

# Doing Away with Tort Law

Stephen D. Sugarman

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# Doing Away with Tort Law

Stephen D. Sugarman†

## INTRODUCTION

In the 1960's and early 1970's legal scholars debated exciting proposals to replace sections of tort law with compensation systems tailored to classes of accidents. The most pressing concern was a no-fault scheme to supplant auto-accident law. Initial legislative successes encouraged reformers to grow increasingly bold in their proposals. However, they have not been able to retain center stage. In the political arena, the auto no-fault movement has ground to a halt. In academia, tort theory has captured the limelight. Although scholars have written on tort theory from various perspectives, the main thrust of their writing has been to defend tort law's commitment to decentralized private law solutions to accident problems, if not to support the details of the existing tort system. It is time, I believe, to focus academic and political attention once more on doing away with ordinary tort actions for personal injury.<sup>1</sup>

The straightforward case against tort law rests on the argument that the costs of the tort system outweigh its benefits. Part I of this Article has that focus. It examines the justifications advanced in support of existing tort law and shows that stated goals are either unachieved or

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I had the pleasure of collaborating with Professor Fleming in a report titled *Perspectives on Compensating Accident Victims* for the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, in which a number of the points I make in this Article were raised. While I was fashioning this Article out of those thoughts, Professor Fleming published two extremely concise and effective analyses of the role of tort in today's world, which parallel this Article at several points. See Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193 (1984), and Fleming, *Is There a Future for Tort?*, 58 AUSTL. L.J. 131 (1984).

1. The American Bar Association's Special Committee on the Tort Liability System has recently released an enormous Report that is, on the whole, highly laudatory of tort law. SPECIAL COMM. ON THE TORT LIAB. SYS., AMERICAN BAR ASS'N, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984) [hereinafter cited as A JURISPRUDENCE OF INJURY]. The report offers some suggestions for reform, but concludes that the tort system is "vital and responsive" and that it "produces a consistently high quality of substantive justice." *Id.* at 13-1. The Committee's Reporter was Professor Marshall Shapo; the Chair was former Attorney General Griffin Bell.

While not written as such, this Article can be seen as a critique of that Report; my conclusions urge public policy to move in quite the opposite direction. I should note, however, that the most forceful analysis in the Report applies to its discussion of intentional wrongdoing, which is largely outside my attention here.

inefficiently pursued. I offer a critique of several different kinds of tort apologists. They include devotees of economics who emphasize the deterrence goal, moral philosophy fanciers who emphasize the justice goal, and enterprise liability scholars who emphasize the compensation goal. Part I also describes a range of social and economic costs that tort imposes on our society.

The present scheme and its simple repeal are not the only policy choices, however. In Parts II and III, therefore, I consider the proposals for change that reformers usually advance: revising tort law, replacing parts of tort law with tailored compensation systems, and substituting for the entirety of tort law a general accident or disability compensation scheme. While I find a number of these reforms to be changes in the right direction, they are not ideal.

Part IV then offers a series of proposals I do favor: (1) eliminate tort remedies for accidental injuries; (2) build on existing social insurance and employee benefit plans to assure compensation to accident victims in line with compensation provided for other major causes of income loss and medical expense; and (3) build on existing regulatory schemes both to promote accident avoidance and to provide outlets for complaints about unreasonably dangerous conduct.

## I

### THE FAILURE OF TORT LAW

#### A. *Avoiding Undesirable Accidents: The Ineffectiveness of Tort as a Deterrent*

##### 1. *The Basic Model: Rational Responses to the Threatened Imposition of Tort Damages*

Many commentators have tried to justify tort law on the ground that it promotes socially desirable behavior. Specifically, they claim that it prevents injuries<sup>2</sup> by deterring unreasonably dangerous conduct.<sup>3</sup> Although by no means new,<sup>4</sup> this idea has had a great deal of play of late since it is the cornerstone of the "law and economics" view of tort law,

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2. The accidents considered in this Part involve personal injuries. The future of tort suits for property damage, "pure" financial loss, and other harms is discussed later. Moreover, I focus first on accidents, the main subject of tort law, and put aside until later the future role of private suits against intentional wrongdoers.

3. See A JURISPRUDENCE OF INJURY, *supra* note 1, at 4-3 to 4-8. I use the phrase "unreasonably dangerous" throughout for two reasons. First, I do not suggest that society should deter conduct on the basis of danger alone; some risks, because of the benefits they create, are socially acceptable. Second, this phrase captures what most people think negligence law should condemn and deter.

4. See the discussion in Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137, 144-51 (1951). For an early statement, see Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 269-70 (1890).

which has been so widely discussed in recent years.<sup>5</sup> If liability effectively served this social engineering purpose, it would be a powerful argument for the retention of tort law.<sup>6</sup> There is, unfortunately, little reason to believe that tort law today actually serves an *important* accident avoidance function. Worse, to the extent that tort law does influence behavior, there is good reason to think that much of the result is socially undesirable. Given the tort system's enormous administrative cost, were deterrence its only objective, I think that society would be decidedly better off if it did away with private law damages for accidents. This section seeks to demonstrate this.<sup>7</sup>

The argument for tort law as a deterrent can be simply stated. It is first assumed that, absent tort law, people would selfishly pursue their own interests, putting their personal desires ahead of the safety of others. As a result, people (and property) would be unreasonably damaged. By contrast, since tort law threatens people with having to pay for the harms they cause, it is seen to force them to take the interests of others into account.<sup>8</sup> In other words, it is assumed that in order to avoid tort liability, people will alter their behavior in a socially desirable, less injury-producing way.

The "law and economics" view of tort law as safety-promoter emphasizes the threat of having to pay tort damages. This is not the only "cost" the tort system imposes, however. Tort law might also deter because of the sting of an official determination of liability. In addition, tort law might deter because people fear undesirable publicity from

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5. One giant in this movement is Professor Guido Calabresi. Though a critic of many aspects of existing tort law, he advocates decentralized, cost-internalizing tort reforms or tort-like mechanisms that depend for their justification on their deterrent effect. See his enormously influential book, G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970). Professor, now Judge, Richard Posner is another giant in the law and economics field. Most take his writing to represent a broad defense of current tort law on deterrence grounds. In fact, Posner's writings have undergone some change. By now it is no longer clear whether his "theory" is (1) as most assume, a largely positive model of how tort law shapes behavior, (2) a normative model of who deserves to bear the costs of accidents, or (3) a predictive model intended to explain how judges have decided and will decide cases. Compare Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972), with Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980), and Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981). See also Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976).

6. The argument would not be conclusive since the comparative advantage of tort law over other behavioral control mechanisms would not have been demonstrated.

7. The reader should bear in mind that some commentators accept my criticisms yet argue not for the abolition of tort law, but for its expansion as a behavioral control mechanism. Others, while favoring abolishing tort, insist on replacing it with one or more accident compensation schemes whose financing is linked to the sources of injuries in order to promote safety. For reasons detailed later, I reject both these reforms as well. Still others, of course, rest their defense of tort on other considerations besides deterrence; hence, they are largely indifferent to this issue.

