . . . a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor.

Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959).

[176] Examples:

Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other- For these they are compensated by all the advantages of civilized society. I f one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life.

Campbell v. Seaman, 63 N.Y. 568, 577 (1876) (arguing for locality rule in nuisance cases).

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.

Cox v. Louisiana (Cox 1), 379 U.S. 536, 554 (1965) (arguing for constitutionality of time, place, and manner regulations of speech).

[177] Examples:

We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment.

Bell v. Wolfish, 441 U.S. 520, 542 (1979) (holding that "double-bunking" of pretrial detainees does not violate the Due Process Clause).

The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to [the] level [of an interest implicit in the concept of ordered liberty]. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

Moore v. City of East Cleveland, 431 U.S. 494, 537 (1977) (Stewart, J., dissenting).

Few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

Young v. American Mini Theaters, 427 U.S. 50, 70 (1976) (plurality opinion of Stevens, J.).

[178] Examples of this type of argument are given in the section on Formal Realizability arguments, *infra* notes 245-48 and accompanying text.

[179] Examples:

[T]he regulation [prohibiting sleeping in national parks could not be] faulted . . . on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways. . . . Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984) (upholding content neutral time, place, and manner regulation of use of federal parks).

When the right asserted is that of the community, the argument that the state has no right because there are

(b) The actor retains a free choice whether to exercise the right or to accept some other benefit (or avoid a penalty).[180]
(c) To the extent that the actor has suffered a restriction of available opportunities, it has not occurred because of a violation of the actor's rights by the defendant but because of other circumstances for which the defendant is not responsible.[181]
(d) The plaintiff has not suffered an "actual" (i.e., non- speculative) impairment of the asserted right.[182]

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other ways of achieving its purposes becomes the familiar "less restrictive alternative" argument:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (arguing against state's right to require public school teachers to list every organization to which they had belonged in the last five years).

[180] Examples:

> The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.

Harris v. McRae, 448 U.S. 297, 315 (1980) (arguing for constitutionality of federal law which subsidized childbirth but not medically necessary abortions).

> To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other . . . .

Coppage v. Kansas, 236 U.S. 1, 21 (1915) (arguing that right of association of employee to join a labor union is not abridged by "Yellow Dog" contract).

[181] Examples:

> The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

Harris v. McRae, 448 U.S. 297, 316 (1980) (arguing that governmental decision to fund childbirth but not medically necessary abortions did not violate constitutionally protected right of privacy).

> We consider the underlying fallacy of the plaintiffs argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (upholding "separate but equal" doctrine).

[182] Examples:

> Although [plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .
> [S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 485-86 (1982) (arguing that plaintiffs did not suffer actual injury when the government donated property to a church related group in an alleged violation of the Establishment Clause).

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

(e) The plaintiff has not suffered a sufficiently great impairment of the asserted right.[183]
(3) "Adequate Remedy Exists" arguments: Whether or not a right exists, and whether there has been a violation of the right, no extra protection is needed because alternative means of redressing the asserted infringement already exist .[184]
(4) "No Remedy" arguments: Whether or not there is a right, and whether or not there has been a violation, there should be no remedy for relief, at least, of the sort the plaintiff or defendant seeks[185].

. . . .

. . . [T]he terms of the respondent's appointment secured absolutely no interest in re-employment for the next year . . . . [T]he respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972) (arguing that a one year employment contract gave no entitlement to a pretermination hearing under the Due Process Clause).

[183] Example:

In view of the torpidity of [the] administrative review process . . . and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. . . . in view of [other] potential sources of temporary income, there is less reason here than in [Goldberg v. Kelly, 397 U.S. 254 (1970)] to depart from the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

Mathews v. Eldridge, 424 U.S. 3 19, 342-43 (1976) (arguing that prehearing termination of Social Security Disability benefits did not violate right to procedural due process).

[184] Examples:

[B]ankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. . . . "[w]ithout a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts . . . ."

United States v. Kras, 409 U.S. 434,445 (1973) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)) (arguing that, in contrast to filing fees for divorce, filing fees for bankruptcy petitions do not unconstitutionally deny a right of equal access to the courts).

The schoolchild has little need for the protection of the Eighth Amendment.. . . Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

Ingraham v. Wright, 430 U.S. 651,670 (1977) (arguing that corporal punishment does not constitute a violation of the eighth amendment's ban on cruel and unusual punishments).

[C]orporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process.

Id. at 672.

Note that the difference between the three examples is that the first and second examples argue that there is no right because of the presence of an adequate alternative remedy, while the third example concedes that there is a right, but argues that it has not been violated because of the presence of an adequate alternative remedy.

[185] Example:

[T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.

United States v. Richardson, 418 U.S. 166, 179 (1974) (arguing that fact that all citizens share an injury equally indicates that no remedy for an alleged constitutional violation lies in the federal courts).

As the above example demonstrates, these arguments often concern the proper

Responses to No Rights Arguments

When a NoR argument is made against an asserted right, and another contrary right asserted to exist in its stead, the proponent of the first right can deny the existence of the second right (NoR); however, she may also respond to her opponents' NoR arguments with more subtle varieties of rights arguments:

(1) The existence and worth of the right may be reasserted through:

(a) Detrivialization-recharacterizing the right or interest in a broad fashion so that it appears important and worthy of protection.[186]

(b) Anti-Slippery Slope arguments. These arguments concede that no right can determine the scope of its own extension but argue that the right exists nevertheless and merits protection in this case. This is coupled with the assertion that reasonable boundaries can be drawn through the use of standards or case-by-case adjudication.[187]

(2) In response to the "No Violation" arguments, the reality of the abridgment may be reasserted by the following arguments:

(a) The abridgment of the right is substantial.[188]

(b) Part of the right consists of the choice of the manner of its exercise. [189]

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institutions to give the complaining party his desired relief. They are related to the arguments of institutional competence and authority mentioned earlier. *See supra* text accompanying notes 69-70; *supra* note 69.

[186]Examples: (See *supra* note 177 for corresponding trivialization arguments.)

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977).

> The fact that the "offensive" speech here may not address "important" topics--ideas of social and political significance," in the Court's terminology. . . —does not mean that it is less worthy of constitutional protection.. . . [I]t is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must beat its height.

Young v. American Mini Theatres, 427 U.S. 50, 87 (1976) (Stewart, J., dissenting).

[187] Examples of this form of argument are given in the section on Substantive Realizability arguments, *infra* notes 249-53 and accompanying text.

[188] Example:

> Limiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so.. . . [T] he restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public [and] reduces the opportunity for privacy of selection and purchase . . . .

Carey Y. Population Servs. Int'l, 431 U.S. 678, 689 (1977).

[189] Example:

> [W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.
>
> . . . .
>
> . . . [W]e cannot overlook the fact . . . that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact. words are often chosen as much

(c) "Chilling" arguments: Forcing the actor to choose between not exercising the right and exercising it at the risk of losing a benefit or suffering a penalty will effectively discourage its exercise.[190]
(d) "Jus Tertii" (or "Overbreadth") arguments: Whether or not the actor's rights have been abridged, the rights of third parties in different positions will be compromised.[191]
(3) One may reject the Alternative Remedies Exist argument by characterizing the remedies as unavailable, inadequate, or otherwise futile.[192]
(4) In response to "No Remedy" arguments, one argues that the existence of the right necessitates a remedy.[193]

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for their emotive as their cognitive force.
Cohen v. California, 403 U.S. 15, 25-26 (1971) (rebutting argument that defendant could have expressed opposition to the draft in other ways than wearing obscene slogan on the back of his jacket).

