

## REVIEWS

### Doctor No

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*Medical Malpractice on Trial*. Paul C. Weiler. Harvard University Press, 1991. Pp xiii, 240.

Paul Weiler's *Medical Malpractice on Trial*<sup>1</sup> is a splendid little book. In 161 very readable pages (plus sixty-eight pages of endnotes), he describes and critiques the current regime of medical malpractice law, surveys and evaluates a range of reforms previously proposed (and sometimes enacted), and offers a bold improvement package of his own. His most inventive and promising ideas are to substitute organizational liability (such as hospital liability) for individual physician liability (pp 122-32) and to replace fault-based compensation with a no-fault scheme covering all medical accidents that lead to serious disability or death (pp 132-58). Weiler tempers the boldness of his vision with a sensitive appreciation of both the political and practical problems of promptly achieving it. This appreciation leads him to advocate the immediate adoption of more modest steps in the direction he favors, including substantial changes in the measure of damages in malpractice cases and experiments with elective no-fault compensation in lieu of litigation.

Although I am persuaded that Weiler's recommendations would lead to a vast improvement over the current regime, he has not yet shown, as I will later explain, that his focused no-fault plan is the best long-range solution. Even so, I think this slim volume is a "must" for anyone who wants to understand contemporary issues surrounding medical malpractice. *Medical Malpractice on Trial* contains countless nuggets of information and analysis concerning

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<sup>1</sup> Paul C. Weiler, *Medical Malpractice on Trial* (Harvard, 1991). All parenthetical page numbers in the text and footnotes refer to this text.

a dazzling array of issues and contentions that have been featured in the debate over medical malpractice reform during the past twenty years. In the course of his presentation, Weiler pulls together nearly all of the best work by others who have written in this field.

Moreover, this book integrates the findings and analyses of two large and important projects for which Weiler has been centrally responsible. This information is otherwise only accessible in more awkward forms. While there is much to be gained from reading the more than 1,000-page final *Reporters' Study of Enterprise Liability for Personal Injury* (1991) for the American Law Institute<sup>2</sup> ("*Reporters' Study*") (which covers many other topics besides malpractice) and *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990)<sup>3</sup> ("*Harvard Study*") (the massive first report of the Harvard Medical Malpractice Study Group), Weiler's book is the place to start for a well organized and compact examination of the medical malpractice field.

## I. MEDICAL MALPRACTICE, MALPRACTICE LAW, AND MALPRACTICE INSURANCE TODAY

### A. Patterns of Claiming and Collecting

Weiler paints a startling picture of current patterns of claiming and collecting which reveals the minor and idiosyncratic role malpractice law plays in the compensation of malpractice victims. Based on the Harvard Study, Weiler explains that of every 100,000 patients discharged from hospitals, nearly 4,000 suffered an "adverse event"<sup>4</sup> from their medical treatment. About one-fourth of these are the result of medical malpractice (p 12). In short, hospital patients on average run about a four percent risk of an adverse event and about a one percent risk of medical malpractice.

These 100,000 patient discharges and 1,000 malpractice-caused injuries generate about 125 legal claims. About sixty of the 125 claimants actually receive compensation (p 13). The rest of the

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<sup>2</sup> *Reporters' Study of Enterprise Liability for Personal Injury* (ALI, 1991) ("*Reporters' Study*").

<sup>3</sup> Harvard Medical Practice Study Group, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (Harvard, 1990) ("*Harvard Study*").

<sup>4</sup> In the Harvard Study, a hospital occurrence counted as an adverse event if it prolonged the patient's stay in the hospital by at least one day or caused the patient's death (p 13).

claims lose at trial or are dropped. Of those sixty successful claimants, about twenty receive payment before they have filed a lawsuit, about thirty-five after a suit is filed but before (or during) trial, and only about five win at trial (pp 53, 193 n 30).

According to neutral physicians reviewing the records, however, of every 125 claims that plaintiffs make, no malpractice occurred in about eighty-five cases. Based on Weiler's account and the Harvard study, I have calculated that most of the cases where malpractice occurred and a patient filed a claim lead to some award (thirty to thirty-five of forty); but some thirty percent of the claims where malpractice apparently did not occur also result in some payment (twenty-five to thirty of eighty-five), albeit a payment that is often substantially discounted from the amount of the claimant's likely recovery had liability been clear.

To put it in a somewhat different way, about thirty to thirty-five of every 1,000 malpractice victims use the legal system to obtain compensation for their losses, although only perhaps four out of every 1,000 obtain an award of individualized justice through a jury of their peers. At the same time, twenty-five to thirty people who were probably not victims of malpractice nevertheless receive payment from the system. In some cases these people probably have not even suffered any harm or a net detriment to health as a result of the medical treatment they complained about.

I've so far used the illustrative numbers of 1,000 tort victims out of every 100,000 hospital discharges in order to provide a ready feel for the data. In fact, we are talking about some forty million annual hospitalizations across America (p 71). These numbers translate into about a million and a half adverse events and 400,000 torts (one percent of 40 million) every year. Yet, the system's compensation shortfall is enormous: only 25,000 medical malpractice claimants, out of 50,000 who claim and 400,000 who are injured, are likely to receive some compensation, of whom only 12,500 to 15,000 were actually malpractice victims.<sup>5</sup> Of course, many of those patients injured through medical malpractice suffer only minor injuries, about half incurring only minimal impairment and recovering completely within a month, and another substantial group fully recovering in less than six months (p 136). Still, in as

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<sup>5</sup> Torts are also committed in doctors' offices—13% of malpractice claims arise out of conduct in doctors' offices as compared with 81% from hospitalizations and the rest from other locations such as nursing homes (pp 225-26 n 18). We know a lot less, however, about how often torts occur outside of hospitals and hence less about the proportion of those so injured who actually claim and recover.

many as twenty-five percent of the cases of medical negligence the patient dies—at least in part as a result of malpractice.<sup>6</sup> In addition, about ten percent of the victims of medical malpractice suffer long-lasting disabilities.<sup>7</sup> Projecting the findings nationally, the Harvard Study suggests that every year the approximately 1.5 million adverse events from medical treatment in hospitals seriously and permanently disable approximately 150,000 people and kill more than 150,000 people (many of whom, admittedly, are elderly and perhaps frail at the outset).<sup>8</sup> Medical negligence accounts for greater than a quarter of those more than 300,000 substantial harms, only a small portion of which are actually compensated through the current tort system.

#### B. Administrative Costs, Insurance, and Other Burdens

Weiler also rightly emphasizes the enormous waste of the existing regime. In order to deliver \$1 in net compensation into the hands of those medical malpractice claimants who receive something from the system, more than \$1.35 is spent on claims processing costs. The legal expenses of both sides are the most significant costs.<sup>9</sup> And these figures don't even count the substantial additional transactions costs not directly attributable to claims processing, including commissions, marketing expenses, and taxes paid and profits earned by insurers, all of which probably amount to more than twenty percent of the cost of medical liability insurance (pp 192-93 n 28).

In states still following the common law rules as to tort damages, forty to fifty percent of the compensation paid is for pain and suffering (pp 51, 55), the lion's share of which is concentrated on the five percent of successful claimants with the most serious injuries (who represent perhaps two or three of every 1,000 victims of

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<sup>6</sup> *Harvard Study* at 6-21, table 6.5 (cited in note 3).

<sup>7</sup> *Id.* at 6-25, table 6.5.

<sup>8</sup> I define the seriously disabled category more broadly than Weiler does. Weiler mentions 30,000 seriously disabled people (p 12), but based on the report of the Harvard Study Group this figure must refer to people in the most severe disability category. The Harvard Study found that 9% of those suffering adverse events were disabled for more than six months and 14% died. *Harvard Study* at 6-1 (cited in note 3). Between 2% and 3% were permanently disabled with a disability rating of more than 50%. *Id.* at 6-21, table 6.5. This puts the number killed in excess of 150,000, the number disabled for more than six months in the range of 150,000, and those in the most seriously disabled category at about 40,000 annually. Weiler notes that those not able to return to work within six months approached a quarter, numbering around 375,000, of the total annual number of adverse events (p 136).

<sup>9</sup> See James S. Kakalik and Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* (Rand Institute for Civil Justice, 1986).

malpractice) (p 48). Moreover, of the remaining compensation paid through the legal system, perhaps as much as sixty percent is already covered by public and private insurance programs like Blue Cross and other forms of private health insurance, Medicare, Medicaid, Social Security, disability insurance, sick leave, and so on (p 51).

A little arithmetic, then, shows that for every one dollar that is collected in malpractice insurance premiums, ten to fifteen cents has traditionally gone to reimburse claimants' actual out-of-pocket economic losses. Furthermore, delays of several years between the time of claim filing and receipt of compensation are not at all uncommon (p 52).

Physicians, hospitals, and others paid a total of about \$7 billion in medical liability insurance premiums in 1988. Weiler's data illustrates that around \$1 billion of that amount will finally go to reimburse otherwise uncompensated economic losses. Claimants will actually probably receive a net cash total of between \$2 and \$3 billion (p 99), depending upon how successful "collateral" sources (private and social insurance funds) are in recouping what otherwise would amount to double recovery by claimants.

The financial impact of the system on certain classes of physicians is enormous. For example, high-risk specialists like neurosurgeons and obstetricians in high-risk states like New York and Florida pay annual medical malpractice insurance premiums of between \$100,000 and \$200,000 (p 4). Still, as Weiler makes clear, the insurance burdens should not be over-dramatized since the national average malpractice insurance cost per doctor was only about \$16,000 in 1988; the \$7 billion in malpractice premiums paid in 1988 represented not much more than one percent of total annual expenditures for health care nationwide that year (p 4).

To this cost, however, one must add at least some of the \$9 or \$10 billion spent annually by physicians on "defensive" medicine, in the form of extra record-keeping, extra tests given to patients, extra time with patients and the like (p 85). Of course, some of those dollars might actually have benefitted patients and are cost-justified in an economic sense. But it is widely believed that many of these defensive measures do not help patients (and sometimes are even risky to patients); they serve primarily to help the doctor ward off malpractice claims (and, frequently, to increase the doctor's income as well) (p 87).

Additional social costs of the existing legal system include (1) the psychological burden on those doctors who feel they are caught up in a Kafkaesque legal system (p 81), (2) the refusal of compe-

tent physicians to enter or continue practice in certain high-risk specialties or to perform certain desirable but higher risk treatments (p 85), and (3) the lost services of and earnings by doctors who must devote up to an average of five uncompensated days to defend against a typical malpractice claim (p 81). So, while the "costs" generated by legal liability for medical malpractice do not loom large in the overall national health care budget, they are plainly not chicken feed.

In sum, from the viewpoint of compensating victims, whether we focus only on victims of malpractice or on all victims of adverse events from medical treatment, Weiler's analysis demonstrates that the current system is a disaster and a disgrace. The few are lucky lottery winners, so to speak, only about half of whom should even have been given lottery tickets. The many are ignored. Although it may not be fair to say that "*only* the lawyers win," it can hardly be said that, from the compensation perspective, patients as a class win.