8. The difference between negligence and strict liability as a standard of liability does not bear upon my general argument. The distinction will be considered later.

reports of official proceedings—publicity beyond that generated by informal assertions backed up by investigative reporting.<sup>9</sup> Finally, tort law threatens large administrative costs of defending one's position, whether one settles or goes to court.<sup>10</sup>

In any event, the general model posited is one in which people, like mice put in a psychologist's maze of electrical shocks, are directed away from conduct that brings the sting of tort liability and toward those channels of activity where the sting is avoided.<sup>11</sup> *However, this simple deterrence model overemphasizes both the amount of overly dangerous activity that would occur without tort liability, and the amount of injury-reduction achieved.*<sup>12</sup>

## 2. Behavior Controls Apart from Tort Law

Self-preservation instincts, market forces, personal morality and governmental regulation combine to control unreasonably dangerous actions independently of tort law. The existence of these forces explains

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9. Although the implications for a defendant's reputation and sales are not altogether certain, it seems fair to assume that most defendants would like to avoid getting into print this way. See Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645, 645, 673-74 (1967).

10. It is perhaps understandable that "law and economics" defenders of tort tend to ignore costs other than damages. The unpredictability of other costs complicates their clean theoretical models where meticulously engineered rules of liability and precisely calculated potential costs combine to bring about just the right level of safety precautions.

11. To use a common example from the literature of law and economics: Absent liability, it is assumed that a railroad will blithely operate without a \$100 spark catcher attached to its locomotive. However, it will install one when faced with the alternative of paying \$1,000 in tort damages (even \$101 in tort damages) to farmers whose crops its escaping sparks would destroy. Economic efficiency is promoted because it is better that \$100 of resources be spent on a spark catcher than it is to waste \$1000 of crops.

12. Others have also catalogued factors undercutting tort's role as a deterrent. Together these writings evaluate tort law in America and other common law countries. See, e.g., D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD & Y. BRITAN, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 328 (1984) ("Deterrence of carelessness operates in a random way.") [hereinafter cited as COMPENSATION AND SUPPORT]; T. ISON, THE FORENSIC LOTTERY 89 (1967) ([T]he value of tort liability as a deterrent . . . is thought on the whole to be negligible.); Brown, *Deterrence and Accident Compensation Schemes*, 17 U.W. ONT. L. REV. 111, 153 (1978) ("[T]he tort liability system appears to offer at most minimal deterrence."); Fleming, *Is There a Future for Tort?*, 58 AUSTL. L.J. 131, 134 (1984) ("[O]ne must be sceptical about the effectiveness of tort law in promoting accident prevention."). For an additional skeptical analysis of the effectiveness of the tort system as a deterrent, see E. BERNZWEIG, BY ACCIDENT NOT DESIGN 65-71 (1980). See also ASSOCIATION OF BAY AREA GOVERNMENTS, PRIVATE SECTOR TORT LIABILITY, SAFETY INCENTIVES AND EARTHQUAKES 14-27 (1983) (with research and conclusions by Gary Schwartz); cf., A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 88-92 (1964) [hereinafter cited as AUTOMOBILE ACCIDENT COSTS]; A. LINDEN, CANADIAN TORT LAW 6-8 (2d ed. 1977). The Conard and Linden studies present a more balanced approach, resting the case for deterrence primarily upon the interaction between tort and regulation. Another perspective would be to examine how other goals of tort impede doctrinal development that would promote deterrence. See, e.g., Stoll, *Penal Purposes in the Law of Tort*, 18 AM. J. COMP. L. 3 (1970). This is not my line of attack here.

why, if tort liability were simply abolished, there would not be the dramatic increase in injuries that the simple tort-as-deterrent model envisions.

First is the *self-preservation instinct* of would-be injurers. Where conduct is likely to be dangerous to oneself as well as others, the drive to protect one's own body will go a long way towards safeguarding others.<sup>13</sup> The attention of airline pilots and drivers to safety well illustrates this point; further examples are efforts by store owners and home owners to ensure that their premises are free from hazards. I recognize that this pressure is not universally applicable: manufacturers and physicians mainly endanger others.

*Ordinary market* forces serve as a second safety control. If buyers have good information and act rationally, the market by itself should provide the goods and services that respond to public willingness to pay for safety.<sup>14</sup> Unfortunately, there is good reason to think that many consumers are neither well informed about damages nor fully rational actors.<sup>15</sup> Hence, market pressures alone, although an important influence, will not suffice to achieve the desired level of safety.

Beyond a desire to cater to current buyer preferences, enterprises and professionals have an interest in attracting new customers. This gives them a financial reason to avoid a reputation for providing dangerous products, premises or services.<sup>16</sup> Bad reviews by consumer organizations or the media, to say nothing of word of mouth complaints, can ruin the marketing of a particular product or service. In addition, a publicized unsafe product line can besmirch a firm's general standing—a matter of considerable importance in a nation of large diversified enterprises.<sup>17</sup>

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13. See, e.g., P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 558 (3d ed. 1980).

14. See, e.g., Musgrave & Pazner, *Liability Rules, Efficiency and Equity*, 35 PUBLIC FINANCE/FINANCES PUBLIQUES 1 (1980).

15. Perhaps one reason for inadequate consumer information is that producers face disincentives to advertise safety. For an expression of concern about market forces and the auto design problem, see Nader & Page, *supra* note 9, at 647-48.

16. See T. ISON, *supra* note 12, at 88; Fleming, *supra* note 12, at 134. George Eads and Peter Reuter predict that this pressure will be strongest in cases of advertised, brand-differentiated products. G. EADS & P. REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 46 (1983) (Rand Corporation study). For a general discussion of this point, see *id.* at 48-51.

The Eads and Reuter monograph presents both a review of prior work and the results of their own empirical studies. Eads and Reuter interviewed executives concerned with safety at some twelve large enterprises. The interviews lasted for at least an hour, often for several hours. They report that they decided not to expand their sample because after a dozen interviews they "seemed to be traversing worn ground." *Id.* at 90.

17. Another economic pressure comes from the desire to escape the problems and out-of-pocket expenses that arise when victims complain, threaten to make trouble, or demand their money back. Similarly, avoiding injuries to an enterprise's own employees means avoiding down time, gossip time, retraining, disgruntled workers, and paperwork. Together, these generally are thought to



Third, *moral inhibitions* serve to block self-satisfying conduct that would be unreasonably dangerous to others. Even if there were no penalties, or no chance of being caught, many peoples' own moral sense—their pride in doing right and the accompanying embarrassment of doing wrong—would protect others from harm.<sup>18</sup> Although in today's world it may be empirically difficult to disentangle morally driven from coerced conduct, the former is widespread. In ordinary life, for example, most people neither litter, pick flowers of others, nor toss cigarettes carelessly into the woods, even though regularly presented with such opportunities for anonymous self-indulgence. Frequent illustrations come as well from the world of physicians where “doing good” is internalized as an intrinsic part of one's calling. Engineers and architects also take considerable professional pride in the quality of their work; the safety of a project or product is typically critical to their own self-esteem.<sup>19</sup> Even from the world of highly competitive business come reports of “missionary” chief executive officers, often firm founders, who have bound up their personal identity with the safety and soundness of their product.<sup>20</sup> And, manufacturers widely adhere to safety standards promulgated by standards associations, even when they are not legally binding.<sup>21</sup> Of course, not all people have the proper moral inhibitions against behaving unreasonably.