[190] Examples:
[T]he Hyde Amendment has effectively removed [the choice whether or not to have an abortion] from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse. It matters not that in this instance the Government has used the carrot rather than the stick.
Harris v. McRae, 448 U.S. 297, 333-34 (1980) (Brennan, J., dissenting).
A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libe1judgments virtually unlimited in amount—leads to . . . "self-censorship."
New York Times v. Sullivan, 376 U.S. 254, 279 (1964) (arguing against strict liability in libel cases).

[191] Example:
In . . . First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980).

[192] Example:
[A subsequent] tort action [against a schoolteacher for wrongfully imposed corporal punishment) is utterly inadequate to protect against erroneous infliction of punishment . . . . First, under Florida Law, a student punished for an act he did not commit cannot recover damages from a teacher "proceeding in utmost good faith . . . on the advice of others," supra, [430 U.S.] at 692 . . . .
. . . .
Second, and more important, even if the student could sue for good faith error in the infliction of punishment, the lawsuit occurs after the punishment has been finally imposed. The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding.
Ingraham v. Wright, 430 U.S. 651, 693-95 (1977) (White, J., dissenting) (arguing for Due Process right of informal hearing prior to infliction of corporal punishment).

[193] Example:
The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. It immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future.. . . The federal judicial power is now limited to levying a toll for such a systematic constitutional violation.
Los Angeles v. Lyons, 461 U.S. 95, 137 (1983) (Marshall, J., dissenting) (arguing against rule that plaintiff had no

C. *Arguments of Social Policy and Social Utility*

Four common forms of Social Utility arguments are: (1) Behavior Modification arguments; (2) Spreading arguments; (3) Distributional arguments; and (4) Arguments of Social Choice. Each of these has individualist and communalist versions which oppose one another.

1. *Behavior Modification arguments* emphasize the changes in the behavior of the parties that will result from the proposed rule. Some of the most common versions of this argument are the following:

a. *Deterrence and No Deterrence arguments.* These arguments are seen most frequently in criminal law. The activity meriting deterrence, however, can be any behavior deemed undesirable by society. The communalist form of the Deterrence argument is that additional responsibilities and duties will deter undesirable conduct on the part of defendants.[194] The individualist version is that reduced responsibilities and duties will reduce undesirable conduct by encouraging plaintiffs to take action which eliminates the harmful conduct, protects them from it, or reduces their exposure to risk.[195]

No Deterrence arguments respond to Deterrence arguments. The individualist No Deterrence response to the communalist Deterrence argument is that the increased duty or responsibility will not deter socially undesirable conduct but will instead punish the innocent, the disadvantaged, and the unwary,[196] or else will simply shift the problem to other areas where it cannot be dealt with as

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standing to seek injunctive relief from chokeholds which may in the future be administered by police in violation of his constitutional rights).

[194] Examples:

> The purpose of the felony murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.

People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

> It is to the public interest to discourage the marketing of products having defects that are a menace to the public.

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (arguing for strict products liability).

[195] Examples:

> The effect of the [fellow servant rule] is to give employees a strong incentive to report careless fellow workers to their supervisors.

Posner, A *Theory of Negligence,* 1 J. LEGAL STUD. 29, 44 (1972).

> This form of argument is implicit in the position that minorities will be better off in the long run if they attain economic and political equality without the benefit of civil rights or affirmative action legislation.
>
> Individuals of any race or creed have but one road to social acceptance and economic abundance. . . . That road is the narrow, rocky, trail of personal exertion, perseverance, study, work, savings, and character building. . . . This road is the only one that leads to self-respect and the respect of others.

110 CONG. REC. 1621 (1964) (statement of Rep. Abernathy) (arguing against passage of the Civil Rights Act of 1964).

[196] Examples:

> Detached reflection cannot be demanded in the presence of an uplifted knife.

Brown v. United States, 256 U.S. 335, 343 (1921) (opinion of Holmes, J.) (arguing against rule that defendant must

efficiently.[197] Another common individualist response is that the best way to ensure that defendants engage in socially desirable conduct is to reduce rather than to increase regulations or restraints on their action.[198] The communalist No Deterrence response to the individualist Deterrence argument

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consider retreat before killing in self-defense).

> To punish as a murderer every man who, while committing a heinous offense, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow creature. The utmost that he can do is to abstain from every thing which is at all likely to cause death. No fear of punishment can make him do more than this: and therefore to punish a man who has done this can add nothing to the security of human life.

T.B. Maucalay, A Penal Code Prepared by the Indian Law Commissioners, Note M, 64-65 (1837) (arguing against felony murder rule).

> [T]he deterrent theory, which is normally accepted as a justification for criminal punishment, finds itself in some difficulty when applied to negligence. . . . Hardly any motorist does not firmly believe that if he is involved in an accident it will be the other fellow's fault. . . . [T]he threat of punishment for negligence must pass him by, because he does not realise that it is addressed to him.

G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122-23 (2d ed. 1961).

[197] Examples:

> Our indiscriminate policy of using the criminal law against selling what people insist on buying [gambling, drugs, prostitution] has spawned large-scale, organized systems . . . . Not only are these organizations difficult for law enforcement to deal with; they have the unpleasant quality of producing other crimes instead.

Kadish, *The Crisis of 0vercriminalization,* 374 THE ANNALS OF THE AMERICAN ACADEMY 157,16364 (1967).

Other classic arguments of this type are that outlawing abortions will only lead to unsafe abortions being performed under unsafe conditions in back alleys, and that restricting access to contraception will not reduce teenage promiscuity but will simply lead to an increased number of teenage pregnancies and an increased burden on the state's welfare system:

> Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability Or unavailability of contraceptives. Although young persons theoretically may avoid these harms by practicing total abstention, inevitably many will not.

Carey v. Population Servs. Int'l, 431 U.S. 678, 714 (1977) (Stevens, J., concurring in part and concurring in the judgment) (arguing against prohibition of distribution of contraceptives to minors under 16 years of age).

[198] Examples of this argument include the claim that giving governmental officials immunity from civil suits will permit them to perform their duties in the public interest without fear of later second guessing by judges and juries:

> Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges . . . a President must concern himself with matters likely to "arouse the most intense feelings" . . . . Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and importantly with" the duties of office.

Nixon v. Fitzgerald, 457 U.S. 731, 751-52 (1982) (announcing rule of absolute immunity for Presidents) (quoting Ferri v. Ackermann, 444 U.S. 193, 203 (1979)).

This form of argument is also used to justify exclusion of evidence of subsequent improvements in products liability cases:

> [Exclusion of this evidence] encourages persons to improve their products, property, services and

is that reduction of duties and responsibilities will not lead to self-protection by plaintiffs but will simply leave them at the mercy of stronger parties who will have no incentives to protect them.[199]

There is an interesting symmetry to each of the individualist and communalist versions of behavior modification arguments: the communalist emphasizes the *defendant's* ability to correct the undesirable situation or achieve the desired effect, while the individualist argument emphasizes the *plaintiff's* ability to achieve desirable results or to otherwise protect herself without recourse to governmental intervention. Thus, a negligence standard with a defense of contributory negligence is said to encourage plaintiffs to protect themselves from accidents [200] and broad first amendment protection is said to encourage people who are offended by speakers' messages to offer their own views so as to convince others.[201] The individualist emphasis on forcing the plaintiff to deal with his own problems is the essence of so-called "Rugged Individualism.[202]

Deterrence arguments (both individualist and communalist) can also be made in terms of a specific cost benefit analysis: although the increased responsibility will have some undesirable effects, they are outweighed by the worthwhile deterrent effects in protecting lives and property.[203]

> customs without risk of prejudicing any court proceeding and consequently delaying implementation of improvements.