### C. Individualized Justice?

The system, overall, also fails to serve well the ideal of individual justice. As Weiler demonstrates, on the patient side, most "deserving" victims, those who have been wronged, get nothing, and only a trivial proportion of wronged victims have the satisfaction (if it turns out to be that) of winning in court. At the same time, many successful claimants are not "deserving" in the sense of having been wronged.

On the defendant side, physicians generally do not pay higher malpractice insurance premiums because of successful malpractice claims against them. Rather, rates turn far more importantly on the number and size of claims against other doctors practicing the same specialty and in the same region (p 76).

Because nearly all the claims are either settled or dropped, "blame" as assigned by the current system is both highly selective and often misapplied. Insurance companies settle many undeserving claims for their nuisance value, often irritating the physicians involved (p 15). And while doctors are actually vindicated about half of the time in court (p 168 n 8), victory in litigation is hardly the sort of justice they crave. (At the same time, some of those doctors who win at trial probably did commit malpractice, but win because of a lack of evidence, or a jury that is overly sympathetic to or awed by them.)

Meanwhile, most "malpractice" in the legal system turns out to be the sort of momentary slip of the hand that most people fre-

quently display (p 14). Unfortunately, in risky medical treatment settings those momentary errors can be extremely harmful. While we might agree that people victimized by these sorts of errors are in some sense “entitled” to better care, an error of this sort hardly makes someone a bad person, let alone a bad doctor. Contrary to widespread belief, repeat offenders are actually responsible for a small share of the malpractice that occurs (p 79). A truer picture is that a large number of doctors regularly commit errors that are in theory avoidable, and only some of these doctors are unlucky enough to have those errors lead to significant patient harm.

#### D. Prevention

Weiler concludes, and I agree, that if the current legal system covering medical malpractice can be justified at all, it must be because of its role in preventing medical accidents by deterring acts of malpractice that would otherwise occur (p 71). Of course, even if the present scheme had some positive impact on physician conduct, that would hardly end the inquiry. Alternative deterrence strategies would also have to be considered.

Weiler addresses the prevention issue in his marvelously helpful Chapter 4. Weiler believes that the existing malpractice regime does aid patient safety (p 91). But he concludes that certain reforms would do better not only on this dimension, but also on other dimensions (such as better victim compensation, lower administrative costs, and less harm to physicians and medical practice) (p 132). However, the goal of accident prevention remains central to Weiler’s victim compensation reforms.

By contrast, I believe that the right strategy is to move toward the separation of the behavioral control and compensation functions—which, as I will explain, would take us away from both the current malpractice scheme and Weiler’s favored alternative.

## II. TRACK ONE REFORMS: SUBSTANTIAL CHANGES IN THE TRADITIONAL LEGAL REGIME

Weiler calls for reform along two tracks. Track two involves moving to what he calls “no-fault liability” for medical accidents. I will discuss this approach in the next section. Track one, my focus here, involves what he terms “serious reform” of the traditional system.

Weiler generally eschews doctrinal reform concerning the standard of care that physicians owe their patients. He quickly dismisses alternative dispute resolution procedures, like screening

panels (p 42). Instead, he concentrates on damages law. In Weiler's prescription, successful medical malpractice plaintiffs should not receive compensation for losses covered by "collateral sources" (pp 47-54) and should have reduced recovery for pain and suffering (pp 54-61). In return, they should receive compensation for their attorney's fees (pp 61-69).

In favoring such a trade, Weiler basically endorses the solution that Professor Jeffrey O'Connell and I have recommended previously for personal injury cases generally—although, in the details, there are perhaps some important differences among us.<sup>10</sup>

#### A. Reversing the "Collateral Sources" Rule

Weiler, O'Connell, and I all favor a general reversal of the common law rule that ignores other "collateral" sources of compensation for the same loss when determining the amount of a victim's award in a tort case (pp 50-52). Weiler does not pay much attention, however, to the details of just which collateral sources should count in reducing what otherwise would be the victim's malpractice award.

I assume Weiler would agree with me that a plaintiff should not recover in a lawsuit for losses already covered by social insurance or public assistance benefits or by basic work-related employee benefits, like health insurance. I also assume that Weiler

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<sup>10</sup> O'Connell's proposed trades came in two sequential proposals that I have combined into a single recommendation for the purposes of this review. See Jeffrey O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U Ill L F 591; Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U Ill L Rev 333; Stephen D. Sugarman, *Doing Away With Personal Injury Law* 167 (Quorum, 1989); and Stephen D. Sugarman, *Serious Tort Law Reform*, 24 San Diego L Rev 795 (1987).

Apart from issues discussed in the text, O'Connell and I both proposed that, as part of the trade, plaintiffs should gain an additional advantage through the elimination of the defense of plaintiff fault. Victim fault would constitute neither a complete bar to recovery, as in the common law regime, nor grounds for a reduced recovery, as is the case under modern comparative fault systems now in place in most states. Weiler does not include this change in his package. Of course, in medical malpractice cases, plaintiff fault is rarely an issue anyway, so this difference among us has little consequence in the malpractice context.

I would also have plaintiffs give up some access to punitive damages by making their availability and amount a matter for the judge, rather than the jury, to decide. This rule would bring punitive damages law in personal injury cases closer to the practice in civil rights law where a judge will often award large attorneys' fees in class action cases which expose and bring to justice especially bad conduct by the defendants. Weiler does not address the issue of punitive damages in his book, perhaps for the sensible reason that it has played relatively little role in the medical malpractice field. The *Reporters' Study* calls for restraints on the award of punitive damages. *Reporters' Study* at 231-65 (cited in note 2).



would agree that malpractice law should continue to ignore the victim's savings and personally-purchased, permanent life insurance, even though they too are available to replace the losses incurred. After all, reversing the collateral sources rule isn't really meant to turn tort law into a means-tested compensation scheme.

Rather, the justification for the proposal is to channel the responsibility for the compensation into broadly applicable and far more cheaply administered first party loss insurance schemes and away from third party liability insurance which is so costly to administer. Yet, even given this general rationale, it is rather difficult to decide what to do about things such as disability insurance, especially when individually purchased by the victim outside the job context; and term life insurance, especially when automatically provided to all employees by the victim's employer. These are close questions that several state legislatures have already recognized in their attempts to turn the general pronouncements of law professors (and others) about the collateral sources rule into specific statutory provisions.<sup>11</sup>

Weiler contrasts the reversal of the collateral sources rule with the imposition of an overall ceiling on malpractice awards (p 51), an approach, he notes, that has been followed in a few states (p 49). He opposes the latter, and I agree, because it bites most in the relatively few cases with the greatest loss (p 50). Reversing the collateral sources rule, by contrast, concentrates malpractice payments on cases of greater need.

#### B. Limiting and Standardizing Recovery for Pain and Suffering

Weiler, O'Connell, and I have somewhat divergent views with respect to tort compensation for pain and suffering. O'Connell's favored solution is to eliminate it altogether.<sup>12</sup> I do not favor that solution, at least for now, partly because it may be thought to represent too sharp a break with tradition, partly because of my empathy with the outrage that may be felt by those very seriously harmed through the fault of another, and partly because even workers' compensation law tends to pay some arbitrarily selected amounts to those who suffer serious permanent impairments.

Therefore, I propose retaining tort recovery for pain and suffering, also called "general damages," but in a quite restricted

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<sup>11</sup> More attention is given to the details of reversing the collateral sources rule in 2 *Reporters' Study* at 161-82 (cited in note 2).

<sup>12</sup> O'Connell, 1981 U Ill L Rev at 341 (cited in note 10).

form. First, no one could recover general damages who had not suffered a serious injury, defined as involving either a disability that prevents one from returning to one's normal activities for more than six months, or a significant and permanent impairment or disfigurement. The idea is to eliminate payments to those claimants who now milk the defendant for the nuisance value of their claim, those claimants who feign or exaggerate soft tissue injuries, and, candidly, those who may well have suffered immediately following their injury, but who, by the time of trial, no longer have significant residual suffering from the accident.

This threshold is broadly based on the threshold employed by the Michigan auto no-fault scheme. It is intended, if applied to all torts cases, to bar the general damages claims of more than three-quarters of those now receiving some compensation for pain and suffering. In the medical malpractice context, however, one would expect proportionately fewer pain and suffering claims to be barred. This result is expected because the difficulties and expense of medical malpractice litigation already serve to exclude from the system a fairly large proportion of small injury cases.

Second, I propose a ceiling on pain and suffering recovery. It would be set at \$150,000 (in 1988 dollars) and would grow with inflation.<sup>13</sup> Weiler rejects a ceiling of the sort I've proposed on the ground that it arbitrarily imposes reduced recovery only on those who have been most seriously injured (pp 55-56). Yet, in practice, as I will shortly explain, I would hope that my proposal could work very much like the considerably more sophisticated regime that Weiler offers.

Weiler favors the creation of a "scale" (pp 58-61). A scale is not the same as a schedule which would attempt to establish in advance a certain dollar sum for every sort of injury. Instead, the scale would assign so many dollars for each of a selected array of injuries. The top of the scale would be reserved for the most serious non-fatal injuries—such as an infant blinded or made quadriplegic at birth (p 59). Other representative and less serious injuries would also appear on the scale, to which lesser dollar amounts of recovery would attach. In addition, the scale would take into account the age of the victim and hence the number of years of suffering ahead (*id.*). The parties (in settlement negotiations) and juries and judges (in cases that go to trial) would be told

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<sup>13</sup> O'Connell's fallback position is less restrictive than mine. Were the legislature not to abolish pain and suffering awards altogether, his alternative statutory language would impose a threshold similar to mine, but no ceiling. *Id.* at 350.

about the scale and would seek to locate their claims at an appropriate place along it (pp 59-60).

As Weiler well recognizes, a scale (as well as a schedule) would in fact contain its own ceiling. But Weiler says that the way existing ceilings work is that juries, unaware of the ceiling, decide on the amount of common law damages to which the victim is entitled. Afterwards, the judge simply applies the cap (p 59). This process results in a range of injuries of quite different degrees of severity being treated alike at the top (p 59).

Caps need not work that way, however. Suppose instead, judges, juries and litigators were told that the purpose of the cap is to serve as the highest point on Weiler's scale—as a sum reserved for the most serious and long-lasting harms only—with lesser injuries to receive appropriately lower amounts. With that understanding, the two schemes might well function much alike, although I concede that Weiler's proposal holds the promise of greater consistency among cases falling along the scale. The real dispute between us here is the comparative advantage, if any, of rule-making over individual adjudication. In this context, the English common law judges seem to have developed a *de facto* scale, without formally adopting one through the rule-making process Weiler proposes.<sup>14</sup> In any event, Weiler and I seem close here in principle, if not in administrative detail.

Another key point of agreement is that in order to reach even the bottom of Weiler's scale, the plaintiff would have to suffer at least the sort of serious injury I described in discussing my proposed threshold (pp 59-60).

A possibly important difference between us is the current dollar value to be awarded for pain and suffering in the most serious injury cases and, in turn, the amount to be awarded along the scale to all seriously injured victims with valid claims. That is, Weiler might find my inflation-adjusted \$150,000 rather too low as the top of his scale, although he is a bit coy on this question.