Regulation, in the form of legally binding *formal behavioral control mechanisms*, is a fourth important force in the realm of accident deterrence. Traditional criminal penalties are but a small part of the overall picture. There has been a proliferation in collective intervention<sup>22</sup> through safety agencies like CPSC, EPA, FAA, FDA, NHTSA, OSHA, and so on, through the alphabet. Perhaps even more pervasive are state, local and professional control regimes as diverse as building codes, highway engineering departments, and medical quality review boards.<sup>23</sup>

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exceed the cost of the victim's medical care and lost wages. See, e.g., T. ISON, *supra* note 12, at 85; ROYAL COMM'N OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND ¶ 90, at 51. (1967) (A. Woodhouse, Chairman) [hereinafter cited as WOODHOUSE REPORT]; see also REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 97 (1972).

18. The sources of these inhibitions include religion, concern about reputation, altruism and socialization by family and peers. Some might argue that tort law educates people in these moral obligations, and that absent tort law these moral scruples would disappear. I disagree. See *infra* text accompanying notes 251-57.

19. See, e.g., G. EADS & P. REUTER, *supra* note 16, at 57-58 (where the “culture” of the designer and engineer insures that safety considerations will play a significant role in the design process).

20. *Id.* at 97.

21. *Id.* at 39-40. Since in some circumstances failure to comply may lead to tort liability, I do not want to overstate the voluntary aspect of those standards. Thus, while I believe that they would function even without tort law, current practice hardly proves this.

22. Professor Calabresi calls most of these strategies “specific deterrence.” See G. CALABRESI, *supra* note 5, at 174-97.

23. *But see* G. EADS & P. REUTER, *supra* note 16, at 44-45 (discussing what they see as the

These regulatory schemes, combined with the moral, economic, and self-preservation pressures described above, plainly deter considerable undesirable behavior. To be sure, there is much to criticize about regulation. It is neither comprehensive in its reach, nor fully effective in its operation. And, not only can regulation be very expensive, it sometimes ill serves the public interest. Its existence, nonetheless, renders superfluous much of tort law's deterrent potential.<sup>24</sup> To use a common example, what driver would slow down to avoid the imposition of tort liability in the unlikely event of an accident who hasn't already slowed down because of the risk of a lost license and a fine (to say nothing of the fear for one's self and one's moral scruples against such conduct)?<sup>25</sup> As another example, tort law is unlikely to increase airline safety beyond that achieved by FAA pressures to say nothing of pilot union pressures and carriers' concerns about reputation and saving lives. Many commentators, while recognizing the importance of regulation, have nonetheless characterized tort and regulation as a partnership.<sup>26</sup> If so, I think tort law has been well described as a "sleeping partner."<sup>27</sup>

The existence of these four safety-promoting forces does not mean, of course, that all drugs, drivers and drill presses will be as safe as they ought to be. A gap would remain between how people act and what is socially desirable. And tort law might serve as an additional deterrent to help close that gap. In fact, considerable unreasonable conduct continues notwithstanding the existence of tort law. I find this unsurprising because I believe our tort system is such a poor behavioral control mechanism.

### 3. *Why The Deterrent Potential of Tort Liability is Undermined*

In the deterrence model, education and information should warn the potential tortfeasor when the sting will be applied. Where avoidance hurts less than the sting, he can rationally elect another course of conduct. This is the "law and economics" view. Its model is decidedly one of *general deterrence*. People are led to behave properly before they have any personal encounter with the law.

From this perspective, pointing to a series of specific tort cases

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limited role now being played by official or quasi-official professional associations in promoting product safety).

24. See Fleming, *supra* note 12, at 134. Some would seek to expand or reclaim the role of torts by doing away with or curtailing many of the governmental safety-control agencies. Later I consider and reject this solution. See *infra* pp 652-53.

25. See R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 252-53 (1965).

26. E.g., A. LINDEN, *supra* note 12, at 10-11; see also A JURISPRUDENCE OF INJURY, *supra* note 1, 10-81 to 10-192.

27. Brown, *supra* note 12, at 140. In brief, I dispute the claim that absent tort liability, regulatory compliance would be significantly diminished. See *infra* pp 652-53.

where personal injury lawyers brought dangerous conduct and products to light hardly proves the “accident protection function or prophylactic purpose of tort law” as Professor Thomas Lambert argues in a recent article on the subject.<sup>28</sup> Rather, successful lawsuits represent a catalog of tort failures;<sup>29</sup> people behaved in unacceptable ways notwithstanding the threat of liability!<sup>30</sup>

Why does general deterrence fail? I have grouped my reasons into five categories. I concede that these reasons vary in strength from one type of accident to another.

*a. Ignorance—of Law and Facts*

The model of general deterrence requires knowledge. Yet many people seem to be ignorant of the threat of tort liability before the first sting. This can be attributed in part to individual inattentiveness and in part to our society’s failure to instruct people effectively in their civil obligations. For example, when a state supreme court announces that hosts risk tort liability if they fail to use reasonable care in serving alcoholic beverages,<sup>31</sup> how many people in the state whose behavior needs

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28. Lambert, *Suing for Safety*, TRIAL, Nov. 1983, at 48. Lambert is one of the most ardent defenders of tort law. His spirited writings for the publications of the American Trial Lawyers Association unmistakably paint plaintiff lawyers as the good guys in white hats—leaders of a populist revolution against the excesses of large-scale organizations that dominate American capitalism.

29. For a shorter piece in a similar vein, see Cartwright, *Law and Perspective in Defense of the Tort System*, CAL. TRIAL LAW. J., Spring 1977, at 21, in which the past president of both the California Trial Lawyers Association and the Association of Trial Lawyers of America advances the case for deterrence by describing specific instances where tort victories were said to put an end to bad practices.

30. Lambert, perhaps conscious of this methodological problem, makes this odd statement: “An error does not become a mistake unless you refuse to correct it.” Lambert, *supra* note 28, at 56. But surely Lambert is not suggesting that in any of his examples the defendants were blameless; surely, he believes that all these harms were reasonably foreseeable and easily correctable before any injury occurred.