Smith v. E.R. Squibb & Sons, 405 Mich. 79, 92, 273 N.W.2d 476, 481 (1979).

[199] Example:

> 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. The legislature recognized this, and to guard against the known hazards of the occupation required the employer to safeguard the workers from injury caused by faulty or inadequate equipment. If the employer could avoid this duty by pointing to the concurrent negligence of the injured worker in using the equipment, the beneficial purpose of the statute might well be frustrated and nullified.

Koenig v. Patrick Constr. Corp., 298 N.Y. 313, 318-19, 83 N.E.2d 133, 135 (1948) (arguing that contributory negligence should not be a defense where the defendant is in breach of safety regulations).

[200] R. POSNER, ECONOMIC ANALYSIS OF LAW § 6.11 (2d ed. 1977).

[201] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring opinion) ("[T]he fitting remedy for evil counsels is good ones.").

[202] *See also infra* note 210.

[203] In criminal law, this might be called the "ten and one" argument: It is better that ten guilty persons be convicted along with one innocent person under a stricter rule than to let all of them go free under a less strict alternative:

> The point here is that the future harm that the ten guilty men who have been acquitted may do, either by repeating their own offences or by encouraging others by showing how easy it is to avoid conviction, far exceeds any injury that the innocent man can suffer by his conviction. The question then becomes: Is it better that ten young persons should be tempted to become drug addicts than that one innocent man should be convicted of being in possession of unauthorized drugs?

Goodhart, *Possession of Drugs and Absolute Liability,* 84 LAW Q. 382, 385-86 (1968) (arguing for strict liability for possession of illegal drugs).

An individualist version of the "ten and one" argument would be that it is better to let a few criminals

The communalist or individualist rejoinder to this form of argument is the denial that the benefits outweigh the costs.[204]

Cost benefit arguments rely on assessments of the comparative desirability of certain conduct. Because these judgments are frequently subjective, arguments are easy both to make and to rebut. The disagreement about the cost benefit analysis can take place both at the level of facts and at the level of values. For example, one can disagree over whether ten guilty men set free would cause more harm than jailing one innocent person along with them because one disagrees about what will actually happen in either case or because one disagrees about the comparative moral value of what is agreed will happen. One may disagree about both.

In general, any Social Utility argument that is predicated upon a factual assessment can be rebutted by denying the truth of the factual predicate. Thus, a claim that a given rule will deter is rebutted by a claim that it will in fact not deter, and so on. In general, any Social Utility argument which is predicated upon a normative assessment can be rebutted by denying the value system which produces the normative judgment. Thus, a claim that the benefits to society in reduced crime outweigh the dangers of police abuse resulting from abolishing the exclusionary rule may be rebutted by claiming that personal liberty and freedom from arbitrary government coercion are more important values than security of persons and property.

b. *Regulation of relationships arguments.* These arguments deal with the consequences of regulating a preexisting relationship between the parties, for example, between family members, doctor and patient, lawyer and client, priest and penitent. The individualist argument is against additional legally created duties between the parties, on the grounds that the special nature of the relationship will be harmed or destroyed by the intrusion of the legal process. The result will be that the relationship will become either less stable, less intimate, or otherwise less rewarding, and society

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escape through the use of the exclusionary rule when the arresting officer makes a good faith mistake than to have a good faith exception and leave the door wide open to police abuse.

> The inevitable result of the [exclusionary rule] is that police officers who obey its strictures will catch fewer criminals. . . . [That] is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.

Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 COLUM. L. REV. 1365, 1393 (1983).

[204] This rejoinder might be called the "one and ten argument": an individualist version would be that it is better that ten guilty persons escape than that one innocent person be sentenced to jail. An example of a communalist version would be that it is better to risk a chance of police abuse under a good faith exception to the exclusionary rule than to let dangerous criminals loose on the streets because of technical errors in police practices.

will be worse off.[205] An allied argument is that regulation of the relationship will allow third parties to intrude on the relationship or else leave the parties with less protection from third parties.[206]

The communalist position is that regulation of the relationship is necessary to redress the unequal bargaining position of the parties; regulation will make the relationship more secure and rewarding for both parties. If the parties are sufficiently at odds that they believe it is necessary to resort to legal proceedings, the intimacy of thl.- relationship will already have been destroyed .[207] These arguments are related to the more general Regulation arguments discussed *infra*.

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[205] Examples:

> [B]oth legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a duty on doctors to disclose patient threats to potential victims would greatly impair treatment . . . . [I]mposing the majority's new duty is certain to result in a net increase in violence.

Tarasoff v. Regents of University of California, 17 Cal.3d 425, 452, 551 P.2d 334, 354-55, 131 Cal. Rptr. 14, 34-35 (1976) (Clark, J., dissenting).

> The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship, and to be a possible fruitful source of dissension and quarrelling. I cannot see that any benefit would result from it to either of the parties, but on the other hand it would lead to unlimited litigation in a relationship which should be . . . protected from possibilities of that kind.

Balfour v. Balfour [1919] 2 K.B. 571, 577 (opinion of Lord Justice Duke).

[206] Thus laws regulating sexual activity are criticized on the grounds that it will put the Government in our bedrooms. Griswold v. Connecticut, 381 U.S. 479,485 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"). A standard argument for retaining intra-family tort immunities has been that tortfeasors would otherwise be able to sue a parent for contribution or indemnity as a joint tortfeasor on a theory of negligent supervision, thus lessening the amount of real recovery that a minor child will receive in a tort suit against a third party. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859(1974).

[207] Examples:

> Critics have argued that [allowing prosecutions for spousal rape] would . . . lessen the likelihood of reconciliation . . . . [R]econciliation hardly seems an expected or likely consequence of a relationship that has deteriorated to the point of forcible sexual advances by a husband.

State v. Smith, 148 N.J. Super. 219, 225-26, 372 A.2d 386, 389 (Law Div. 1977).

> If a state of peace and tranquility exists between the spouses, then the situation is such that either no action will be commenced or that the spouses . . . will allow the action to continue only so long as their personal harmony is not jeopardized. If peace and tranquility is nonexistent or tenuous to begin with, then the law's imposition of a technical disability [a defense of interspousal immunity] seems more likely to be a bone of contention than a harmonizing factor.

Freehe v. Freehe, 81 Wash. 2d 183, 187, 500 P.2d 771, 774 (1972) (abandoning rule of interspousal immunity).

> One suggested interest [in requiring a minor's parental consent prior to obtaining an abortion) is the safeguarding of the family unit and of parental authority. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where . . . the very existence of the pregnancy already has fractured the family structure.

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976).

c. *Investment in Safety Arguments.* These arguments concern whether the rule proposed will cause one of the parties to make a proper investment in safety either by the purchase or use of necessary precautions or by a reduction in that party's activities.[208]

The communalist form of this argument is that an increased duty or responsibility on the defendant will lead to a proper cost benefit expenditure, and give the defendant sufficient incentives to invest in safety or to restrict the scope or nature of his activities in order to achieve a socially desirable level of activity.[209]

The individualist form of the Investment in Safety argument proposes, conversely, that a decrease in responsibilities and duties owed by the defendant is necessary in order to ensure that the *plaintiff* has incentives to make an optimal investment in safety, either through self-protection or by restricting potentially harmful activities.[210] This is often coupled with the following responses to the communalist position:

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[208] These arguments are really a special case of Behavior Modification Arguments which concern accident prevention. For this reason they take on an economic flavor.

[209] Examples:

> By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research.