My idea is to provide enough money so that the most seriously injured victims could invest the award and comfortably earn the arbitrary sum of \$1,000 a month in 1988 dollars—an amount that would significantly benefit most Americans, but would not make anyone rich. Given modest inflation and lowered interest rates since 1988, the \$150,000 figure might be raised to \$200,000 today.

Weiler first argues that the point of the pain and suffering award should be to allow the person to adjust socially and psycho-

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<sup>14</sup> But, of course, English personal injury cases generally do not use juries.

logically to his or her condition, just as the other damages awarded address medical and vocational adjustment (p 58). He emphasizes the importance of inquiring whether the award really can be used to pay for things that would further those social and psychological goals (*id.*). Yet, it is not clear that he favors individualized inquiries along these lines. He gives an example of a hobbyist piano player and a hobbyist chess player each losing a hand, suggesting that, other things being equal, the piano player should get a larger payment (pp 60-61). But this illustration seems primarily to emphasize differences in lost enjoyment from similar injuries, not, so much a difference in what each person needs to adjust, unless he has in mind the pianist taking lessons to learn how to play pieces written for one hand. So, too, when he suggests that a blind or quadriplegic child should be at the top of his scale (p 59), he really doesn't justify this suggestion in terms of appropriate spending for social and psychological adjustment, but rather, it seems, in terms of the enormity of these injuries.

As a result, Weiler's analysis, like mine, provides no real basis for determining the range of the scale, and, like mine, his solution would involve a certain arbitrariness. At one point Weiler says that under his plan the amount paid at the ceiling "would likely fall well within the range of the statutory damage caps recently adopted by the state legislatures" (p 58). I find this statement ambiguous. Does he have in mind as the range Maryland's \$350,000 limit and New Hampshire's \$875,000?<sup>15</sup> Is California's \$250,000 cap in medical malpractice cases, adopted in the 1970s,<sup>16</sup> "recent" enough? While Weiler's discussion leaves me thinking that the top of his scale might approach \$500,000, I note that he also favorably cites the Canadian approach in which the scale tops out at about \$200,000 Canadian (close to my recommendation) (pp 58, 195-96 n 45).

### C. Paying Successful Plaintiffs' Legal Fees

Weiler, O'Connell, and I all agree that successful claimants should be entitled to reasonable legal fees as part of their damage award, and that losing claimants should not be obligated to pay the legal fees of defendants (pp 66-67). Frivolous claims aside,

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<sup>15</sup> Md Cts & Jud Pro Code Ann § 11-108 (1989); NH Rev Stat Ann § 508:4-d (Equity, Supp 1990).

<sup>16</sup> Cal Civil Code § 3333.2 (West, Supp 1991).

bringing a lawsuit is not a tort, and, given the current tort system, the cost of defending against non-frivolous claims seems fairly a part of the cost of the practice of medicine. By contrast, requiring the defendant to pay for those real costs incurred by winning plaintiffs seems just. This sense of justice is especially clear because the proposed changes would reduce recovery for pain and suffering and collateral sources—damages that are well understood, as a practical matter, to provide the money to pay for the plaintiff's lawyer.

I propose that plaintiffs who win at trial normally be awarded legal fees calculated as a declining percentage of the rest of their award, starting with forty percent of the first \$50,000 awarded and decreasing to a sum equal to fifteen percent of the award above \$600,000.<sup>17</sup> In a small proportion of cases involving special difficulty or ease, trial judges would be permitted to award higher or lower sums for the lawyers. For cases that settle reasonably early in the litigation process, I propose that a lower proportion of the award should be added on for legal fees. Although O'Connell's proposed statute provides for the payment of "reasonable attorney's fees" by defendants to successful plaintiffs, it does not address how to determine that sum.<sup>18</sup>

Weiler falls somewhere between O'Connell and me in terms of specificity. Although he does not take a firm stand, his tentatively favored solution seems to be one in which, like mine, the legal fees would be set as a percentage of the overall award (pp 68-69). The specific percentage would not vary based on the amount of the award; instead, it would vary based on the point in the process at which the case is resolved (for example, fifteen percent if settled early and thirty-five percent if tried) (p 64). Weiler appears to endorse part, but not all, of my proposal.<sup>19</sup>

We disagree over whether the attorney's percentage should be lower the higher the total amount of the award. The disagreement turns in large part on our different views of the current market for plaintiffs' legal services, which I believe is quite imperfect and Weiler does not. As I see it, most claimants do not shop for lawyers; they see only one, by referral or otherwise, and do not bargain

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<sup>17</sup> This percentage schedule is based on the California rule now in place that limits how much the plaintiff's lawyer may take out of the plaintiff's award. Cal Bus & Prof Code § 6146 (West, Supp 1990).

<sup>18</sup> O'Connell, 1981 U Ill L Rev at 352 (cited in note 10).

<sup>19</sup> He also proposes several nice additional wrinkles to deal with both baseless suits and frivolous defenses, as well as unreasonable unwillingness by either side to settle during the process once an offer is made (p 68).

over price. Of course, even if a small proportion of claimants shopped well, they might effectively police the market for everyone else. But I don't think that happens either.

Even when claimants shop among lawyers, frequently through referrals, I believe that malpractice attorneys try to convince claimants to employ them through non-price-cutting strategies. If nothing else, offering a lower price might inadvertently signal to the would-be client that the lawyer is less qualified. That danger is especially great in those cases where the plaintiff is highly risk-averse and unable to evaluate either how good the lawyer is or just what sort of lawyer is needed. Rather, the claimant generally wants the best lawyer possible, fearing that otherwise the case might be lost entirely. If I am right that claimants typically select their lawyer on the basis of reputation,<sup>20</sup> the result, in a socially perverse way, is that the lawyers with the best reputations will tend to get the easiest and most lucrative cases. Conversely, those with lesser reputations will handle the harder cases. The best strategy for ambitious and talented lawyers lower down in the pecking order, then, seems to be to work exceptionally hard in an effort to build a reputation in the legal community, not to charge a lower fee.

Were there to be negotiations among sophisticated parties for legal services in malpractice cases, I believe that contracts would provide for a lower percentage the more recovered, as is apparently true for real estate agent commissions on sales of homes. This result, I believe, is especially likely in the Weiler-reformed world in which far more of what the claimant receives would be readily predictable than is true today. Once the attorney makes a strong enough case for liability, the negotiations over the amount of damages should be less complicated and less difficult than now. Obtaining a large award would much more likely be a function of the plaintiff's actual loss than the attorney's skill.<sup>21</sup>

#### D. Summary and Likely Impact

In sum, Weiler's first track reform is thoughtful and well argued, even though it is neither as detailed as I would have liked,

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<sup>20</sup> For some insight into the process, see the story of Chicago's Philip Corboy, one of America's best-known malpractice lawyers, in John A. Jenkins, *The Litigators* 315-70 (Doubleday, 1989).

<sup>21</sup> By contrast, in the present situation, one could argue that since what the claimant will get is such a crap shoot, the lawyer might justifiably claim an even larger share the more he or she is able to obtain through negotiation and/or jury skills. Of course, to admit this reality is largely to abandon the claim that the current system delivers individual justice and therefore may make it difficult for plaintiffs' attorneys as a class (staunch defenders of the system on "justice" grounds) to ask for more the more they win.

nor terribly original. The areas Weiler addresses are exactly the ones that legislatures, scholars, and commissions have been working to reform.

The most important quality of Weiler's proposal, in my judgment, is that it is balanced. This balance is in sharp contrast to the one-sided proposals from the Reagan and Bush Administrations<sup>22</sup> and, as Weiler points out, to the generally one-sided legislation that states have so far enacted. And Weiler's particular balance, it must be re-emphasized, would mesh the damages awarded in malpractice cases with malpractice claimants' actual losses far more sensibly than does the current system.

Given the wide array of legislation enacted by different states during the past twenty years, Weiler's package would have quite different meanings from state to state. For example, in those states that have already reversed the collateral sources rule and capped pain and suffering awards, or capped total awards (pp 31-32), the total cost of the system to defendants might actually go up under Weiler's plan. By contrast, in a regime still embodying the basic common law rules, Weiler's package should reduce overall costs to defendants, as well as significantly altering who gets what.

Creating more predictability in awards by imposing a threshold on, and precluding extravagant awards for, pain and suffering is likely to lead to somewhat reduced administrative costs and to the elimination of a fair number of weak, modest-injury liability cases. On the other hand, there is little reason to think that this sort of package will either end the payment of invalid claims where there are serious injuries but no malpractice, or increase legitimate serious injury malpractice claims. And, of course, this package does not broaden coverage to seriously injured victims of adverse events in the absence of malpractice.

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<sup>22</sup> For the general views of the Reagan Administration on tort law reform, see US Attorney General, Tort Policy Working Group, *Report on the Causes, Extent and Implications of the Current Crisis in Insurance Availability and Affordability* (1986) (criticized in Sugarman, *Doing Away* at 78-82 (cited in note 10)). For Reagan Administration proposals aimed specifically at medical malpractice, see Department of Health and Human Services, *Report of the Task Force on Medical Liability and Malpractice* (Aug 1987). The views of the Bush Administration are contained in S 1123, 102d Cong, 1st Sess (Apr 25, 1991), in 137 Cong Rec S 6357 (May 22, 1991). A competing malpractice reform bill now before Congress is S 1232, 102d Cong, 1st Sess (Jun 3, 1991), in 137 Cong Rec S 7307 (Jun 6, 1991) which emphasizes binding arbitration of malpractice claims. This bill is discussed in Clark C. Havighurst and Thomas B. Metzloff, *S.1232—A Late Entry in the Race for Malpractice Reform*, 54 L & Contemp Probs 179 (1991). For yet another approach, see The Health Care Injury Compensation and Quality Improvement Act of 1991, introduced by Senator Durenberger in October, 1991.

In sum, Weiler's package deserves support because, although it would not likely have a dramatic impact on malpractice insurance premiums, it would distribute money among plaintiffs in what I consider to be a far more socially desirable way than does the current system and is not easily labeled pro-plaintiff or pro-defendant.<sup>23</sup>

#### E. A Further Idea—Organizational Liability

Although it appears elsewhere in his book, Weiler recommends yet another change that I think should be included as part of his track one reform. He calls it "organizational liability" (pp 122-32). Breathtakingly simple, and exceedingly inventive, organizational liability means that, for injuries incurred inside health care institutions, mainly hospitals, the institution—not the physician—would be liable for the physician's malpractice. Victims could not sue their surgeons or anesthesiologists, for example, but could sue the hospital instead. The proposal would treat doctors as employees of hospitals, even when they are, for other legal purposes, only independent contractors.

The direct consequences of organizational liability would be that doctors could no longer be named as individual defendants, except in cases concerning malpractice they might commit in their offices, and they would no longer purchase individual malpractice insurance to cover torts they commit in hospitals. As Weiler explains, this reform would largely conform medical practice to the prevailing situation in health maintenance organizations, some university and public hospitals, and other settings where the doctors are in fact employees of the institution and do not buy their own malpractice insurance (pp 124-25). While doctors in those other settings today may actually be named as defendants, everyone involved soon appreciates that any damage or settlement awards will be paid by the employer or its insurer.