I recognize, of course, that once conduct is determined to be unreasonably dangerous, it is socially desirable for it to stop. Hence, a fallback defense of tort as deterrent would argue that at least it functions to identify and halt ongoing dangerous activity. This contention parallels the idea of special deterrence in the criminal law which is meant to discourage recidivism. This is perhaps closer to what Professor Lambert had in mind since the practices in his examples did change. Nevertheless, there are again problems of proof, because Lambert cannot show from his evidence that it was tort law that induced these changes. It is certainly possible that general publicity and customer feedback prompted such improvements. Consider his discussion of a 1963 case in which charcoal briquettes were used to heat a mountain cabin. The bags at one time had said “Quick to Give Off Heat,” and “Ideal for Cooking In or Out of Doors.” Now these bags contain the following notice: “Warning. Do not use for indoor heating or cooking unless ventilation is provided for exhausting fumes to outside. Toxic fumes may accumulate and cause death.” *Id.* at 48. But where is the proof that liability, rather than the event itself, prompted this warning?

31. For the California history, see *Vesley v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), and *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). These decisions have been abrogated by statute. CAL. BUS. & PROF. CODE § 25602(a), (c) (West Supp. 1985).

modifying even learn of this ruling, let alone remember it? Even in enterprises, key actors may remain quite ignorant of their obligations under tort law. In an important recent study, George Eads and Peter Reuter report they were "struck in the companies we visited by how few changes in law were transmitted to those involved in design decisions."<sup>32</sup> They noted two manufacturers of potentially highly dangerous products "[b]oth made substantial efforts to keep their product liability problems separate from their ongoing operating decisions . . . both firms treated the information generated by specific product liability suits as random noise."<sup>33</sup>

Even those with broad awareness of tort liability have many reasons to see it as highly unpredictable. These reasons include doctrinal complexity,<sup>34</sup> rapid legal change, state-to-state variance, the perceived lottery-like nature of secret jury decision-making,<sup>35</sup> the vagaries of trials, and pervasive rough-and-ready settlement practices.<sup>36</sup>

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32. G. EADS & P. REUTER, *supra* note 16, at ix.

33. *Id.* at 94. By contrast, in these firms operational decisions were quite responsive to regulatory commands. See also Whitford, *Products Liability*, in NATIONAL COMM'N ON PROD. SAFETY, PRODUCT SAFETY LAW AND ADMINISTRATION: FEDERAL, STATE, LOCAL AND COMMON LAW 221 (1970) (Volume 3 of Supplemental Studies to the Final Report of the National Commission).

34. Even professionals aware of potential liability may be unaware of required standards of conduct. Professor Daniel Givelber and his colleagues confirmed this point in a recently published empirical study, Givelber, Bowers & Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, about the California Supreme Court's decisions in *Tarasoff v. Regents of University of California*. *Tarasoff v. Regents of the Univ. of Cal.*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974) [hereinafter cited as *Tarasoff I*]; *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) [hereinafter cited as *Tarasoff II*]. The case involved the duty of a therapist to protect a would-be victim at risk from a dangerous patient. The authors recognized that their survey of therapists could not tell us what the respondents did in actuality, but rather only what they said they did. Nonetheless, they tried to minimize this potential gap between reported and actual behavior. In addition they employed a large sample: more than 1700 therapists responded to their questionnaire. Givelber, Bowers & Blitch, *supra*, at 455 n.49. Professional awareness of the *Tarasoff* case was, in the authors' view, astoundingly high—over 75% of therapists had heard of *Tarasoff* or a case like it, *id.* at 459. Nevertheless, the authors found that the typical therapist did not understand the case in two important respects. First, the professionals seemed to equate the law with the subsequently withdrawn *Tarasoff I*, interpreting tort law as requiring them to warn the victim. In fact, in the revised *Tarasoff II*, the court held that "reasonable conduct" was the appropriate standard. In other words, the therapist's duty might be met through other behavior, such as warning the police. Second, some therapists seemed to believe the *Tarasoff* court required action whenever the patient made a threat. In fact, the *Tarasoff II* opinion adopted the lawyerly, but nebulous, idea of a duty to act reasonably in the face of impending danger. This duty might exist without an actual threat and might not exist even if a threat were made.

35. Professor James Henderson has charged, in regard to design defect cases, that "juries are free to, and do with regularity, react purely out of whim." *Product Liability Reform: Hearings Before the Subcomm. for Consumers of the Senate Comm. of Commerce, Science and Transportation*, 97th Cong., 2nd Sess. 22 (1982) (statement of J. Henderson) [hereinafter cited as *Product Liability Hearings*].

36. For Calabresi's comments on why the tort system fails to give proper signals in medical malpractice cases, see Calabresi, *The Problem of Malpractice—Trying to Round Out the Circle*, in THE ECONOMICS OF MEDICAL MALPRACTICE 233, 238 (S. Rottenberg ed. 1978).

It has been argued that uncertainty engenders caution. That argument theorizes:

Under the present system, it seems reasonable to speculate that any deterrent effect that arises, arises from the spectre of huge, perhaps business-crippling, judgments for pain and suffering . . . . Indeed, the virtue of the present system, from a deterrence standpoint, is that the precise magnitude of the costs of malfeasance or nonfeasance is impossible to project . . . . The blows [of tort law] can be financially crushing, and it is those blows of which manufacturers and the medical profession are ever vigilant.<sup>37</sup>

In fact, liability insurance, which I later discuss, has largely vitiated the argument. Besides, many parties will probably ignore the tiny possibility of a crushing financial loss, like the chance of being hit by lightning. Alternatively, if they dwell on this risk, people may develop socially undesirable defense strategies or excessive caution. Finally, even if enterprises and individuals were to try to respond to an indeterminate likelihood of crushing liability, they would not know what amount of precaution to take.<sup>38</sup>

Ignorance of the law is but one problem. People can also fail to appreciate that they are engaging in excessively dangerous conduct. Sometimes this occurs because people are not sufficiently alert to the consequences of their behavior. Even reasonably attentive people simply do not always analyze all the information necessary to make the "right" decision.<sup>39</sup> Since full rationality often takes too much time, money, or attentiveness, these people may be content to rely on shortcuts such as rules of thumb or advice and customs of others. In short, they employ "satisficing" behavior, engaging at best only in "bounded rationality" that may be unreasonably dangerous.<sup>40</sup>

Finally, the deterrent function of tort law is undermined when parties simply can't obtain needed information. In certain situations, people don't become aware that their conduct or product is harmful until long after the harm has occurred. For example, the dangers of some cancer-causing substances appear only after a considerable latency period. Even with more ordinary risks, many firms are engaged in such rapidly changing activities that they may no longer be making the product by the time field reports identify it as dangerous.<sup>41</sup>

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37. Campbell, *Enterprise Liability—An Adjustment of Priorities*, 10 FORUM 1231, 1235-36 (1975).

38. Besides many would find it unfair to subject defendants to strict liability rules which threaten financial destruction.