Beshada v. Johns- Manville Products Corp., 90 N.J. 191, 207, 447 A.2d 539, 548 (1982) (arguing for strict liability for asbestos manufacturers).

> [I]t is said that a rule imposing liability [for the intentional torts of an insane person) tends to make more watchful those persons who have charge of the defendant and who maybe supposed to have some interest in preserving his property. . . .

McGuire v. Almy, 297 Mass. 323, 327, 8 N.E.2d 760, 762 (1937).

[210] Examples:

> Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.

Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033, 1035 (1936).

> [A] pure rule of strict liability would frequently result in inefficient solutions to conflicting resource use problems because it would give the victim of the accident no incentive to take steps to prevent it even if those steps cost less than prevention by the injurer.

R. POSNER, ECONOMIC ANALYSIS OF LAW 139 (2d ed. 1977).

In general, the individualist theory asserts that society will be better off if defendants' responsibilities and duties are reduced; therefore, members of the plaintiff class must develop their own means of protection, either by investing in safety, by self-insuring, or by accepting certain injuries as inevitable (developing a "thicker skin"). It is from this promise that the notion of “rugged individualism," that a normal person needs no help from others, probably arose. This rhetorical mode is often used to argue for reduced responsibility to others. It is important to note, however, that individualism does not necessarily imply that the defendant is responsible for her *own* behavior—rather it asserts only that the defendant is not responsible for what happens to *others.* Thus although individualist principles are often used to argue that others should care for themselves, the same arguments can be used to deny an individual's responsibility for her own actions. In short, the defenses of both contrib u tory negligence and insanity are highly individualist.

(i) The imposition of increased duty or responsibility will lead to an overinvestment in safety precautions or a restriction in activities which will be socially undesirable.[211]

(ii) Even with a reduced standard of duty or responsibility, market forces will produce an optimal level of activity and investment in safety in the absence of transactions costs.[212]

The communalist counter-responses to this argument are:

(i) The imposition of increased duty or responsibility will not lead to an overinvestment in safety or a restriction in socially desirable activities because defendants will simply internalize the cost of the activity (or spread part of the cost on to others) and continue to engage in the activity as

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[211] Examples:

> Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide "police" protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner.

Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962) (arguing against landlord liability for crimes against tenant).

> Pressure to conform to the existing standard of care. induced by fear both of being sued and of being held liable, has led physicians to practice "defensive medicine" in order to guard against liability for "sins of omission." The practice of defensive medicine involves prescribing or performing a test or procedure that is not medically justified but is nevertheless carried out "primarily (if not solely) to prevent or defend against the threat of medical-legal liability."

Note, *Rethinking Medical Malpractice Law in Light of Medicare Cost-Cutting*, 98 HARV. L. REV. 1004, 1012 (1985) (quoting U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 14 (1973)).

[212] Usually an argument of this form is explicitly or implicitly derived from the Coase Theorem; whatever the choice of rules of liability, the amount of investment in safety will be the same, and will be efficient because the parties can locate the cheapest cost avoider and bargain for the proper investment in safety. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 16 (1972). Given this fact, the law should opt for a lower standard of duty because it involves fewer administrative costs or fewer lawsuits, *see* Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973), or because shifting losses is government interference, which is thought to be an evil if not justified by some more pressing goal. *See* 0. HOLMES, THE COMMON LAW 96 (1923); *see also infra* notes 245-48 and accompanying text (arguments of Formal Realizability). The Coase Theorem thus becomes a weapon in an individualist argument for *laissez-faire* in questions of economic regulation. It is possible to respond, however, that strict liability might in fact be easier to administer than negligence. *See* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). A more standard communalist response is the claim that transactions costs prevent the Coase Theorem from having any validity.

> Example:
>
> If there were no transaction or information costs associated with paying people to alter their behavior, it would not matter (in terms of market control of accidents) who bore the accident costs initially. Regardless of who was initially liable, there would be bribes or transactions bringing about any change in the behavior of any individual that would cause a greater reduction in accident costs than in pleasure. Since in reality transactions are often terribly expensive, it is often not worthwhile spending both the cost of the transaction and the amount needed to bribe someone else to diminish the accident-causing behavior. As a result, the accident cost is not avoided by society . . . .

G. CALABRESI, THE COST OF ACCIDENTS 136 (1970).

long as it is worth it to them. To the extent that this results in a reduction in the level of activity, the extra activity is judged to be socially undesirable.[213]

(ii) Market forces will not produce an optimal level of activity or investment in safety due to the existence of transactions costs or other market imperfections. It is therefore necessary to place an additional duty on the defendant because she is the best able to make a correct decision as to the optimal level of activity or investment in safety.[214]

2. *Spreading arguments.* These arguments concern neither behavior modification nor investment in safety but the allocation of burdens on actors in society. The communalist version of this argument is that additional responsibilities and duties should be placed upon the defendant because the defendant is best able to spread the costs of the additional burden by passing the cost forwards or backwards to other persons. This result is more socially desirable than allowing the total societal burden (for example, the cost of an accident) to fall randomly on particular individuals.[215]

The individualist version of this argument is an argument for self-insurance (analogous to the individualist Investment in Safety argument for self-protection). The purchase of insurance by each potential plaintiff is a cheaper and more efficient way of distributing the risk of loss. This is normally joined with an Anti-Paternalism argument (discussed in the section on arguments of Social

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[213] Examples:

> Where a volunteer blood bank holds a monopoly, strict liability will not end its operations. The blood bank will simply increase its charges, the way all monopolists do when faced with increased costs. Where the volunteer blood bank is faced with competition, the court believes that the bank would still pass on any cost increases resulting from the imposition of strict liability, because volunteer blood banks have kept their fees lower than what the open market would bring. Should a volunteer blood bank cease operations, this will further insure that less hepatitis-infected blood will be delivered to hospitals and ultimately to patients.

Brody v. Overlook Hospital, 121 N.J. Super. 299, 311, 296 A.2d 668, 675 (Law Div. 1972) (arguing for strict products liability in cases of hepatitis-infected blood transfusions).

> The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated . . . . Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 390-91 (1974) (White, J., dissenting) (arguing that media's liability for libel will not inhibit exercise of First Amendment freedoms).

[214] *See generally* G. CALABRESI, *supra* note 212. This type of argument is a form of the Regulation argument discussed in the section on Arguments of Social Choice. *See infra* text accompanying notes 225-35.

[215] Examples: Why, then should the master be responsible [for the torts of his servant]?

> . . . [I]t is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few.

Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456 (1923) (justifying doctrine of *respondeat superior).*

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring in the judgment) (arguing for strict products liability).

and individual Choice *infra)* that it is better to place the responsibility for the choice of whether or not to selfinsure on individuals than to force individuals to purchase insurance through higher prices for goods and services that result from stricter rules of liability.[216]

3. *Distributional arguments.* These arguments concern neither efficiency nor risk spreading but the distributional consequences of liability rules.[217] The communalist version of this type of argument is a Redistribution argument: additional responsibilities and duties should be placed upon the defendant because either (1) the defendant is financially better able to afford the loss which would otherwise be borne by the plaintiff class (also known as the Deep Pocket Argument), or (2) these additional duties and responsibilities will achieve a socially desirable redistribution of income, benefits, or power from one class of persons to another.[218] A special version of this argument applies when the plaintiff and the defendant stand in any contractual or bargaining relationship. This version proposes that additional duties should be imposed on the party with disproportionate bargaining power to equalize the relative bargaining positions of the parties.[219]

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[216] Examples:

> To hold that the owner must not only meet his own loss by fire, but that he must guaranty the security of his neighbors on both sides . . . would be to create a liability which would be the destruction of all civilized society . . . . In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss.