Thus, although the formal common law rule is that employers who are held vicariously liable for the torts of their employees have a right of indemnity from their employees, this right simply is not asserted against negligent employees who impose costs on the organization. The upshot, as Weiler notes, is that doctors would basically be treated the way airline pilots are in cases arising out of plane crashes (p 125). Pilots are not expected to carry individual

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<sup>23</sup> Subject to the reservations I have already noted as to some of the details.



insurance and, whatever the technical legal rights of their employer airlines, airlines simply do not seek indemnity from negligent pilots.

I agree with Weiler that two strong advantages of organizational liability would be that: (1) hospitals could better build medical malpractice costs into the overall cost of patient care than could doctors (p 127), and (2) physicians would no longer labor under the fear of an individual judgment against them that they perceive to be unjust (p 131).<sup>24</sup> For those reasons, I applaud and support this recommendation.

Weiler's own main reservation about his proposal concerns whether it might lead to more careless conduct by doctors (p 129). But he concludes that, to the contrary, organizational liability should actually lead to fewer patient injuries as compared with the current rule (pp 129-31). Weiler is keenly aware that, although airline pilots don't individually pay tort damages when their carelessness brings about passenger harm, airline liability, at least in theory, translates into the retraining, discipline, or even firing of negligent employees. Likewise, he envisions that hospitals would respond to the threatened imposition of organizational liability with new and more effective behavioral controls over their physicians. As a result, in Weiler's view, organizational liability would also prove beneficial in preventing accidents.

I am skeptical about these projected safety gains; at the same time, I am not worried that organizational liability would lead to more patient injuries. But I want to reserve my discussion of the question until I take up Weiler's track two no-fault reform proposal, which also contains organizational liability as a component and depends importantly for its intellectual justification upon the same alleged safety-promoting features.

### III. TRACK TWO REFORMS: TOWARD A NO-FAULT SYSTEM FOR MEDICAL ACCIDENTS

#### A. The Plan

Most exciting of Weiler's recommendations is his call for a no-fault compensation scheme covering all seriously injured victims of medical treatment. Although he admits that he has not yet worked out the full details of his proposal, its main features are clear. Any hospital patient injured by medical treatment who is disabled for

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<sup>24</sup> Of course, malpractice litigation would still focus on whether the doctor acted carelessly.

six months or more would be entitled to compensation from the hospital, regardless of fault (p 136). That compensation would cover economic losses (such as lost income, lost household production, and medical and rehabilitation expenses) not otherwise covered through broad-based social and first party insurance schemes (id). It would also include modest payments for non-economic loss to the severely and permanently disabled, based upon a schedule that takes into account the victim's age at the time of injury and the nature of the impairment (p 135).

Weiler is not the first to recommend a no-fault approach to medical accidents. O'Connell proposed an "elective" no-fault remedy for malpractice problems nearly twenty years ago.<sup>25</sup> Professors Clark Havighurst and Laurence Tancredi, separately and together, have been promoting various medical no-fault plans for just as long.<sup>26</sup> Weiler's analysis, however, is the first to claim that it is both affordable and administratively feasible for no-fault to cover the full range of patient harms from medical treatment, provided that coverage is restricted to the most seriously injured.

Previously, it was generally believed (or feared) that it would too often be too hard or too expensive to tell whether medical treatment caused the injury. After all, many people leave the hospital worse off than when they entered, not because of something done to them by their doctor or by hospital employees, but because their ailment has simply taken a turn for the worse. None of the advocates of medical no-fault plans believes that a no-fault program should cover those situations. People who die or decline from the disease or condition from which they suffer on entry are not the responsibility of the medical establishment. No-fault is meant to pay only for those patients the system accidentally harms, whether through malpractice or not. In addition to the causation problem, it has been feared that it would be much more expensive than in the current system to compensate all patients who are accidentally injured in the course of medical treatment.

Faced with these causal and fiscal conundrums, medical no-fault advocates have tended to favor creating a list of typical injuries that are generally caused by medical accidents and have reasonably well understood financial consequences. The no-fault plan

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<sup>25</sup> Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 Va L Rev 749 (1973).

<sup>26</sup> Clark C. Havighurst and Laurence R. Tancredi, "Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance, 51 Milbank Mem Fund Q 125 (1973).

would then cover only those things on the list (often called the "designated compensatory events"). This list might be generated legislatively to cover all hospitals, or it might be the product of decentralized market transactions in which individual hospitals and patients contractually agree that the no-fault plan and not malpractice law would cover specified injuries.

Weiler argues, however, that the Harvard study reveals two startling facts that go against the conventional wisdom. First, determining whether a patient is suffering from a medical accident or not was, in the Harvard study, not so difficult after all. Based upon expert reviews of medical files, only five percent of the cases were "close calls" (p 144). So, while there will be hard cases, those situations evidently do not arise very often. Second, even though nearly fifty times as many patients suffer from medical accidents as recover on malpractice claims (p 134), restricting the no-fault plan to the less than one-fourth of those victims who are seriously injured and then compensating them only for their net losses appears to make the scheme affordable (pp 135-36).

Notice that this "same-cost" assertion assumes that the no-fault plan would substitute completely for the tort system, at least for injuries suffered in a hospital. The implication, then, is that Weiler's track one proposals are best seen as first step reforms of the traditional system.

It remains to be seen whether the ease of administration and affordable cost conclusions would stand up in practice, and the Harvard study has already run into criticism along these lines.<sup>27</sup> But I believe that Weiler has made a strong enough showing of his proposal's potential practicality that the proposal plainly deserves the more careful study and evaluation that Weiler seeks.

#### B. The Likely Impact of Weiler's No-Fault Plan

In order to decide what difference Weiler's no-fault plan would make, we must compare it to something. The most important comparison, I believe, is to the malpractice system altered by Weiler's track one reforms discussed above.

Consider, first, the seriously injured who would otherwise have valid malpractice claims. Because track one reforms would already restrict them to net economic losses and curtail payments for pain

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<sup>27</sup> See Maxwell J. Mehlman, *The Harvard No-Fault Project: A Critique* (Special Committee on Medical Malpractice of the New York State Bar Association, 1989); Daniel Kramer, *The Harvard Study, An Analysis*, NY L J 1 (Mar 9, 1990).

and suffering, in most cases their benefit package would not be terribly different under the no-fault plan. First, hospitals would be liable for pretty much the same net out-of-pocket losses under both schemes. To be sure, Weiler's no-fault plan would restrict lost wages to no more than 150 percent of the state average wage (p 137), so that the relatively few no-fault claimants who earn more would be denied full recovery if they had failed to arrange for disability or life insurance on their own. But, of course, those higher earners are exactly the people who are most likely to have such private first party protection anyway.

In addition, the no-fault plan would probably cut back pain and suffering awards even further. Weiler doesn't acknowledge this directly, but the language he uses in describing those benefits (p 135) and the workers' compensation analogy he draws upon (p 132) suggest that would be the case. Whether this result would lower claimant recoveries to the range I have proposed for tort law, or even lower, remains to be seen.

In return for these reductions, claimants would be spared the burden of having to prove malpractice. Assuming the Harvard Study's findings about the eligibility determination under no-fault hold up, recovery would become enormously easier for those who now eventually show enough evidence of malpractice to win a settlement or verdict.

And, of course, no-fault would bring in a large new group of previously uncompensated claimants who suffer from adverse events not caused by malpractice. Unfortunately, Weiler does not make clear just how many new beneficiaries we are talking about, but it has to be many times the number who are currently compensated for serious injury caused by malpractice.

Most seriously disabled, elderly victims of medical accidents, now covered by Medicare and Social Security, would likely be eligible for little more than the no-fault plan's pain and suffering payment, because their uncovered economic losses are likely to be small. Some, however, would exhaust their Medicare coverage, or have special needs that no-fault, but not Medicare, would cover, and would substantially benefit from the plan. Most middle and professional class people with steady jobs would be largely restricted to recovering the pain and suffering component, because other insurance would already cover most of their economic losses. However, some people in those groups do not have adequate health insurance, rehabilitation coverage, or disability income protection, and could benefit considerably. If a member of one of these groups were killed in a medical accident, her heirs might qualify for sub-

stantial income replacement benefits under the plan, depending on the extent to which the plan allows duplication of the victim's own pension and life insurance benefits.

The plan would be of the most help to those people currently without much first party insurance protection. These individuals typically include homemakers, children and older students, the temporarily unemployed, and modest earners employed in the secondary labor force or by small employers without good employee benefit plans. As Weiler notes, income replacement is especially important, since, as the Harvard study found, insurance typically protects only a small portion of lost earnings (pp 136-37).

By paying only after other basic compensation sources have been expended, Weiler's no-fault medical accident plan would be far better aimed at real need than are existing auto no-fault and workers' compensation schemes. Simplifying somewhat, those schemes, like the traditional tort system, are primary in the sense that if they and some type of first party insurance both cover the same loss, the loss falls on the compensation plan and not the insurance. By contrast, just as Weiler wants reformed malpractice law (in his track one reform) to pay only after "collateral sources" do, he also wants the medical no-fault plan to pay last.

### C. How the Money Is Redirected

How are all those extra no-fault claims to be funded? There are three major sources of money. One portion would come from money saved as a result of lowered recoveries by those who are covered—lowered both from what Weiler's reformed malpractice system would pay and from what the current tort system pays.

The second major source of funds would be reduced costs of claims processing. Weiler believes that, instead of society spending more than fifty percent of the malpractice premium dollar on administration as is done today, the no-fault plan would reduce spending to fifteen to twenty percent on claims administration, more like what is spent in workers' compensation (pp 139, 229 n 38). This savings is to be achieved by employing an administrative compensation mechanism something like that which Social Security now uses in determining eligibility for disability benefits. Here Weiler writes somewhat approvingly of a recent proposal of the American Medical Association to shift medical malpractice claims to an expert administrative model and away from the current judi-

cial model (pp 114-22).<sup>28</sup> But for Weiler the AMA proposal is much too timid, as it would retain the basic fault criteria as the entry point into the system (pp 117-18). Still, Weiler likes the AMA's idea of using specially trained hearing officers to decide doubtful cases (pp 115-16). In any event, the aspiration is that the administrative model would drastically reduce the use and cost of lawyers on both sides. Weiler is quite aware that workers' compensation in America has not eliminated claimants' lawyers; on the other hand, their compensation is typically a far lower share of the recovery than that paid in tort suits. So, whether compared with legal fees paid for by both sides (as today) or by defendants (as under Weiler's track one reforms), the legal fees under the no-fault plan are meant to be considerably less.