39. See Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677 (1985).

40. For a general discussion of "bounded rationality," see L. FRIEDMAN, *MICROECONOMIC POLICY ANALYSIS* 222-25 (1984).

41. G. EADS & P. REUTER, *supra* note 16, at 108; see also Whitford, *supra* note 33, at 228.

b. *Incompetence—Individual and Organizational*

A second general reason for the failure of tort law to deter I will call incompetence. At the *individual* level, most people, even if aware of the sting, find that, from time to time, they simply cannot make their way safely through the maze. This problem is by no means restricted to the unusually awkward or to those who have unusually bad judgment. Ordinary people occasionally act clumsily, rashly, or absent-mindedly. We do so even when we know better and will privately admit as much. No person always acts as the "reasonable person" is supposed to act. Many feel we only have our lucky stars to thank for the fact that our occasional lapses have not seriously hurt anyone, or in some cases, have hurt as few as they have. This is not to suggest that people have no control over their behavior, or that they can not be broadly influenced to take greater care in their conduct. It is quite another thing to expect tort law to shape basic character, however.<sup>42</sup>

*Organizations* are faced with a related sort of incompetence problem. As much as management may want to reduce its liability exposure, actually achieving cost-effective changes is often easier said than done. It is not that management lacks strategies to deal with lax or incompetent employees, whether on the assembly line, in the design lab, or on the sales floor. They include better supervision, on-the-job training and education, in-firm incentives, more careful hiring practices and the creation of separate safety units. But the effective deployment of these techniques is terribly difficult.<sup>43</sup> To quote an experienced observer of corporate safety programs, "[t]here is usually an important difference between issued policy and procedure on product safety and what is actually taking place. No activity is as effective as those responsible for it say it is."<sup>44</sup>

One reason safety receives inadequate attention is that individuals

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42. See *infra* text accompanying notes 251-55.

43. See Reber, Wallin & Chhokar, *Reducing Industrial Accidents: A Behavioral Experiment*, 23 INDUS. REL. 119, 119 (1984). The authors argue, with respect to industrial accidents, that most safety research has focused on "correlations between accident rates and selected variables, most of which are difficult for management to control (citation omitted)." *Id.*

44. G. EADS & P. REUTER, *supra* note 16, at 87 (citing Manuele, *Product Safety Program Management*, 2 J. PROD. LIAB. 98 (1978)). Further evidence comes from a study by Professors Twerski and Weinstein and their colleagues who carefully examined the design processes in four firms selected because of their reputation for product safety. See generally A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, *PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT* (1978). Their purpose was to explore the utility of a "process defense" in product liability cases. See also Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347 (1980). Even in these firms, Twerski and Weinstein were disappointed in what they discovered. None of the companies' processes included every element the authors saw as important. Of course, maybe the authors were too demanding; perhaps the extra elements they sought would make no real difference in terms of outcomes. They did not explore that issue. Indeed, they could not even tell us whether the processes in place were responsive to tort law.

and units within the firm have their own agendas and priorities. Managers tend to worry most about their short-run profits, upcoming budgets, and compensation rather than the firm's long-term financial health. Furthermore, since there is often considerable delay between when key decisions are made and when tort liability arises, they may be gone from the firm before the tort problem they ignore comes home to roost.<sup>45</sup>

c. *Discounting the Threat*

A further diminution of tort law's effectiveness as a deterrent occurs because people discount the threat of tort liability.<sup>46</sup> From an economic perspective, some discounting can be quite rational.<sup>47</sup> Some victims with bona fide claims will not sue. The injured party may be unaware of his legal rights, have an aversion to the idea of litigation, have adequate sources of compensation other than tort damages, or have a small individual loss. Or the victim may not even know who his injurer is.<sup>48</sup> Sometimes the judicial system will fail to impose liability for conduct which actually was unreasonably dangerous. This can occur where the victim may have lost evidence, a witness is reluctant, or the fact-finding process works imperfectly. Additionally, the tortfeasor likely is aware that many cases can be settled for far less than the cost of damages incurred.<sup>49</sup> Other discounting, while perhaps economically foolhardy, makes psychological sense. Sometimes the risk of harming someone is so small that it is simply disregarded.<sup>50</sup> Other times, people ignore considerably larger dangers—hoping that miraculously no one will be hurt or that they won't be caught. Some will discount future liability in this way because they are rash gamblers, others because they are self-destructive, and still others because they put instant gratification ahead of nearly everything else. Finally, some people act rashly out of desperation—which brings me to the next point.

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45. See G. EADS & P. REUTER, *supra* note 16, at 108; Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 363 (1984). For one expert's opinion confirming what I have called the incompetence problem, see Wigglesworth, *The Fault Doctrine and Injury Control*, 18 J. TRAUMA 791 (1978).

46. I am not surprised, therefore, by the responses to a 1976 survey of the Machinery and Allied Products Institute (MAPI). See G. EADS & P. REUTER, *supra* note 16, at 72-74. Two hundred and ten industrial manufacturers were questioned about product liability issues at a time when there was a great national uproar. Only 18% of the respondents said they had a "serious" tort problem, and this is in an industrial sector that is a frequent product liability defendant. *Id.* at 74 n.2.

47. See generally Nader & Page, *supra* note 9, at 664-68.

48. See generally Schwartz & Mahshagian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution* 73 CALIF. L. REV. 941 (1985).

49. See COMPENSATION AND SUPPORT, *supra* note 12, at 318-19. The Harris group found that half the settlements in its survey made allowance for contributory negligence. *Id.* at 319.

50. See, e.g., Boffey, *How People Make 'Rational' Decisions*, San Francisco Chron., Dec. 14, 1983, at 43, col. 1 (reporting on the research of Stanford's Amos Tversky).

d. *High Stakes in Behaving Dangerously*

The fourth reason for tort law's failure as a deterrent is that some actors feel they have so much at stake that they satisfy their own immediate needs even though they realize their conduct is dangerous to others. They conclude that certain actions place critically at risk important things like career, family well-being, or self-image. This risk simply swamps the prospect of an ordinary tort penalty.<sup>51</sup> This reason helps explain why a doctor would continue practicing although aware of his incompetence, why a small business owner would continue selling a key product despite safety problems, and why a financially overextended landlord would ignore dangerous conditions. Thus, I am unpersuaded by argument that it is the "marginal, fly-by-night manufacturer [who] might be encouraged by the absence of restraints against irresponsible conduct."<sup>52</sup> The real fly-by-nights are tempted to act dangerously even with tort law; indeed, they have little incentive to carry liability insurance.

People expose others to harm for many selfish or idiosyncratic high-stakes reasons that remain socially unacceptable even though the injurer's benefit may be great.<sup>53</sup> Tort law, however, allows people to conclude that paying monetary damages is an acceptable tradeoff for the ability to engage in objectionable high-stakes conduct.<sup>54</sup>

e. *Small Penalty*

A fifth general reason for the ineffectiveness of tort law as a deterrent arises because it is perfectly rational for most actors to conclude that they risk little penalty. One aspect of this is simply the matter of dollars and cents. According to one large survey carried out in 1978, even after huge increases in liability insurance premiums, product, occupier and general liability costs together typically amounted to less than 0.2% of

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51. I imagine that people who think they have much to protect by dangerous conduct often engage in psychological discounting as well.