Ryan v. New York Central R.R., 35 N.Y. 210, 216-17 (1866) (arguing for narrow rule of proximate cause).

> But this argument [that strict liability permits the spreading of costs of unavoidable accidents which under negligence would be concentrated on the victim] overlooks the fact that the individual can also remove the concentrated loss from his shoulders-by insuring himself against the accident and thereby spreading the loss to the other policyholders of the company he insures with.

R. POSNER, ECONOMIC ANALYSIS OF LAW § 6.11, at 141 (2d ed. 1977).

[217] *See* Kennedy, *supra* note 34, at 572 (issue in distributive arguments is the balance of power between various groups in civil society).

[218] Examples:

> The purpose of [strict products] liability is not to regulate conduct with a view to eliminating accidents, but rather to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise.

Goldberg v. Kollsman instrument Corp., 12 N.Y.2d 432, 440, 191 N.E.2d 81, 85, 240 N.Y.S.2d 592, 598 (1963) (Burke, J., dissenting).

> In the great majority of cases the servant actually guilty of the negligence is poor, and unable to make good the damage, especially if it is considerable, and the master is at least comparatively rich, and consequently it is generally better to fix the master with liability . . . .

River Wear Comm'rs v. Adamson, 2 A.C. 743, 767 (H.L.(E.) 1877) (opinion of Lord Blackburn) (arguing for *respondeat superior* doctrine).

[219] This argument is related to the communalist Regulation argument discussed in the section on arguments of Social and Individual Choice, *see infra* text accompanying notes 225-35, that an additional duty or responsibility should be imposed because the parties would have agreed to it but for the inequality of bargaining power between them. In that case, however, the reason for the concern is the limitation of free choice caused by the inequality, not the desire for redistribution of wealth or power per se.

The individualist responses to Redistribution arguments are twofold. The first is a denial of the legitimacy of the use of legal rules for the redistribution of power, income, or benefits. Strictly speaking, this is not a true distributional argument. Since virtually all rules of legal liability have some redistributive character, this argument usually boils down either to a NLWF argument (rules of duty and responsibility should not be chosen solely for their redistributive effects but should be based upon notions of the fault of one party or the moral desert of the other), or an Institutional argument that such goals should be achieved only through the tax and welfare system.

The second individualist response is a true distributional argument; it concedes the propriety of the distributional goal but argues that the goal will not be achieved. This No Distribution argument runs as follows: increased duties placed upon the defendant class will simply be passed along in the form of higher prices or reduced benefits to other persons. The defendant class will not suffer a significant loss of income, benefits, or power foiling the redistributional goal. Worse yet, the defendant class will probably pass a large portion of the extra costs along to the plaintiff class, the intended beneficiaries of the increased duty.[220]

In the special context of bargaining or contractual relationships between plaintiffs and defendants, the argument is that additional responsibilities placed upon the defendant will not correct the inequality of bargaining power between the two. Rather, the defendant will raise the price of her product or service, reduce other possible benefits provided to the plaintiff, simply refuse to deal with the plaintiff, or go out of business. The result will be that (1) plaintiffs will get the benefits of the extra duties and responsibilities only by absorbing most of the extra cost to the defendant; (2) other plaintiffs will be forced to buy extra features or protections they do not want or need; and *(3)* other plaintiffs will be priced out of the market for the defendant's goods or services, and will have to content themselves with inferior or less desirable substitutes. In each case there will be no substantial alteration in the relative bargaining power or the profit margin of the defendant.[221] This version of

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[220] Example:

> It may seem unfair on wealth-distribution grounds to force the victim, rather than the enterprise, to pay the insurance premium; the victim has less money. But if the enterprise is forced to insure, the cost will be borne, in major part anyway, by its customers, who are also "little people."

R. POSNER, ECONOMIC ANALYSIS OF LAW § 6.11, at 141 (2d ed. 1977).

[221] Examples:

> Housing code enforcement leads to a substantial reduction in the supply of housing . . . coupled with a substantial rise in the price of the remaining supply.

Id. § 16.8, at 357.

> [T]he effect of the *Fuentes* decision [invalidating replevy without notice or prior hearing of goods purchased under an installment sales contract] is to increase the cost of the installment sales contract: a dubious blessing to consumers, especially those who have no alternative to such contracts if they wish to purchase consumer durables.

Id. § 25.3, at 507.

> Consider another example of an allegedly unfair type of contract: the installment contract in which a default entitles the seller to repossess the good no matter how small the remaining unpaid balance of the buyer's note. . . . Were the right of repossession of late defaults to be limited, sellers would have to require either a larger down payment or higher initial installment payments in order to protect themselves against sustaining windfall losses from early defaults. Consumers unable to pay large down payments or high initial installment payments would be harmed by such a change

the argument is known as the "Landlord Will Raise the Rent" argument, because it was used by persons opposed to judicial creation of an implied warranty of habitability in landlord-tenant contracts.[222]

4. *Arguments of Social and Individual Choice.* These arguments concern to what extent the community should disregard the decisions of private parties. The four basic kinds of arguments are Paternalism arguments, Regulation arguments, Facilitation arguments, and AntiPaternalism arguments. In the normal situation in which these arguments occur, the issue presented is whether to foreclose choices made by the plaintiff class by imposing an additional duty on the defendant class because it is in the best interest of the plaintiffs. In this situation, the Paternalism argument is communalist, and the Anti-Paternalism argument is individualist. The Regulation argument is communalist when it is opposed to either the Facilitation or Anti- Paternalism arguments, and the Facilitation argument is individualist when it is opposed to either the Regulation or Paternalism arguments.

a. *Paternalism arguments.* Paternalism arguments favor the imposition of duties or responsibilities on parties because they are in the best interests of those parties or of the parties with whom they deal.[223] Thus, a Paternalism argument might be made for criminalizing heroin use because it harms people, even though there are people who want to use the drug. A Paternalism argument also might be made for preventing automobile dealers from disclaiming liability for personal injury caused by defects in their product on the grounds that it is not in the best interests of their *customers,* even though there are people willing to buy cars with a disclaimer if the price is low enough. Paternalism arguments do not concern themselves with what the parties themselves believe to be in their own best interests; they represent a societal imposition of values on the individual because the societal values are deemed superior.[224]

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in the contractual form.

Id. § 4.8, at 86-87.

> [I]f the holder in due course doctrine is abolished, the price of consumer credit will rise to compensate installment sellers for the higher costs of operating without benefit of such a doctrine. The price increase will probably make consumers worse off (rather than simply no better off) than they were with a lower price plus the remedial disadvantages imposed by the doctrine.

Id. at 87.

[222] *E.g.,* Meyers, *The Covenant of Habitability and the American Law Institute,* 27 STAN. L. REV. 879 (1975) (arguing that the ALI'S position would decrease the available stock of housing for low income persons and raise rental costs); Moorehouse, *Optimal Housing Maintenance Under Rent Control,* 39 S. ECON. J. 93 (1972) (rent control results in decrease in maintenance services and an increase in real rent); Note, *The District of Columbia Rental Housing Act of 1977: The Effect of Rent Control on the Rental Housing Market,* 27 CATH. U.L. REV. 607 (1978) (arguing that rent control causes lack of new investment in housing that poor persons can afford).

[223] *See generally* Kennedy, *supra* note 34, at 625-49.