The third main source of funds to cover new claimants under the no-fault plan would come from the elimination of malpractice claims by those without serious injuries (p 136). Of course, many of those victims are *de facto* closed out of the current system because the costs of pursuing their cases, given the prospective recovery, make lawyers unwilling to take them. Even the payment of plaintiffs' legal fees by defendants under Weiler's reformed tort law is not likely to cause many more claims to be filed. The AMA's plan, by contrast, seeks to bring these lesser-injured victims into the system, by providing a lawyer for any claimant with a bona fide claim. Weiler's no-fault plan, however, not only excludes all the smaller-injury victims from coverage in the no-fault scheme, but also seemingly would deny them their tort rights. Weiler first disavows a position on the "exclusivity" issue (p 134), but then proceeds on a "same cost" assumption (p 135) which requires exclusivity if all the costs are to be used up by no-fault.

Weiler's approach to medical no-fault sharply departs from the American automobile no-fault practice. There, a few states like Michigan and New York aside, the plan is aimed almost entirely at small-injury cases, not the seriously injured. Automobile no-fault benefits are available with little or no deductible and no requirement of serious harm, and they have very low caps, such as \$10,000. The seriously hurt are left to try their luck with tort law.<sup>29</sup>

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<sup>28</sup> Report of the American Medical Association/Specialty Society Medical Liability Project, *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based, Administrative System* (AMA, 1988). For wide-ranging analysis of the AMA proposal, see *Symposium: Taking Medical Malpractice Out of the Courts*, 1 Cts. Health Sci & L 3 (1990).

<sup>29</sup> Department of Transportation, *Compensating Auto Victims* (May 1985).

Weiler's medical no-fault is concentrated on the seriously injured. To keep costs under control, the plan would deny a tort remedy to anyone injured by a medical accident in a hospital.

I would be far more content to exclude those not seriously injured by medical accidents from both the tort and the medical no-fault plan were we to have a stronger social safety net for all Americans who are disabled for six months or less. That means reasonably assured first party health care benefits for lesser disabilities and well-designed, short term income replacement benefits. Having such programs in place, I believe, would also make Weiler's plan politically far more plausible.<sup>30</sup>

#### IV. TRACK THREE REFORMS: BROADENING THE SOCIAL INSURANCE NET AND DE-COUPLING PREVENTION AND COMPENSATION

##### A. The Comprehensive Compensation Alternative

As are his track one reforms, Weiler's no-fault plan is hospital based—doctors would not be individually responsible for compensating hospital patients who suffer an accidental injury while under their care. As before, Weiler's justification is that imposing the costs on sophisticated organizations like hospitals will promote safer and more cost-effective medical practice.

Otherwise, Weiler would surely agree that there is no principled basis for advantageously singling out victims of medical accidents for compensation. After all, once fault is abandoned as the criterion, one cannot very forcefully argue that someone who is injured through the course of medical treatment has a greater entitlement to receiving compensation for his or her losses than does one who suffers losses directly from illness or birth defect, or by an accident occurring outside of the hospital.

Indeed, because I believe that all Americans suffering from disabilities of virtually every cause should have access to a program that takes reasonable care of their medical and related expenses and reasonably replaces their lost wages, I much prefer a comprehensive compensation solution that does not distinguish among medical accidents, auto accidents, product injuries, work accidents and the like. For me, such a solution would rely upon a

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<sup>30</sup> For discussions of solutions to the short-term income replacement need, see Sugarman, *Doing Away* at 135-36 and 169-72 (cited in note 10); Sugarman, 24 *San Diego L Rev* at 808-15 (cited in note 10); and Stephen D. Sugarman, *Short-Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 *Cal L Rev* 465 (1987).

broadened Social Security system and increased mandatory employee benefits.<sup>31</sup>

#### B. Do We Need Medical No-fault for Accident Prevention?

But what of the claim that we need focused plans, such as Weiler's medical no-fault scheme, in order to force those who are in a position to reduce accidents to internalize costs so that the accident rate will decline? There are two responses to this claim.

The first retort was given by Professor Marc Franklin more than twenty years ago and reiterated by Professor Richard Pierce more than ten years ago.<sup>32</sup> As they pointed out, it is quite possible to imagine a comprehensive compensation scheme that makes no distinctions among causes of harm on the benefits side, but which is funded by contributions that vary with the number and severity of accidents caused by the scheme's funding sources, which, of course, could include hospitals.

The second retort frontally challenges the prevention claim. A reduction of medical accidents is better promoted through behavioral control mechanisms that do not depend upon the hospital having a financial interest in paying out lower no-fault benefits or making lesser contributions to the compensation fund.<sup>33</sup>

For one thing, organizational no-fault liability also gives hospitals socially perverse incentives. For example, as is the case of employers under the existing workers' compensation scheme, hospitals will have a strong financial reason to fight claims by arguing that the claimant's injury was really caused by the condition that brought the patient to the hospital, and there will be pressure to organize the information collected at the hospital to lead to this conclusion. Hospitals are also likely to find it financially attractive to turn away patients whose health profiles make them most at risk of medical accidents, and to discourage or forbid the performance of medical treatment that most risks medical accidents—even when serving the patient and performing the riskier treatment are the socially desirable behaviors.

On the other hand, hospitals already have considerable incentives to police the conduct of independent contractor physicians, quite apart from any fear that courts might manipulate existing

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<sup>31</sup> Sugarman, *Doing Away* at 127-52 (cited in note 10).

<sup>32</sup> See Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va L Rev 774 (1967); Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 Vand L Rev 1281 (1980).

<sup>33</sup> For my general arguments against tort law as an effective deterrent, see Sugarman, *Doing Away* at 3-34 (cited in note 10).



tort doctrine to hold them legally liable for the malpractice of doctors working there. First, a hospital does not want to gain the reputation that its patients are more commonly victims of malpractice than patients elsewhere. Second, hospital administrators and boards are concerned about the care received by patients they tend; although hospital managers may increasingly think of themselves as running businesses, surely there is still a strong self-imposed moral commitment to good medical care. Anyway, to the extent that business considerations do dominate, I believe that the changes brought about by recent health care cost containment pressures also give hospitals an incentive to get their doctors to do it right the first time. Now if the doctor fouls up and the patient has to stay longer for more treatment, this longer stay may well not be paid for by the private or public insurer standing behind the patient.

This does not mean that all or even most hospitals today adequately supervise doctors practicing there, require retraining for doctors who need it, or deny privileges to incompetent physicians when that drastic solution is warranted. But many of the barriers to such actions would remain under Weiler's no-fault plan, or, alternatively, might be removed quite apart from his plan. For example, Weiler explains that the fear in the health care profession that a disciplined health professional will invoke antitrust laws may help explain some of the reluctance by hospitals to act more aggressively in policing those professionals (pp 111-12).

The Harvard Study sought to develop and analyze new evidence on the impact of tort law on physician behavior through an econometric study that relied on the fact that the likelihood of being sued for malpractice varies considerably from place to place within New York state. For reasons not worth trying to detail here, I am skeptical about this aspect of the Harvard study. Perhaps more importantly, Weiler himself expresses grave misgivings about whether the study really proves that malpractice law actually causes better medical care. Still, he does assert that it is his "judgment" that malpractice law has a "modest . . . preventive effect" (p 90).

Yet, if Weiler were right, we should expect to see lower malpractice rates in hospitals that are part of health maintenance organizations, other things being equal, as compared with hospitals in which independent physicians practice. After all, for the current malpractice system, HMOs face organizational liability of the sort Weiler is advocating. But I have seen nothing from the Harvard study or other research that demonstrates that HMOs or other

hospitals with employee-physicians in fact do respond with the greater accident prevention efforts that Weiler's simple economic model predicts. An important part of the explanation for this lack of response, I believe, is the very point that Weiler himself emphasizes: a large amount of malpractice actually involves slips of the hand or momentary inattention that are extremely difficult to avoid (p 129).<sup>34</sup>

Moreover, Weiler himself points to new developments on the regulatory front that hold considerable promise in terms of medical accident reduction quite apart from any cost internalizing strategy. Simply put, state medical boards are probably better advised to spend more of their resources on requiring hospital risk management and physician peer review rather than directly investigating and prosecuting doctors themselves (pp 110-11).

To be sure, these boards may not currently have sufficient resources available to them to carry out their regulatory functions as effectively as we might like. But it would surely seem right to redirect toward regulatory enforcement some of the money that could be saved by eliminating the administrative costs of determining causation, as would occur were a comprehensive accident or disability compensation plan substituted for medical no-fault and other focused plans.

### C. Medical No-fault as a Step

Nevertheless, I can support Weiler's medical no-fault plan, not as the best long-range solution, but instead as a step toward a more comprehensive system for compensating the seriously disabled. Taking political reality into account, we would expect to achieve Weiler's track one reforms sooner than his medical no-fault reform. Indeed, medical no-fault might be preliminarily tried on an elective basis or in a few experimental states, as Weiler suggests, before being applied universally (p 151).

If, however, concurrent with the track one reforms an expanded temporary disability insurance scheme were adopted and combined with a strong national health insurance system, then

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<sup>34</sup> For very recent analyses of the impact of medical malpractice law on the promotion of safety and the slowing of innovation, see the following essays in *The Liability Maze*, Peter W. Huber and Robert E. Litan, eds (Brookings Institution, 1991): Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context* 28; Stanley Joel Reiser, *Malpractice, Patient Safety, and the Ethical and Scientific Foundations of Medicine* 227; and Laurence Tancredi and Dorothy Nelkin, *Medical Malpractice and Its Effect on Innovation* 251.

people would realize that neither tort law, nor workers' compensation, nor auto no-fault or other no-fault plans such as Weiler's would need concern themselves with other than the most seriously injured.

Perhaps in the next stage, then, we might enact a series of such schemes focusing on the seriously injured—say, for victims of medical accidents, airplane accidents, prescription drug and vaccine side-effects, organized recreational sporting accidents and the like, as well as auto and workplace accidents. At that point, however, rather than continuing to add plans covering more and more specified groups, many might conclude that it would be wiser to consolidate this proliferation of schemes into a single compensation plan.

Whether we should define that overall plan in terms of accidents as New Zealand has,<sup>35</sup> or even more broadly in terms of the seriously disabled generally, as I have proposed, could then be debated. By then we should also know more about whether organizational no-fault liability for medical accidents had indeed contributed to patient safety (as Weiler predicts), in which case the funding of the comprehensive plan might well wish to target those hospitals experiencing relatively more accidents for larger contributions toward the funding of the comprehensive plan. Or, if, as I anticipate, we conclude (as New Zealand has so far) that fine tuning on the pay-in side is not really worthwhile, then the comprehensive plan would likely be funded by much broader-based revenue sources.

In sum, viewing both Weiler's track one and track two proposals as steps rather than ends, I find them highly attractive, and, as such, I very much hope that the prescriptions offered in *Medical Malpractice on Trial* gain the support they deserve.

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<sup>35</sup> For discussions and evaluations of the New Zealand plan, see Terence G. Ison, *Accident Compensation* (Croom Helm, 1980), and Geoffrey Palmer, *Compensation for Incapacity* (Oxford, 1979).



# Something Old, Something New, Something Borrowed, Something Blue

Jim C. Chen<sup>†</sup>

*The Bluebook: A Uniform System of Citation*, 15th ed. The Harvard Law Review Association, 1991. Pp xvii, 343.