52. Ford, *The Fault with "No Fault"*, 61 A.B.A. J. 1071, 1072 (1975).

53. Surely utilitarians and law and economics devotees do not actually believe that it is always socially desirable for people to take risks because they are benefited more than their victims are harmed. There must be some cases where the injurer acts with a "perverse" motive that ordinary morality does not condone.

54. These are cases in which most people would want victims protected by property rights rather than by ordinary liability rules. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The only way for torts to deal with this problem is to become a quasi-criminal law through the use of punitive damages. This is not tort law's central purpose.

In addition, negligence law traditionally does not question some decisions involving "high stakes." Thus, the termination of operations, relocation, and product development all represent critical decision points where the public interest might be better served by an alternative choice. In such instances high stakes may militate against socially responsible actions.



sales. This included a burden of 0.115% of sales in the form of insurance costs plus 0.054% of sales in settlement and administrative costs not covered by insurance.<sup>55</sup> To be sure, these costs varied by industry. Hospitals were the industry with the greatest costs—more than ten times the average—but that still amounted to only 2.35% of income. In manufacturing the highest figure was for rubber and plastics at 0.58% of sales.<sup>56</sup> Moreover, these modest figures describe the *full liability costs* for these firms. But only rarely can a firm hope to reduce more than a small proportion of its liability costs through accident avoidance efforts.<sup>57</sup> The problem is compounded because it may take considerable cash outlays to achieve accident avoidance in the sometime distant future. Furthermore, since effective safety efforts show up indirectly as costs avoided, they are often difficult to identify, quantify, monitor and manage. It should not be surprising, therefore, if manufacturers more vigorously pursue other cost-reducing strategies in production, administration, marketing and finance.

Moreover, it is unlikely that tort-generated publicity and social censure will combine with liability costs to make the economic threat large at the margin. A tortfeasor can almost always avoid an official slap on the wrist by settlement. Besides, cases litigated to the end tend to be those where responsibility is most in dispute, so that many of those held liable are not considered wrongdoers by their peers. Finally, for potential injurers the prospect of unfavorable publicity is highly speculative. The popular press selectively publicizes cases with large settlements, titillating facts, or a multitude of victims. Most tort suits never get any significant publicity.<sup>58</sup>

Next I will describe five additional factors minimizing the force of tort law. They revolve around the idea that people will not change their behavior in response to the threat of having to pay for the harm they cause if, in practice, that threat is sharply reduced or eliminated.

First, many individuals have no wealth and hardly any income; many enterprises are woefully undercapitalized. These potential injurers,

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55. G. EADS & P. REUTER, *supra* note 16, at 30.

56. *Id.* at 31. Consistent with this finding, Professor Patricia Danzon (Munch) found in 1976 after sharp rate increases that "even an upper bound estimate of full product liability costs" was "less than 0.5 percent" of "net domestic income of the non-financial corporate business sector." See P. MUNCH, *COSTS AND BENEFITS OF THE TORTS SYSTEM IF VIEWED AS A COMPENSATION SYSTEM 12* (1977) (Rand Corporation study). Eads and Reuter conclude that in 1984 "for most large manufacturing firms, product liability costs . . . probably amount[ed] to much less than 1 percent of total sales revenue." G. EADS & P. REUTER, *supra* note 16, at 121.

Eads and Reuter also report that product liability premium income was about \$1.3 billion in 1980 versus \$23 billion in workers' compensation premium income that year. G. EADS & P. REUTER, *supra* note 16, at 136.

57. This point is discussed further *infra* at text accompanying notes 73-97.

58. See T. ISON, *supra* note 12, at 94-95.

by virtue of their *poverty*, have almost nothing with which to pay damages. Therefore, the threat of a judgment is not meaningful.<sup>59</sup>

Second, *vicarious liability* causes victims of employee conduct to sue the enterprise, and in practice, employers do not exercise their legal right to claim indemnity from the employee tortfeasor.<sup>60</sup> As a result workers are not directly deterred by tort law. Rather, their conduct must be indirectly influenced, if at all.<sup>61</sup> Yet, the ability of firms to threaten employees who impose tort liability on the firm with job loss or some other penalty is limited for many reasons. The frequent delay between bad conduct and a determination of liability will often mean that the person responsible has already moved to another job.<sup>62</sup> In addition, the collective nature of many firm decisions makes it difficult to allocate blame. Moreover, union, morale, and litigation pressures militate against seriously punishing workers, especially where the firm has defended itself against liability. Finally, in many instances where a firm penalizes a worker causing tort liability, it would have taken action against him even without a judicial determination of fault. In sum, I do not believe that tort law contributes much to better employee behavior by causing workers to fear losing their jobs.<sup>63</sup>

A third stakes-reducing factor is the *inadequacy of tort damage awards* from the deterrence perspective.<sup>64</sup> The "law and economics" model requires the correct threat in order to produce the appropriate safety-minded response. Ordinary tort damages are an inaccurate and confused measure of our desire to deter, however. For example, torts sends out the economic message that one may take less precaution to avoid killing someone than to avoid permanently injuring them since, by the way damages are measured, it is cheaper to kill than to disable. Similarly, torts tells the rational would-be injurer that he may take less precaution to avoid killing a child than a working adult.<sup>65</sup> Tort law creates

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59. The absence of compulsory liability insurance heightens the importance of this point.

60. It is as though the common understanding were that vicarious liability serves as a fringe benefit of employment so far as the injured employee is concerned.

61. For a theoretical discussion of this issue from the law and economics perspective, see Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability in Accidents*, 70 CALIF. L. REV. 1345 (1982); Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

62. This also decreases the likelihood that a worker will see a fellow worker punished.

63. Unfortunately I have found no empirical research on this issue. Using an economic model, Shavell argues that top managers have too little incentive to control their workers in view of the limited nature of what managers have at stake. See Shavell, *supra* note 45, at 362.

64. See Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1290-1300 (1980).

65. Recent doctrinal developments allow more generous general damages for the wrongful death of children. However, these cases only modestly undermine my point. See generally M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 232-33, 448 (3d ed. 1983).

these implicit priorities because it awards damages to compensate rather than to deter. But from the perspective of accident avoidance, these priorities do not reflect our social values.

A fourth factor muting the penalty of tort damages arises from *market imperfections*. In brief, in some circumstances tort damages will not lessen profit because the defendant will effortlessly shift those costs to its consumers. Traditional public utility pricing represents one illustration; tort liability costs are usually absorbed into the rate base automatically.

Liability insurance is a final factor contributing to a reduced torts sanction. Indeed, Professor John Fleming has suggested that "the deterrent function of the law of torts was severely, perhaps fatally, undermined by the advent of liability insurance."<sup>66</sup> However, this subject is of sufficient importance to require considerable separate discussion.