[224] Examples:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required . . . .

b. *Regulation arguments.* In contrast to Paternalism arguments, Regulation arguments propose preemption of individual choices in favor of societal choices not because the individual choices are deemed irrelevant but because conditions exist which prevent individuals either from choosing or from making informed choices. These arguments enforce certain societal choices on the parties because it is assumed that the parties would have made the choice in the absence of these complicating conditions. In general, Regulation arguments are, like Paternalism arguments, relatively communalist, because they are used to justify additional responsibilities and duties on a party which, it is claimed, the party would not assume unless the party's choice were regulated by the legal system.

The conditions that are most often used to justify imposition of a societal choice on the parties are (1) various forms of market failure and (2) the lack of information by or risk neutrality of the plaintiff class.

(i) *Market Failure arguments.* Conditions of market failure that are used to justify regulation of social choice include:

(a) Externalities, by which are meant costs of activity that are not adequately factored into market pricing mechanisms and not borne by the persons creating them.[225]

(b) Public Goods or "Free Rider" Problems.[226]

(c) Inequality of Bargaining Power Between the Parties.[227]

The T.J. Hooper, 60 F.2d 737, 740 (2d Cit. 1932) (rejecting industry custom as a defense to negligence).

> The control of impulsive behavior, then, may provide a key to justifying [the nonwaivability of the right of discharge in bankruptcy]. If unrestrained individuals would generally choose to consume today rather than save for tomorrow . . . they may opt for a way of removing or at least restricting that choice . . . .
>
> . . . .
>
> A nonwaivable right of discharge controls impulsive credit decisions by encouraging creditors to monitor borrowing.

Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1409 (1985).

[225] *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089, 1111-12 (1972) (limitations on alienability or freedom of contract justified where a transaction creates significant externalities to third parties, or where external costs do not lend themselves to objective and nonarbitrary collective measurement).

[226] For example, where there is a common pool of resources, the argument is often made that restrictions on use or increased responsibilities for use (through liability rules) will help preserve the resources and promote their more efficient use:

> The rational man finds that his share of the costs of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone. we are locked into a system of "fouling our own nest," so long as we behave only as independent, rational, free-enterprisers. . . . [T]he tragedy of the commons as a cesspool must be prevented by . . . coercive laws or taxing devices that make it cheaper for the polluter to treat his pollutants than to discharge them untreated.

Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1244-45 (1968).

[227] Example:

> The basis of voiding exculpatory clauses is that they are contrary to the public policy of discouraging negligence and protecting those in need of goods or services from being overreached by those with power to drive unconscionable bargains.. . . [I]t is evident that the subject matter of

(d) Monopolistic or Oligopolistic Power of One of the Parties.[228]
(e) High Transactions Costs[229]

(ii) *High Information Cost/Lack of Risk Neutrality Arguments.* A socially desirable result will not be achieved from the interaction of market forces because one of the parties lacks access to important information or is not risk neutral and therefore does not know what is in that party's best interests. The usual claim is that the risk preference is due to the high cost of obtaining information.[230]

Additional duties should therefore be imposed upon the defendant because plaintiffs are unaware of disadvantages, extra costs, or dangers to them or to others which result from their

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> the exculpatory clause herein—shelter—is indispensable for the physical well being of tenants; that they have nothing even approaching equality of bargaining power with landlords and no free choice whatever in agreeing to the exemption, since they will be confronted with the same clause in other form leases if they seek shelter elsewhere.

O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 446, 155 N.E.2d 545, 550 (1958) (Bristow, J., dissenting) (arguing against enforceability of clause which exculpates landlord from the consequences of his negligence in operation of apartment building).

[228] Example:

> The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection? . . . Because there is no competition among the motor vehicle manufacturers with respect to the scope of protection guaranteed to the buyer, there is no incentive on their part to stimulate good will in that field of public relations. Thus, there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold. Since all competitors operate in the same way, the urge to be careful is not so pressing.

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 391, 161 A.2d 69, 87 (1960) (arguing that a warranty disclaimer limiting damages to cost of replacement parts in consumer automobile purchase contract is unconscionable).

[229] Example:

> No individual tenant had it within his power to take measures to guard the garage entranceways, to provide security at the main entrance of the building, to patrol the common hallways and elevators, to set up any kind of a security alarm system in the building, to provide additional locking devices on the main doors, to provide a system of announcement for authorized visitors only, to close the garage doors at appropriate hours, and to see that the entrance was manned at all times.

Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 480 (D.C. Cit. 1970) (arguing for landlord liability for crimes against tenants).

[230] The risk neutrality argument is thus a special case of a market failure argument. The high information costs that lead to the skewing of costs and benefits by a risk preferring class may in turn be attributed to one of the other forms of market failure listed above.

An alternative claim might be that risk preference is an inherent characteristic of the plaintiff class that would be manifested even in the presence of adequate information. An argument for foreclosing a choice by the plaintiff class in that case would be a true Paternalism argument.

choices.[231] A communalist Regulation argument in favor of forcing plaintiffs to make different choices by imposing greater responsibilities on the defendant might be based upon the fact that:

(a) The plaintiffs are not even aware of the dangers to them and are thus unaware that there exists information that they need. The combined cost of recognizing the risks and evaluating them is prohibitive.[232]

(b) The plaintiffs have a limited appreciation of the value of information, but they regard the cost of education as too high, given the difficulty of acquiring and understanding - complex information.

(c) The defendants or other actors in society recognize that they could educate the plaintiffs to make different choices which would be both in the plaintiffs' best interests and their own (for example, defendants might increase their profits by selling a higher priced but safer product or by offering guarantees of job security to workers in exchange for lower wages), but they are unable or unwilling to educate the plaintiff class because:

(1) The costs of educating the plaintiff class by themselves are prohibitive.[233]

(2) The benefit of educating the plaintiff class extends to all defendants similarly situated, so that there is a "free rider" problem.[234]

(3) The education of the plaintiff class to understand that they have previously been receiving inferior contractual terms or unsafe merchandise may have a "backlash" effect which will hurt the defendants.[235]

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[231] For example, plaintiffs maybe buying an unsafe product at a lower price when they could buy a safer product at an increased cost, and a risk neutral person armed with information about the product or its dangers would purchase the more expensive product. To give another example, the plaintiffs may not be bargaining for certain job security clauses in employment contracts in exchange for a lower wage or reduced benefits because they lack information concerning how important such a clause really is to them. *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1831-32 (1980).

[232] Examples:

> Manufacturing processes . . . are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness ofa product, even when it is not contained in a sealed package . . . .

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring) (arguing for strict liability for product defects).

[233] *See* Kennedy, *supra* note 34, at 601 (referred to as the "simple cost information case").

[234] *Id.* (referred to as the "simple freeloader case").

[235] *See, e.g.*, Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973). A producer who wishes to advertise that his product is safer than others

> may be reluctant to advertise a safety improvement, because the advertisement will contain an implicit representation that the product is hazardous . . . . He must balance the additional sales that he may gain from his rivals by convincing consumers that his product is safer than theirs against the sales that he may lose by disclosing to consumers that the product contains hazards of which they may not have been aware, or may have been only dimly aware. . . . But make the producer liable for the consequences of a hazardous product, and no question of advertising safety improvements to consumers will arise. He will adopt cost-justified precautions not to divert sales from competitors but to minimize liability to injured consumers.