The Bible of legal citation?<sup>1</sup> I prefer to think of the *Bluebook*<sup>2</sup> as a legal *Pilgrim's Progress*. Like Bunyan's allegory, the *Bluebook* has remained a perennial best-seller, the last trace of a rapidly disappearing common legal culture. Even as external pressures accelerate the decline of law as an autonomous discipline,<sup>3</sup> hordes of lawyers and law students cling to the *Bluebook* as their final article of faith in a world that has become increasingly agnostic toward law as a religion. In 1986, Judge Richard Posner proclaimed himself a leading heretic by bidding "Goodbye to the *Bluebook*."<sup>4</sup> Just this once, however, Judge Posner may have proved a false prophet. The *Bluebook* is here to stay; "bluebook" has even become a verb. Few other unofficial works can boast authoritative status in such disparate legal institutions as the *Harvard Law Review* and the Federal Energy Regulatory Commission.<sup>5</sup> The *Bluebook* has even

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<sup>†</sup> J.D. 1991, Harvard University. I would like to thank Brad Berenson, Jayne Bultena, Lance Bultena, Adam Charnes, Greg Katsas, Amy Folsom Kett, Kyle McSlarrow, Andrew Schlafly, and Elizabeth Young for comments on earlier drafts. I especially thank my wife, Anne, for patiently enduring this and all my other pet projects.

Regrettably I must explain my qualifications for writing this book review. As an executive editor of the *Harvard Law Review* from 1990 to 1991, I joined my fellow executive editors in interpreting the fourteenth edition of the *Bluebook*. Charged with interpreting this "statute" in the jurisdiction most widely credited with developing it, Harvard's executive editors are, for better or worse, experts in *Bluebook* form and lore.

<sup>1</sup> See Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 L Libr J 3, 21 (1982), citing Jonathan Jacobson, *Book Review*, 43 Brooklyn L Rev 826 (1977).

<sup>2</sup> *The Bluebook: A Uniform System of Citation* (Harv L Rev Assoc, 15th ed 1991). All parenthetical page numbers in the text and footnotes refer to this book.

<sup>3</sup> See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv L Rev 761 (1987).

<sup>4</sup> Richard A. Posner, *Goodbye to the Bluebook*, 53 U Chi L Rev 1343 (1986).

<sup>5</sup> FERC has officially adopted the *Bluebook*. See 48 Fed Reg 17066 (Apr 21, 1983).

inspired its own brand of scholarship.<sup>6</sup> Now in its fifteenth edition since 1926, the *Bluebook* has transcended its role as a legal citation manual. For those who think too intensely about law—including anyone who ever edited or wrote a law review article—the *Bluebook* serves as a morality play too dull to endure but too conspicuous to ignore.

Three diverse analogies link the *Bluebook* to the larger legal world. As the citation creed for the four leading law reviews that own its copyright,<sup>7</sup> the *Bluebook* acts as the contract, combination, or conspiracy in restraint of trade that keeps its publishers solvent. Second, the *Bluebook* expresses in condensed form the familial relationship between legal academia and student-edited law reviews. In effect, it is the fifteenth prenuptial contract between the professors and the journals. Finally, as the unofficial “Uniform Citation Code,”<sup>8</sup> the *Bluebook* is a legislative waste dump, a statutory release for the pent-up frustrations of the fragmented groups interested in citation politics.

#### PROLOGUE: THE *BLUEBOOK*'S NEW CLOTHES

Let us first contemplate the visual setting. The editors of the new edition (*Bluebook 15* for short) self-consciously tried to distinguish the new *Bluebook* from its predecessors. They have adopted “The Bluebook” as its official title, relegating the stodgy “A Uniform System of Citation” to subordinate status. The obligatory rear-cover index reflects drastic structural changes inside. Long hounded by accusations of favoring academic users over legal practitioners, *Bluebook 15*'s revisers have set aside ten pages of “practitioners' notes” on distinct blue pages (pp 10-19). The editors have also segregated all tables into a blue compartment toward the rear (pp 164-305). Accommodating this elaborate structure, cross-references to tables and practitioners' notes populate *Bluebook 15*'s margins.

Graphic changes as dramatic as these disclose an intent to abandon the bad old days. By appearances alone, the revisers certainly accomplished this objective. Ideally, the changes should ease

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<sup>6</sup> See, for example, W. Duane Benton, *Book Review: Developments in the Law—Legal Citation*, 86 Yale L J 197 (1976); Peter Lushing, *Book Review*, 67 Colum L Rev 599 (1967); *Book Review, Technical Due Process: ?*, 12 Harv CR-CL L Rev 507 (1977); *Book Note*, 32 NY L Sch L Rev 199 (1987). The best survey of legal citation literature appears in Mary I. Coombs, *Lowering One's Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation*, 76 Va L Rev 1099 (1990).

<sup>7</sup> Harvard, Yale, Columbia, and the University of Pennsylvania.

<sup>8</sup> Posner, 53 U Chi L Rev at 1349 (cited in note 4).

actual use of *Bluebook 15*, but here the revisers faltered. At the risk of judging a book by its cover, I confess that I find the visual reconstruction of the *Bluebook* somewhat dizzying. The new chapter headings mostly consist of the letter “R” (for “Rule” or “Rules”) and microscopic numbers. Deprived of helpful (if arbitrary) letter headings, the user must remember that rules fifteen through seventeen cover books, periodicals, and other secondary materials (pp 100-25). At least the old system of letters, “A” through “I,” added extra information; veteran bluebookers learned that “D” covered books and other secondary materials. *Bluebook 15* resists the cold truth that its rule numbers are meaningless.

Separate blue pages seem helpful, but collecting the tables in one place offers mixed blessings. The *Bluebook*’s editors have always been better at compiling tables than at drafting decipherable rules, and most users seem to consult the tables more than any other offering. Now all the most frequently used material appears together on blue pages spanning 140 of *Bluebook 15*’s whopping 343 pages. This convenience comes at a price. A reader using the tables can’t find the corresponding rules without following annoying cross-references. Worse, *Bluebook 15* isn’t merciful enough to provide cross-references to pages; it insists on meaningless rule and table numbers. This practice reinforces the twisted examples in the *Bluebook*’s rule on internal cross-references, the most egregious of which is “*See supra* notes 12-15, 92-97, and accompanying text” (p 39). *Bluebook 15*’s revisers have learned well one of Judge Posner’s “anti-lessons”: “Use a lot of cross-references—see if you can make the reader spend his time flipping backwards and forwards in your work.”<sup>9</sup>

But enough on aesthetics. *Bluebook 15*’s preface lists twenty-four significant changes, including some striking departures from *Bluebook* tradition. To place these changes, and the equally significant lack of changes, in the proper context, I begin by examining *Bluebook 15* as the charter of America’s leading legal citation cartel.

#### ACT I: THE CITATION OCTOPUS—A TALE OF THE EAST

An authoritative short history of the *Harvard Law Review* recounts the rise of the *Bluebook* and its publishing cartel:

[The *Bluebook*] goes back at least to the 1920s, when an “Instructions for Editorial Work” was prepared by student edi-

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<sup>9</sup> Id at 1350.

tors and put in the hands of the new members of the *Review*. In due course, this booklet developed and was revised: other law reviews heard about it, and made suggestions for its improvement. This led to a meeting of the Presidents of the *Harvard*, *Columbia* and *University of Pennsylvania Law Reviews*, and the *Yale Law Journal*. As a result of this meeting, the four journals now publish the *Bluebook* jointly and share the revenues; but virtually all the editorial work is still done at Harvard, which earns the largest share of the income.<sup>10</sup>

What Dean Griswold writes is, of course, gospel. But even the Dean's Word deserves a good apocrypha. Inspired by the orally transmitted institutional history of the *Harvard Law Review*, I now tell a somewhat mythical tale. At the height of the *Bluebook's* Eastern cartel, the *Harvard Law Review* ruled two worlds, the lesser world of legal citation and the greater, parallel world of legal academia. As the *Bluebook* enters middle age, Harvard has begun to learn about the inherent instability of cartels.

Unlike most other law review products, the *Bluebook* makes money.<sup>11</sup> Profits from the *Bluebook* still sustain the *Harvard Law Review's* and the *Yale Law Journal's* much vaunted claim to being among America's only self-financed student-edited law journals. New editions appear not when the revisionist spirit grips law review editors in Cambridge, New Haven, New York, and Philadelphia, but when revenues from *Bluebook* sales dip unacceptably. Such sensitivity to profits befits an institution that has crowned legal citation the new dismal science.

Among legal citation manuals, the *Bluebook* once bestrode the narrow world like a Colossus. Originally published in 1942, the *California Style Manual*<sup>12</sup> might qualify as the first significant competitor in this somewhat specialized market. Sometime during the 1970s, Harvard faced a greater threat. Formerly content to contribute suggestions for the *Bluebook's* periodic revisions, Yale, Columbia, and Penn threatened to issue a competing manual. As classical microeconomics would predict, these potential competitors found greater gains in collaborating. Harvard decided that

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<sup>10</sup> Erwin N. Griswold, *The Harvard Law Review—Glimpses of Its History as Seen by an Aficionado*, in *Harvard Law Review: Centennial Album* 1, 12 (1987) (footnote omitted).

<sup>11</sup> Ordinarily I would spare Harvard from public exposure of this embarrassingly capitalistic aspect of the *Bluebook*, but Harvard has already conceded the profitability issue. See Book Note, *Manual Labor, Chicago Style*, 101 Harv L Rev 1323, 1323 n 5 (1988).

<sup>12</sup> The *Manual* is now in its third edition. See Robert E. Formichi, *California Style Manual* (3d ed 1986 & 1989 Supp). It is the official manual of the California Supreme Court.



sharing its monopoly would be more profitable than letting the others shave off a market share. Given the proper opportunity, one member of the cartel might defect, surreptitiously publishing a rival manual while superficially respecting the existing cartel. But let's not delude ourselves. These are law reviews, two notches below savings and loan associations in competitive evolution.

Harvard cannot convince its fellow conspirators in restraint of trade to follow the *Bluebook's* most basic rules. The *Bluebook* syndicalists have apparently spawned chaos for its own sake, and rampant disagreement reigns in the journals' footnotes. For example, the four journals disagree on how to implement the *Bluebook's* typeface conventions, one of the manual's most distinctive traits (pp 30-32). Columbia, for example, fails to use roman, italic, and large and small capitals as the *Bluebook* commands. As comprehensive as the *Bluebook* purports to be, Harvard has long felt compelled to catalogue its own "common law" interpretations of ambiguous rules.<sup>13</sup> Furthermore, *Bluebook 15's* examples on the use of parentheticals contradict the *Harvard Law Review's* practice (pp 27-28). A Harvard parenthetical on *Roe v Wade*<sup>14</sup> would never say, "holding that right to abortion is grounded in constitutional right of privacy" (p 28). *Bluebook 15* may not believe in the use of articles within parentheticals, but Harvard does. Other examples abound. The rule on introductory signals (pp 22-24) remains so vague that Harvard, Yale, Columbia, and Penn appear unable to draw a consistent line between "[no signal]" and "see." Similarly, the example *Bluebook 15* gives to illustrate the line between "contra" and "but see" would be incorrect at the *Harvard Law Review*. I have never seen "contra" followed by anything stronger than "see also" (p 24). Indeed, "accord" and "contra" have fallen into nearly complete disuse at Harvard.