#### 4. *Liability Insurance and Deterrence*

Complete liability insurance protection shifts the *direct* economic deterrent pressure of tort law from would-be tortfeasors to insurance companies. This shift complicates tort law's potential for behavioral control.<sup>67</sup>

For most American enterprises, as well as professionals and drivers,

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66. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823 (1967); see also Fleming, *supra* note 12, at 133. But see James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROBS. 431, 441 (1950), arguing "there is no substantial reason to believe that the existence of widespread insurance has fostered irresponsibility." Of course, if tort law has little influence on behavior, there is not much for insurance to undermine.

67. It is useful to consider why liability insurance is permitted at all. Without insurance, fear of an enormous tort judgment could have a strong, socially undesirable impact. Many individuals, for example, might abandon driving because of the risk that they might be held liable for an enormous injury despite their care. In addition, the risk of losing one's capital as a result of enormous tort liability might deter the formation of small businesses. Most would agree that these examples represent overdeterrence—the undesirable squelching of socially acceptable behavior.

At the same time, were there no insurance, other segments of the population might engage in even more discounting. These actors would either disregard the prospect of tort liability or else rashly assume that they could somehow maneuver out of any lawsuits. This "denial" approach to potential liability undermines its role as a deterrent. Besides, many would find it socially objectionable for the risk averse to shoulder the behavioral consequences of such a system.

By contrast, large enterprises could deal sensibly with the unavailability of liability insurance through self-insurance. They could absorb even the largest losses they might plausibly anticipate. One probable consequence, therefore, would be the formation of more large enterprises. Doctors might form huge partnerships. Many individual shop-owners would seek to become chain-store outlets. Yet structural changes motivated solely by risk-spreading concerns may be socially unwelcome. Indeed, American economic policy for many reasons has favored small enterprises. Thus, liability insurance is probably thought important simply because it counters such pressures towards economic concentration.

There is also a fairness argument for allowing liability insurance. Bad luck, rather than bad conduct, often generates enormous liability. Thus, absent insurance, people would pay damages out of proportion to their wrongdoing. In addition, it would be unfair to preclude insurance when liability is imposed on a nonfault basis—for example, in product injury cases.

protection by liability insurance is the rule. Insurers, however, rarely choose to use significant deductibles or co-insurance provisions to put economic pressure on insureds.<sup>68</sup> That alone should breed skepticism about the role of insurers and insurance in promoting safety. There are, nevertheless, three factors that might serve to reintroduce some of the safety pressures that liability insurance removes: (a) insurance pricing, (b) the cancellation and nonrenewal of coverage, and (c) safety measures required as a condition of coverage.<sup>69</sup>

Before considering such complexities, it should be understood that the giant American enterprises are less insulated from the deterrent pressure of tort law. They typically are self-insured or else buy insurance either covering only extremely large losses or containing "retrospective" premium-setting provisions which cause liability costs generally to reflect actual experience.<sup>70</sup> In the latter case insurers are used largely to process claims.

Large enterprises tend to be sophisticated profit-maximizers; many have separate safety and loss control units. Of course, since these giant firms are so visible, they are subject to reasonably close scrutiny by regulatory authorities and consumers. Thus, they have good reason to promote safety independent of tort law. On the other hand, these same firms may make allies of regulatory agencies, thereby blunting the effect of administrative control.<sup>71</sup> Although the picture is a complex one, I will concede that the behavior-influencing potential of tort law is probably greatest for giant enterprises. Unfortunately, as I will shortly discuss, these economic giants often respond to such pressures in perverse rather than socially desirable ways.<sup>72</sup>

#### a. Insurance Pricing

There is plainly some potential for insurance pricing to reestablish economic incentives for safe conduct.<sup>73</sup> For example, suppose insurance

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68. Regarding the infrequent use of such features in medical malpractice insurance, see Zeckhauser & Nichols, *Lessons from the Economics of Safety*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 19, 23 (S. Rottenberg ed. 1978).

69. For a sharply critical appraisal of the insurance industry's role in loss prevention, together with suggestions for reform, see Denenberg, *Products Liability Insurance: Impact on Safety and Implications for the Consumer*, in *NATIONAL COMM'N ON PROD. SAFETY, PRODUCT SAFETY LAW & ADMINISTRATION: FEDERAL, STATE, LOCAL AND COMMON LAW 247* (1970) (Volume 3 of Supplemental Studies to the Final Report of the National Commission).

70. See G. EADS & P. REUTER, *supra* note 16, at 110-11; TASK FORCE ON PROD. LIAB. & ACCIDENT COMPENSATION, U.S. DEP'T OF COMMERCE, *REPORT ON PRODUCT LIABILITY INSURANCE RATEMAKING*, 48-49 (1980) [hereinafter cited as TASK FORCE].

71. See *infra* pp. 651-52.

72. See *infra* text accompanying notes 112-32.

73. Professor Fleming has argued that controlled variations in insurance costs may actually promote safety more effectively than the highly variable liability costs of a system without insurance. Fleming, *supra* note 66, at 825. Recently, he has written: "Insurance premiums are commonly

pricing were highly sensitive to risks insureds created. Carried to its extreme, one's premium would exactly reflect the harm one were going to cause, although at that point we are no longer talking about insurance. Indeed, in order for insurance to work there must be some uncertainty—about future conduct and/or the amount of liability. While that in turn prevents fully accurate individualized premiums, still under a system of individual-risk based pricing alert insureds would recognize immediate financial incentives: can  $x$  dollars in premiums be avoided by a lower cost investment in safety? Alternatively, suppose at the other extreme that liability insurance premiums were indifferent to the safety efforts or records of enterprises. In that case, insureds would have no self-interested incentive to increase safety in order to lower insurance costs.

In theory, one might expect the pressure of competition to encourage insurers to individualize pricing wherever possible. They could break the market into finely tuned categories, and set different premiums to reflect the injury potential of each category. The insured, in turn, would have an economic incentive to get into a lower-priced category. Pricing practices could thus make enterprises sensitive to the dangers they create.

In practice, however, only a very small proportion of insureds pay premiums sensitive to *changes* in the dangerousness of *their* conduct. This is not to say that insurance rates in no respect reflect the likelihood of tort liability. For example, young males, city dwellers and heavy drivers typically pay higher auto liability insurance premiums.<sup>74</sup> But these price differences do not relate to how carefully the individual actually drives.<sup>75</sup> To be sure, such price differences could influence decisions at the "activity level," such as whether to drive when young and whether to drive less frequently. However, they will not influence the manner in which the driving is performed.<sup>76</sup> In the same vein, many enterprises pay greater premiums because their industry has a record of more frequent or costly accidents. Yet, once again, so long as individual firms pay on the

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adjusted in the light of the insured's accident record, and fear of substantial rises . . . arguably has some effect on individual conduct." Fleming, *supra* note 12, at 133. In contrast, however, Professor Terrence Ison argues that "there is no real evidence that experience ratings have been beneficial in reducing accident rates." T. ISON, *supra* note 12, at 93.