Id. at 211.

c. *Facilitation arguments.* Facilitation arguments claim that the best way to deal with market imperfections is not to impose social choices on the parties but rather to rid the system of these problems and allow the parties to choose for themselves. Thus a Facilitation argument against nondisclaimable contract terms for the sale of consumer goods would be that a simple requirement of full disclosure as to the consequences of various terms is all that should be required of the parties. Once information costs are lowered, the parties can freely and fairly bargain and any decision they reach should be respected. [236]

d. *Anti-Paternalism arguments.* These arguments are the most individualist forms of Social Choice arguments. They oppose attempts to impose increased responsibilities or duties on parties that the parties have not freely chosen for themselves. They also oppose any attempt to control the choices of parties through the use of rules of liability. AntiPaternalism arguments are often coupled with Rights as Freedom of Action and Rights as Freedom of Contract arguments. They are strongly identified both with "rugged individualism" and with libertarian social theory. Anti- Paternalism arguments usually make one of three claims:

(i) Since no one can tell what is really in the best interest of the parties (or society as a whole), individual choice should be respected.[237]

(ii) The parties are in the best position to determine their interests, and the legal system should not interfere with their choice.[238]

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[236] Examples:

> True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.

Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972).

> [A]s in the case of patent drugs sold over the counter without a prescription, the manufacturer of a prescription drug who knows or has reason to know that it will not be dispensed as such a drug must provide the consumer with adequate information so that he can balance the risks and benefits of a given medication himself.

Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cit. 1974).

[237] Example:

> I do not know whether the ugly pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes . . . . In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless.

Smith v. United States, 431 U.S. 291, 319-21 (1977) (Stevens, J., dissenting) (arguing against obscenity prosecutions).

[238] Example:

> It is just too much, absent a contractual agreement, to require or expect a combination office-apartment building . . . to provide police patrol protection or its equivalent. . . . If tenants expect such protection, they can move to apartments where it is available and presumably pay a higher rental . . . .

(iii) The best consequences to individuals (and to society as a whole) flow from respecting individual choice.[239] This is usually coupled with both a claim that individual choices working together as market forces will produce a socially desirable outcome, and a series of rejoinders to the claims of market failure made in the communalist Paternalism and Regulation arguments.

The individualist response to the claims of market failure, high transaction costs, or high information costs is normally that market failure does not exist or is minimal in the long run.[240] Similarly, transaction and information costs do not exist or are minimal in the long run, since it is in the interest of all parties to lower these costs through technological advances or other means of cost reduction if by doing so the parties can increase profits or maximize utility.[241] Thus, for example, it may be argued that defendants have market incentives to advertise and educate plaintiffs about the relative safety of product improvements even if plaintiffs have insufficient incentives to educate themselves.[242]

The individualist response to the claim that regulation of choice is necessary to correct inequalities of bargaining power or concentrations of market power is another version of the familiar "Landlord Will Raise the Rent" argument. Although the individual choices of plaintiffs may be "corrected" in one area, it will simply lead to a loss of benefits to the plaintiff class in other areas, and no real change in the inequality of bargaining power will be achieved.[243]

Most situations involving Arguments of Social Choice arise where foreclosing plaintiffs' choice would effectively impose additional duties on the defendant. This is the case in all of the examples mentioned above. Hence Paternalism is normally associated with communalism and Anti-Paternalism is associated with individualism. However, there is a class of situations where a Paternalism argument can be relatively individualist, and an Anti-Paternalism argument can be relatively communalist. This occurs when foreclosing a choice to the plaintiff class would involve *relieving* defendants of duties they would otherwise have.

These types of situations may arise, for example, where the plaintiff is a patient and the defendant is a doctor. Consider a situation in which the patient sues the doctor for malpractice on the grounds that the doctor failed to inform the patient of the risks of a particular medical procedure.[244] A duty imposed on the doctor to disclose information concerning the risks of a medical

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Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 492-93 (D.C. Cir. 1970) (MacKinnon, J., dissenting).

[239] *See supra* note 53 and accompanying text.

[240] R. POSNER, ECONOMIC ANALNSIS OF LAW §§ 13.1-13.7 (2d ed. 1977).

[241] *See* Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 210-11 (1973).

[242] *Id.*

[243] *See supra* notes 221-22 and accompanying text.

[244] *E.g.*, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

procedure to a patient would be relatively communalist (because it would increase the doctor's duties and responsibilities to the patient). On the other hand, giving the doctor the right to withhold this information from the patient if the doctor reasonably believed that it was in the patient's best interests would be relatively individualist (because it would serve as a defense to a charge of malpractice for failure to disclose).

In this case, the doctor will make an individualist Paternalism argument that she should not be forced to disclose all possible dangers because patients may refuse to submit to medical procedures which are best for them. Alternatively, the doctor will make an individualist Regulation argument that the high cost of educating the patient (or the patient's risk aversion) will prevent the patient from making the proper decision. The patient will respond with a communalist Anti-Paternalism argument that the doctor should not have the authority to limit the patient's autonomy. In addition, she will make a communalist Facilitation argument that if the doctor is concerned about the patient's ability to make an informed decision, the doctor should be required to give the patient enough information to decide, instead of foreclosing individual choice.

II. FORMAL AND SUBSTANTIVE REALIZABILITY ARGUMENTS

These arguments are neither individualist nor communalist—they represent instead a separate axis of opposition. As described above, however, they color and are colored by individualist and communalist arguments.

A. *Formal Realizability Arguments*

1. The rule in question should be chosen because the alternative involves a standard that will be difficult for juries and judges or law enforcement officials to apply in particular contexts and thus will lead to inconsistent and arbitrary decisions.[245]

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[245] Examples:

> What the majority envisions as a fair apportionment of liability to be undertaken by the jury will constitute nothing more than an *unfair reduction* in the plaintiffs total damages suffered, resulting from a jury process that necessarily is predicated on speculation, conjecture and guesswork.

Daly v. General Motors Corp., 20 Cal. 3d 725, 751-52, 575 P.2d 1162, 1178, 144 Cal. Rptr. 380,396 (1978) (Jefferson, J., concurring and dissenting) (arguing against recognition of comparative fault principles in strict products liability cases) (emphasis in original).

> The vast confusion that is virtually certain to arise from any attempt to deal in a trial setting with the concept of scientific knowability constitutes a strong reason for avoiding the concept altogether by striking the state-of-the-art defense [in products liability cases].
>
> . . .
>
> We doubt that juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue.

Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 207-08, 447 A.2d 539, 548 (1982).

> Where, as here, there are no standards governing the exercise of the discretion granted by the [vagrancy) ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient too] for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."

2. The rule in question should be chosen because the alternative rests upon a principle which has no logical stopping point and, if applied in its fullest extension, will lead to results which are unfair, unjust, or contrary to public policy. (This form of the argument is the familiar "Slippery Slope" argument.)[246]

3. The rule in question should be chosen over its alternative because it is easier to prove whether or not the rule has been complied with; the alternative involves a standard which creates serious proof problems leading to either:

(a) inconsistent and arbitrary verdicts by juries who differ on what constitutes adequate proof;

(b) awards or benefits to undeserving plaintiffs or exculpation for undeserving defendants who are able to deceive decisionmakers through cunning or guile;

(c) inappropriately inflated awards or benefits to plaintiffs who have suffered only minimal or moderate harm (or reduced verdicts or penalties against defendants incommensurate with their real degree of responsibility); or

(d) strike suits or blackmail by disgruntled plaintiffs against innocent defendants.[247]

4. The rule in question should be chosen because the alternative will result in an avalanche of frivolous legal claims or defenses. The task of separating the small number of meritorious suits, claims, or defenses from the frivolous ones will overburden the court system and will leave less time

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Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (quoting Thornhill v. Alabama, 3 10 U.S. 88, 97-98 (1940)) (arguing against constitutionality of vagrancy ordinance).

[246] Examples:

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

Winterbottom v. Wright, 10 M.& W. 109, 114, 152 Eng. Rep. 402, 405 (Ex. 1842) (opinion of Lord Abinger, C.B.).