The confusion should not shock veteran *Bluebook* observers. Despite the four journals' collective arsenal of legal talent, the *Bluebook* cannot articulate the difference between its most basic signals. The fourteenth edition had used the meaningless distinction between "states" and "supports" to separate [no signal] from "see" and "contra" from "but see."<sup>15</sup> *Bluebook 15* purports to resolve the problem by adding the adverb "clearly" to both verbs

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<sup>13</sup> Harvard Law Review, *Executive Editor Handbook* 11-17 (on file with U Chi L Rev).

<sup>14</sup> 410 US 113 (1973).

<sup>15</sup> *A Uniform System of Citation* 8-9 (Harv L Rev Assoc, 14th ed 1986) ("*Bluebook 14*").

and italicizing the whole verb clause (pp 22-23).<sup>16</sup> I prefer the following interpretation of the *Bluebook's* introductory signals:

Use *no signal* when you've got the guts. Use *e.g.* when there are other examples you are too lazy to find or are skeptical of unearthing. Use *accord* when one court has cribbed from the other's opinion. Use *see* when the case is on all three's. Use *cf.* when you've wasted your time reading the case. Insert *but* in front of these last two when a frown instead of a smile is indicated.<sup>17</sup>

That's some legal realism that would bring tears to Karl Llewellyn's eyes.

Now that The University of Chicago has finally challenged the Eastern cartel by publishing *The University of Chicago Manual of Legal Citation* (the *Maroonbook*),<sup>18</sup> the long-awaited infusion of superior citation rules has begun. Nevertheless, Harvard has not responded to the *Maroonbook's* competitive threat by improving the *Bluebook*. Harvard initially reacted in the fashion of the robber barons. It punished Chicago's entry into the market by publishing a blistering book review of the *Maroonbook*.<sup>19</sup> *Bluebook 15* commemorates this act of attempted monopolization<sup>20</sup> in examples that mock its competitor (pp 115, 118). When the market eventually adjusts,<sup>21</sup> consumers of citation rules will be able to choose the type of regime under which they draft footnotes until partnership, tenure, or appointment to the bench confers the privilege of letting a subordinate fret about citation. The market for legal citation manuals can accommodate the opposing philosophies represented by the *Bluebook* and the *Maroonbook*. For big-shouldered legal giants, the *Maroonbook's* greater flexibility leaves the mind uncluttered, free to think about real issues. For spoon-fed scribes, the aroma of home-cooking rides on an east wind.

The *Maroonbook* offers specific rule choices that *Bluebook* users should consider. At the most basic level, the *Maroonbook* counters the *Bluebook's* brittle dogma with a refreshing bit of flex-

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<sup>16</sup> The *Bluebook* instructs writers to use "[no signal]" when the cited authority "*clearly states*" the proposition and "*see*" when the cited authority "*clearly supports*" the proposition (pp 22-23).

<sup>17</sup> Lushing, 67 Colum L Rev at 601 (cited in note 6).

<sup>18</sup> *The University of Chicago Manual of Legal Citation* (Lawyer's Co-op, 1989) ("*Maroonbook*").

<sup>19</sup> See Book Note, 101 Harv L Rev at 1323 (cited in note 11).

<sup>20</sup> See 15 USC § 2 (1988).

<sup>21</sup> See Ronald Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

ibility. As would befit the product of a cartel, *Bluebook 15* lacks a decent rule of reason. *Bluebook 14* did admit that “when unusual circumstances make [its] forms confusing or otherwise inadequate, a different citation form should be substituted,”<sup>22</sup> but the fifteenth edition has abandoned even this modest concession. Having forsworn the *Bluebook’s* ambition “to write a particular rule for every sort of citation problem that might arise,”<sup>23</sup> the *Maroonbook* allows miscellaneous sources to “be cited in any unambiguous form consistent with the general practice of this manual.”<sup>24</sup> Supporters and detractors agree: the overly fastidious adherence that the *Bluebook* engenders is one of its greatest weaknesses.<sup>25</sup> To be sure, *Bluebook 15* shows admirable resilience in developing new citation forms for electronic databases (pp 68, 122-23), unpublished materials (pp 119-21), and sound recordings (p 124). Yet law review editors, the most hidebound *Bluebook* users, might profit more from one extra rule: “If any rule proves unduly oppressive in any context, violate it.”

Even though *Bluebook 15* improved its rule for newspapers, a rule of reason approach could have attained similar results with less anguish. The fourteenth edition had required that newspapers be cited both by page and by column.<sup>26</sup> As citations to newspapers proliferated, pressure arose to reform this rule by eliminating the onerous column requirement. Because most researchers discover newspaper articles on line, the column rule added no value. Nevertheless, *Bluebook 14* dispatched far too many law review editors on mindless missions to microform rooms. Without fanfare, *Bluebook 15* finally eliminated the useless column rule (p 113). Just as silently, however, the fifteenth edition restored the practice of using large and small capital letters for newspaper names (*id.*)<sup>27</sup> The rule of reason would have jettisoned the pointless column requirement long ago and let individual writers choose the appropriate typeface for newspapers.

To the *Bluebook’s* embarrassment, the *Maroonbook* has produced more innovations with fewer rules. Citation aficionados may choose between the *Bluebook’s* rigid insistence on citing all subse-

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<sup>22</sup> *Bluebook 14* at iv (cited in note 15).

<sup>23</sup> *Maroonbook* at 7 (cited in note 18).

<sup>24</sup> *Id.* at 24.

<sup>25</sup> Compare Griswold, *Glimpses of History* at 12-14 (cited in note 10), with Posner, 53 U Chi L Rev at 1344 (cited in note 4).

<sup>26</sup> See *Bluebook 14* at 106 (cited in note 15).

<sup>27</sup> Five years ago, the fourteenth edition had switched to “ordinary roman type.” *Id.* at v, 105.

quent dispositions of cases in the United States Supreme Court (p 65) and the *Maroonbook's* wise counsel to omit "a denial of review . . . that has no precedential authority (for example, a denial of certiorari by the United States Supreme Court) unless it is particularly recent and thus indicates finality."<sup>28</sup> Likewise, the *Maroonbook's* rule on cross-references and subsequent references to secondary sources<sup>29</sup> eliminates three of the most pompous words in law: "*supra*," "*infra*," and "*hereinafter*." By promoting words of Latin and Legalese, *Bluebook 15* reinforces lawyers' perverse predilection for dead and deadening languages.

Unfortunately, the market has adjusted slowly. Despite the *Maroonbook's* overwhelming price advantage,<sup>30</sup> the *Bluebook* retains a massive market share. Perhaps brand loyalty among consumers of citation manuals is unbelievably strong. Or perhaps the *Bluebook* represents an elusive Geffen good: the higher a citation manual's price, the greater its demand. Most likely, some *Bluebook* users cannot find an adequate substitute. The fourteenth edition provided inconsistent examples on whether to underline the period in "*id.*" in legal memoranda. An embarrassingly high number of letters and phone calls requested the *Harvard Law Review's* clarification on this pressing issue. These desperate souls must really believe that the *Bluebook* is divinely inspired. In such matters of personal faith, I suppose economic rationality is at best irrelevant and at worst blasphemous.

#### ACT II: FOR BETTER OR FOR WORSE . . .

Law reviews. Law review editors. Law professors. Law professors' law review articles. The progression merits a pregnant pause. On one hand, the intimate nature of the relationship between law reviews and the professors who fill their pages demands a family law analogy. On the other hand, to describe law professors and law review editors as wedded smacks of incest. Editors and professors distrust each other with an intensity that dwarves the animosity displayed in some marriages, most divorces, and all prenuptial contracts. In lieu of a more explicit marital arrangement, the principal players of legal academia have adopted the *Bluebook*. Law reviews set different conditions on the hundreds of hopeful proposals they receive in academia's greatest lottery. Almost all agree on one con-

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<sup>28</sup> *Maroonbook* at 17 (cited in note 18).

<sup>29</sup> See *id.* at 25-26.

<sup>30</sup> As of December 1, 1991, Chicago Law Books sold the *Bluebook* for \$9.50 and the *Maroonbook* for \$5.

dition: "Citations should conform to . . . ." Such widespread acceptance qualifies the *Bluebook* as one of the few common elements of a law review culture marked by increasing specialization. Consequently, many disputes between law review editors and authors revolve around *Bluebook* form. The editors' often superior grasp of *Bluebook* arcana enables them to enjoy a rare edge over their professors. For example, *Bluebook 15's* three-page rule on the order of authorities within each signal (pp 25-27) gives editors leverage over uncooperative authors who insist that an obscure article by the chairman of the tenure committee better supports a point than does a recent Supreme Court decision. This feature alone may explain many law reviews' preference for the *Bluebook* over the *Maroonbook*, which provides that "[a]uthorities may be organized in any manner that seems desirable."<sup>31</sup>

Most citation disputes end amicably, usually with the edge to the editor. The loser may whine, wheedle, and wheeze, but the thrill of publication eventually overcomes any hard feelings. Two professors, however, did not accept defeat in the ordinary, sportsmanlike fashion. They chose to engrave their complaints into their hallowed footnotes. A feminist author "had wanted to humanize and particularize the authors whose ideas I used in this Article by giving their first as well as last names,"<sup>32</sup> contrary to *Bluebook 14's* convention of omitting first names.<sup>33</sup> After all, personhood is essential in an article discussing "rational empiricism, standpoint epistemology, postmodernism, and positionality."<sup>34</sup> Likewise, a book reviewer "object[ed] to the transformation in law reviews of what I understood to be the First Amendment to the 'first amendment'."<sup>35</sup> Though the right to free speech recognizes that "one man's vulgarity is another's lyric,"<sup>36</sup> "Capitalize the First Amendment" proved too unsavory a slogan for Harvard.

But wait. The *Bluebook* is not the Clayton Act of legal citation, under which the editor always wins.<sup>37</sup> The editors of *Bluebook 15* have changed the two rules that sparked an open academic

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<sup>31</sup> *Maroonbook* at 12 (cited in note 18).

<sup>32</sup> Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv L Rev 829, 829 n \* (1990).

<sup>33</sup> See *Bluebook 14* at 91 (cited in note 15).

<sup>34</sup> Bartlett, 103 Harv L Rev at 832 (cited in note 32).

<sup>35</sup> Floyd Abrams, Book Review, *A Worthy Tradition: The Scholar and the First Amendment*, 103 Harv L Rev 1162, 1162 n 11 (1990).

<sup>36</sup> *Cohen v California*, 403 US 15, 25 (1971).

<sup>37</sup> Compare *United States v Von's Grocery Co.*, 384 US 270, 301 (1966) (Stewart dissenting) ("The sole consistency that I can find is that § 7 [of the Clayton Act], the Government always wins.").

revolt in the *Harvard Law Review*. Proper *Bluebook* form now requires giving a cited author's full name (p 101). One suspects that *Bluebook 15's* editors were less motivated by the *Maroonbook*, which instructs users to supply full names in the interest of providing full information,<sup>38</sup> than by the complaint that omitting first names eliminated "one dignified way in which women could distinguish themselves from their fathers and their husbands."<sup>39</sup>

Other aspects of *Bluebook 15* suggest that interest group appeasement dominated the revision. As though to atone for snubbing feminist interests, *Bluebook 15* cites Catharine MacKinnon in at least five separate examples (pp 34, 35, 40, 41, 101), and one essay by Kay Deaux and Brenda Major appears three times (pp 12, 29, 106). In Kaldor-Hicks fashion, however, these gains came at the expense of coauthors. If a work has more than two authors, the first author gets full credit while all others disappear into an "et al." (p 101).

Yet no one can accuse *Bluebook 15* of not taking personhood seriously. Citations to signed student works in law reviews now include the authors' full names (p 114). Like the full name rule, this change conceals an ulterior purpose. Citing student writing by author punishes the few journals whose student editors still publish anonymously. Though mostly misguided, the fad of signing student notes and comments does have its virtues. Some students often retain more innate writing ability than do their jaded professors. Besides, as long as some professors feel entitled to sign articles prepared by their "research assistants,"<sup>40</sup> why shouldn't the students take credit for their own pieces? Then again, any enterprising student can cure imposed anonymity by publishing after graduation and citing himself gratuitously.<sup>41</sup>

By conceding the rule on capitalizing "first amendment," *Bluebook 15* accommodated not only sublime issues of personhood but also trivial ones of typography. Now, free speech scholars may "capitalize parts of the U.S. Constitution when referring to them in text, but not in citations" (p 51). In yielding, the *Bluebook* succumbs to the cheap fashion of random capitalization. Legal writers

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<sup>38</sup> See *Maroonbook* at 14 (cited in note 18). Posner, 53 U Chi L Rev at 1344-45 (cited in note 4), also criticizes the old *Bluebook* rules directing the omission of authors' first names.

<sup>39</sup> Bartlett, 103 Harv L Rev at 829 n \* (cited in note 32).

<sup>40</sup> Professors might rethink this practice. Feathering the chiefs' headdresses through the labors of the braves may eventually hurt the tribe.

<sup>41</sup> See Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 Harv L Rev 1306 (1990); *The Supreme Court, 1989 Term: Leading Cases*, 104 Harv L Rev 129, 319 (1990).

often capitalize, italicize, and punctuate at random, as though BIG, *ornate* letters decorated with dashes convey deeper thoughts. These writers seem to believe that capitalizing "Republican Guarantee Clause" or "Ninth Amendment" will infuse these provisions with legal significance. *Bluebook 15* inflates the trivial by commanding needless capital letters. Decent writing need not be a demonstration of available typefonts.

### ACT III: CITATION LOBBYISTS IN THE SLOUGH OF DESPOND

Not every change in the *Bluebook* helps the cartel attain its stated goal of a comprehensive, internally consistent system of citation rules. Virtually every change, however, reflects the interests of its proponents. As the chosen citation manual for much of the legal profession, the *Bluebook* must please a diverse market. *Bluebook 15*'s greatest success, therefore, lies in satisfying its discrete and insular constituencies.

Some reforms, of course, are desirable. Previous editions had instructed users to place cases before all other authorities within a single citation.<sup>42</sup> To positivists' delight, *Bluebook 15* has relegated cases to fourth priority, after constitutions, statutes, and treaties. The international and foreign law lobbies succeeded in producing some of *Bluebook 15*'s most visible changes. Just in time for 1992, the *Bluebook* offers substantially revamped rules for European Community materials (pp 158-60). It has introduced a table for intergovernmental organizations (pp 259-61). The foreign tables have abandoned the traditional distinction between common law and civil law jurisdictions (pp 219-58) and have added Austria, China, Czechoslovakia, Hungary, and Spain (pp 223-48). Shifting political fortunes threaten to render obsolete the tables for the Soviet Union (pp 256-57), but in this respect *Bluebook 15* is as much a victim of timing as formerly employed Communist apparatchiks.

Despite these reforms, most *Bluebook* rules remain as inconsistent and vague as before. Bad drafting subverts the *Bluebook*'s stated goals: furthering citation uniformity. Abbreviations for the same word differ arbitrarily. Why "So. 2d" instead of "S.2d" when every other "S." represents every other instance of "Southern"? Why signify "Supplement" two different ways, as in "F. Supp." and "N.Y.S.2d"? And why should "Federal" be "F." in "F. Supp." and "F.2d" but "Fed." in "Fed. Reg."? The *Bluebook* also encourages prolixity. No one would be confused if "P.L.," "F.R.," and

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<sup>42</sup> See, for example, *Bluebook 14* at 10-11 (cited in note 15).

"F.S." replaced the longer "Pub. L. No.," "Fed. Reg.," and "F. Supp." No wonder the revisers banished the title "Uniform System of Citation" to subordinate status. The *Uniform Citation Code* is no more uniform than its commercial law counterpart.<sup>43</sup>

For the typical law student, however, the list of periodical abbreviations (pp 276-93) carries the greatest weight. The sheer volume of letters that Harvard received from law reviews not listed in the fourteenth edition suggests that this table confers some sort of legitimacy. At least one law review insisted that its funding depended on being listed. Until this edition, the *Bluebook's* rather limited list did carry an elite aura. That the slimmer *Maroonbook* boasted a more comprehensive list<sup>44</sup> severely undercut *Bluebook 14's* claim to superior coverage. The fifteenth edition has taken great strides toward curing this deficiency, but it still falls short of completeness. Among the more glaring omissions: *Energy Law Journal*, *Journal of Law and Economics*, *Journal of Law and Policy*, *Journal of Legal Education*, and *Journal of Legal Studies*. The *Maroonbook* lists all of these journals. Though *Bluebook 15's* revisers graciously accommodated every law review that requested to be listed, they somehow overlooked some of the more prominent publications in legal academia. Lack of space would be an obscene excuse for a 343-page manual.

*Bluebook 15* leads the way in listing specialty journals that have seceded from the legal mainstream such as the *Stanford Journal of Law, Gender, and Sexual Orientation* and the *Yale Journal of Law and Liberation*. Frustration with established academia partly explains the explosion of specialty law reviews.<sup>45</sup> In addition, the increasing prominence of cross-disciplinary studies in legal education has created publication opportunities for law students and professors with otherwise unmarketable degrees in sundry strains of sociology.<sup>46</sup> Appearing in the *Bluebook* list "legitimizes" these specialty law reviews. Conversely, the status of being listed in the *Maroonbook* seems too staid unless the publication specializes in law and economics or energy law.

If *Bluebook 15's* list of publications accelerates fragmentation in legal circles, it does so only incidentally. Not so with the most

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<sup>43</sup> See Jim C. Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 *Tex Intl L J* (forthcoming 1992).

<sup>44</sup> See *Maroonbook* at 47-54 (cited in note 18).

<sup>45</sup> See, for example, Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U Pa L Rev* 561 (1984).

<sup>46</sup> Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 *Harv L Rev* 926 (1990), has collected gems from every political and philosophical perspective.



substantial *Bluebook* change spurred by interest groups: the abandonment of citations to state reporters (p 61). Even the streamlined *Maroonbook* advises users to cite state as well as regional reporters, though it concedes that "it is permissible to give the particular pages supporting the text for one reporter only."<sup>47</sup> In light of its putative quest for completeness, *Bluebook 15* strangely forsakes state reporters. Indeed, deserting parallel citations contradicts the information-enhancing effect of requiring authors' first names. When one considers the politics of *Bluebook* revision, however, the apparent incongruity evaporates. A citecheckers' lobby seems to have persuaded the revisers to alleviate the burden of tracking down pesky state reporters. Whereas lowly legal practitioners must follow state court rules, which formally or informally require citation to state reporters (pp 14-15), all others (read: law review editors) should "cite *only* to the relevant regional reporter, if the decision is found therein" (p 61).

Relieving law review editors of the duty to cite state reporters arose solely from sloth. For law reviews, this sin is unforgivable. Practitioners often refer to law review articles for case citations rather than legal analysis. If adopted widely, this *Bluebook* rule would substantially diminish law reviews' value. Imagine the annoyance of a lawyer at the firm of Scrooge & Marley, P.C., who must go on line to find a parallel citation that a law review article failed to provide. As between law review editors and law review readers, the burden to supply parallel citations should fall upon editors. In appeasing their multiple constituencies, the editors of *Bluebook 15* apparently placed state court practitioners at the bottom of their list.

Despite threatening to widen the gap between legal academia and legal practice, the new rule on parallel citations will have little real impact on documents that practicing lawyers file in the courts. The Massachusetts Supreme Judicial Court's cite to the *Bluebook* as persuasive authority on the meaning of commas<sup>48</sup> does not typify the state courts' view of the manual. Although the *Bluebook* insists that the Official Code of Georgia Annotated be cited "Ga. Code Ann. § x (Michie 19xx)" (p 179), the Georgia Supreme Court prefers "O.C.G.A." I predict that state courts will also promote the use of parallel citations for the foreseeable future.

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<sup>47</sup> See *Maroonbook* at 16 (cited in note 18).

<sup>48</sup> See *Muchnick v State Harness Horse Racing and Breeding Assoc.*, 341 Mass 578, 171 NE2d 163, 166 (1961).

When the blood from *Bluebook 15*'s jihad against state reporters clots, West Publishing Company may emerge as the only party to gain from the abandonment of parallel citations. By renouncing state reporters, *Bluebook 15* won't hurt sales of West's regional reporters. Westlaw will surely do its best to replace law reviews as a source for parallel cites. By requiring jump cites and granting a monopoly on state case citations to the regional reporters, *Bluebook 15* has also enhanced the franchise value of Westlaw's star paging feature.<sup>49</sup> Mead Data Central may rue the day it agreed to help publish the *Maroonbook*.

#### EPILOGUE: AFTER THE GOLD RUSH

Little lies at stake in specific citation rules. *Bluebook 15* was destined to turn a fat profit regardless of its content. The true prize at stake in the *Bluebook-Maroonbook* tussle is the relative prestige of the law reviews at Harvard and Chicago. Law schools don't have football teams; they have law reviews. That these schools' contestants battle for recognition and status through footnotes<sup>50</sup> better describes the pettiness of legal academia than any other observation about the student-driven legal culture. Whatever the eventual outcome of this struggle, the *Bluebook* has already inflicted heavy losses. The intricate *Bluebook* diverts scarce intellectual energy from thinking, writing, and rewriting in legal scholarship. Among the hundreds of student-edited journals almost all read the *Bluebook* as a map to the promised land. The *Bluebook* lights a path down some road, but surely not to salvation. If this be heresy, let the minions of Cambridge come. I'll take my stand.

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<sup>49</sup> See *West Publishing Co. v Mead Data Central, Inc.*, 799 F2d 1219 (8th Cir 1986), which established West's proprietary interest in the page numbers of its regional reporters.

<sup>50</sup> See, for example, Arthur D. Austin, *Footnotes as Product Differentiation*, 40 Vand L Rev 1131 (1987); Lasson, 103 Harv L Rev at 937-41 (cited in note 46).