> If [the right of privacy] be incorporated into the body of the law . . . the attempts to logically apply the principle will necessarily result, not only in avast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits.

Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 544-45, 64 N.E. 442, 443 (1902).

[247] Examples:

> Those actions for interference with domestic relations which carry an accusation of sexual misbehavior—that is to say, criminal conversation, seduction, and to some extent alienation of affections—have been peculiarly susceptible to abuse. Together with the action for breach of promise to marry, it is notorious that they have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement.

PROSSER & KEETON ON THE LAW OF TORTS § 124, at 929 (W. Keeton 5th ed. 1984).

> [I]f ignorance of the law were admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice impracticable. If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party, and the court, in every case, would be bound to decide the point.

1 J. AUSTIN, LECTURES ON JURISPRUDENCE 498 (3d ed. 1869); *see also supra* text accompanying notes 97, 103-04, 109 (Formal Realizability arguments made against the recognition and extension of the tort of negligent infliction of emotional distress).

to consider meritorious actions fully and fairly, with the result that the courts will be less able to administer justice efficiently.[248]

B. *Substantive Realizability Arguments*

1. The use of per se rules will not achieve the desired level of judicial administrability. Per se rules can never anticipate the multitude of factual situations a court may confront, and will lead to a confusing complex of rules, exceptions, and counterexceptions. In fact, directing the jury to use their own common sense in the application of a simple standard, in the long run, will lead to fairer and more predictable results.[249]

In contrast, adherence to draconian per se rules which prevent a substantively just result (compensation to injured plaintiffs or exculpation to defendants) in the name of judicial administrability will lead to *sub rosa* manipulation of existing doctrine by judges and juries in favor of sympathetic litigants, or even jury nullification. Ultimately, this will lead to disrespect for the law and inconsistent and arbitrary results.[250]

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[248] Examples:

> [T]here can be no question but that a rash of new applications from state prisoners will pour into the federal courts, and 98%of them will be frivolous, if history is any guide. This influx will necessarily have an adverse effect upon the disposition of meritorious applications, for, . . . they will "be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

Fay v. Noia, 372 U.S. 391, 445-46 (1963) (Clark, J., dissenting) (arguing that a procedural default furnishing an adequate and independent ground for a state conviction should bar habeas corpus relief) (quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)).

> Although cases may arise in which the emotional distress absent physical harm may not be temporary or slight, nothing before us indicates that most such claims are not of that character. We are unwilling, therefore, to impose upon the judicial system and potential defendants the burden of dealing with claims of damages for emotional distress that are trivial, evanescent, temporary, feigned, or imagined, in order to ensure that occasional claims of a more serious nature receive judicial resolution.

Payton v. Abbott Labs, 386 Mass. 540, 555, 437 N.E.2d 171, 180 (1982).

[249] Example:

> [T]he drafters of Article 2 [of the Uniform Commercial Code] proceeded on the conviction that general commercial law was prototypically adapted to standards. This choice was explicitly based on the claim that ideas like "reasonableness" and "good faith" provide greater predictability in practice than the intricate and technical rule system they have replaced.

Kennedy, *Form and Substance, supra* note 4, at 1704-05.

[250] Example:

> "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one." (Prosser, *Comparative Negligence* [41 Cal. L. Rev. 1 (1953)] p. 4; footnote omitted) . . . . It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis.

Li v. Yellow Cab Co., 13 Cal. 3d 804, 811-12,532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975) (arguing for

2. The fact that no doctrinal principle determines the scope of its own extension is no justification for refusing to recognize principles which are substantively correct in most ordinary contexts. It is always possible to dream up ridiculous hypotheticals in which a principle, if carried too far, would lead to an unjust result. However, the very purpose of the judicial system is to define the limits of principles of law. Adoption of the alternative rule would simply countenance unjust results in a large number of cases.

Judges and juries will be able to decide the proper scope of the rule's protection through case-by-case adjudication and the normal common law development of doctrine. Over time, a consistent and coherent doctrinal framework will emerge which is just, nonarbitrary, and predictable. (This form of response is an Anti-Slippery Slope argument.)[251]

3. The fact that certain rules may involve difficult questions of proof and require juries to make credibility judgments is not an argument against their adoption. The very purpose of a jury system is to try difficult and contested questions of fact and ascertain the truth. Undeserving litigants will always try to deceive juries, regardless of the cause of action, and the courts sit to sort out valid claims from the invalid, and real damages from the feigned. The alternative rule would simply throw the baby out with the bath water, by denying both deserving and undeserving litigants a chance to prove the existence and amount of their injury (if they are plaintiffs) or a chance to demonstrate their innocence (if they are defendants).[252]

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comparative negligence standard).

A further example of how rigid rules can be manipulated involves the now abandoned rule that to recover for negligent infliction of emotional distress, the plaintiff had to suffer physical damage from some direct impact to the plaintiff's body. The justification for this rule was, of course, that it would prevent false claims from being filed. *See supra* text accompanying note 97. However, in order to get around the harshness of this rule, the courts began to find that the slightest impact was adequate to serve as the basis for a cause of action for emotional distress. *See. e.g.,* Porter v. Delaware, L.W.R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust got in plaintiff's eye); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 969 (1930) (plaintiff inhaled smoke); Kenny v. Wong Len, 81 N.H. 427, 128 A. 343 (1925) (hair of mouse in spoonful of stew touched roof of plaintiffs mouth).

[251] Examples:

> When a legal principle is pushed to an absurdity, the principle is not abandoned, but the absurdity avoided. The courts are competent, we think, to deal with difficulties of the sort suggested, and case by case, through the traditional process of inclusion and exclusion, gradually to develop the fullness of the principle and its limitations.

Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438,447 (1941) (arguing in favor of recognizing right of privacy and rejecting argument that the principle would have no stopping point).

> The genius of the common law is that the case-by-case analysis permits opening and closing of the door to the courtroom. . . . In my judgment, the assertion that appellant should be denied relief because his case represents the opening wedge of a theory which might produce further litigation is an inappropriate judicial consideration.

Geary v. United States Steel Corp., 456 Pa. 171, 188, 319 A.2d 174, 182 (1974) (Roberts, J., dissenting).

[252] Examples:

> [I]t is hardly uncommon for our criminal justice system to deal with false and fabricated criminal charges. Indeed, our jurisprudence is designed to test the very truth or falsity of accusations in all criminal proceedings. We see no basis for the supposition that it will completely and utterly fail to operate in the circumstances here presented . . . .

State v. Smith, 148 N.J. Super. 219, 226, 372 A.2d 386, 389 (Law Div. 1977).

> We believe that it is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of the designated class may file fraudulent lawsuits.. . ."Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases."

Henry v. Bauder, 213 Kan. 751, 761,518 P.2d 362, 370 (1974) (arguing against the constitutionality of guest statutes) (quoting Emery v. Emery, 45 Cal. 2d 421, 431, 289 P.2d 218, 225 (1955)).

See also supra text accompanying notes 95, 100-01, 106 (substantive realizability arguments made in favor of the extension of the cause of action for negligent infliction of emotional distress).

4. The purpose of the court system is to separate meritorious claims from nonmeritorious claims. If all claims were meritorious there would be no need for a judicial system. The alternative rule would deny relief to deserving plaintiffs or a valid defense to deserving defendants simply because of a fear that many other litigants will come before the court who may not be so deserving[253].

[253] Example:

> That some claims maybe spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform.

Samms v. Eccles, 11 Utah 2d 289, 293, 358 P.2d 344, 347 (1961).