74. Some states, however, are beginning to eliminate sex-based rates. See *Auto Insurance: How It Works*, CONSUMER REP., Sept. 1984, at 505.

75. Similarly, the different premiums set for pediatricians and surgeons do not reflect an individual's level of care. Professor Danzon found, for example, that specialty alone accounted for half the variation in doctors' premiums. She concluded that the variation due to individual experience is probably small. P. DANZON, WHY ARE MALPRACTICE PREMIUMS SO HIGH—OR SO LOW? 31-33 (1980) (Rand Corporation study).

76. I will consider later the desirability of inducing activity-level behavioral changes through cost-internalization. See *infra* text accompanying notes 258-69.

same basis,<sup>77</sup> individual accident records and safety measures will have no impact on premiums.<sup>78</sup>

It would appear so far that insurance pricing practices drastically dampen any potential for tort damages to stimulate individual safety efforts. However, the insurance practice known as *experience rating* remains to be discussed. To be sure, because of actuarial requirements, under current practices only a modest proportion of firms qualify for experience rating.<sup>79</sup> For smaller firms past experience is too uncertain a guide to future risk. Besides, insurers wish to avoid the administrative costs of individualizing premiums for such small firms. Only when firms are large enough can insurers use individual past records as a predictor of future claims when setting premiums.<sup>80</sup>

Experience rating holds greatest promise for large enterprises with broad insurance protection. As already indicated, the largest firms dominating this group tend to self-insure—the ultimate experience rating. Nevertheless, I doubt that experience rating serves as an important promoter of safety.<sup>81</sup>

In theory, experience rating gives prompt and accurate economic feedback on the efficacy of safety investments; in practice, it does not.<sup>82</sup> One difficulty is delay. Because of concerns about the credibility of the data, experience rating usually involves basing premiums on multiyear moving averages. As a result, on top of the delay between the time investments in safety are made and a lower accident rate is experienced, there is a further lapse before those fewer losses are reflected in lower premiums. If those who made safety decisions had the firm's long-run profit in mind, these delays wouldn't be such a problem. However, as already noted, there is good reason to think that such a perspective is

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77. Typically insurance is quoted on the basic sales volume or the enterprise's floor space.

78. My comments about activity level, *supra* text accompanying note 76, apply here, too. I am assuming that the firm does not so dominate its classification so that its experience would importantly change the class experience.

79. Eads and Reuter's study suggests that 43% of premium income (obviously representing the great bulk of insureds) comes from policies that are not experience rated. G. EADS & P. REUTER, *supra* note 16, at 25.

80. Generally speaking, a firm must have annual liability insurance premiums of more than \$2500 before experience rating can even *begin* to apply. See Insurance Service Office, General Liability Experience and Schedule Rating Plan 1 (1983). This likely requires annual sales of more than \$2.5 million. See TASK FORCE, *supra* note 70, at 53.

81. In 1977, the Interagency Task Force on Product Liability concluded that insurance rates provided inadequate incentives for firms to undertake liability-prevention programs. See 1 INTER-AGENCY TASK FORCE ON PROD. LIAB., FINAL REPORT OF THE INSURANCE STUDY (1977) (under the direction of the United States Department of Commerce).

82. For a detailed description of liability insurance rating and pricing practices, see AMERICAN INS. ASS'N, PRODUCT LIABILITY INSURANCE: UNDERWRITING, RATES, RESERVES, BUSINESS CYCLES 34-53 (1979) [hereinafter cited as PRODUCT LIABILITY INSURANCE]; TASK FORCE, *supra* note 70, 32-96.

unusual.<sup>83</sup>

Second, experience rating yields premium adjustments which only loosely reflect an individual firm's safety record. Much of the premium depends on insurer overhead costs rather than the insured's experience.<sup>84</sup> In addition, in setting new premiums insurers usually must only roughly estimate past losses that are incurred but not yet reported.<sup>85</sup> Finally, pricing leeway and current competitive practices among insurers further weaken the connection between actual loss and premium levels. According to Eads and Reuter, most liability insurance rates "are determined judgmentally, not on the basis of actuarial experience."<sup>86</sup> Most insurance companies allow their underwriters to authorize reduced premiums for companies with good safety programs and good management. Although lacking solid actuarial justification,<sup>87</sup> this price flexibility, at least in theory, could influence a company to improve safety since it turns in part on factors under the insured's control.<sup>88</sup> In practice, however, this underwriting flexibility is not used to promote safety. Rather, it forms the basis of vigorous price competition at times of soft markets for liability insurance.<sup>89</sup>

Similarly, the experience rating of individuals seems more a marketing strategy, appealing to a vague sense of fairness, than an effective

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83. Higher management wants to know how to lower costs now. In this climate, extra outlays for safety may seem less attractive than investing in litigation.

84. Depending on how expenses attach to the "pure premium," they can dampen or exaggerate the impact of claims experience. See generally N. DOHERTY, *INSURANCE PRICING AND LOSS PREVENTION* (1976).

85. For concerns about how so-called incurred but not reported (IBNR) losses are handled, see generally Page & Stephens, *The Product Liability Insurance "Crisis": Causes, Nostrums and Cures*, 13 CAP. U.L. REV. 387 (1984).

86. G. EADS & P. REUTER, *supra* note 16, at 110. For Bernzweig's comments on the many unscientific factors that influence insurance pricing see *supra* note 12, at 124-33.

87. See TASK FORCE, *supra* note 70, at 55-58.

88. See Insurance Service Office, *supra* note 80, at 7, which calls for a maximum adjustment of 25% including up to 2% for safety programs.

89. Interview with Leslie Cheek, Vice President, Crum and Forster Insurance Companies, in Washington, D.C. (May 16, 1984).

The underwriter and the insured are not the only actors in the process. It is common to work through an insurance broker. While shopping for a carrier, a broker is probably trying to sell the client as a relatively low risk. Though the competitive state of the insurance industry is an important factor in determining rates, the attractiveness of the client also counts. Thus, it is conceivable that brokers could move insureds in the direction of loss prevention.

Nevertheless, my sense is that brokers have little impact upon a client's safety efforts. Rather, the broker emphasizes the positive aspects about the firm's already established practices. The broker is too infrequent a player to influence the firm's practices. While the broker also may inform the client about the underwriter's concerns, this is not an independent influence.

Recent revelations suggest that brokers sometimes pass over the best interests of the insureds in order to obtain "bonus commissions" from insurers, often without the insured's knowledge. See McIntyre, *Buyers Oppose Bonuses Paid to Brokers for New Accounts*, BUS. INS., Apr. 30, 1984, at 1.

deterrent.<sup>90</sup> Because individuals have a low frequency of prior claims and accidents, there is considerable doubt whether past experience reliably can predict future liability.<sup>91</sup> Nonetheless, both drivers and some professionals face the prospect of higher insurance rates based upon their past experience.

A recent survey by *Consumer Reports* shows that one accident costing more than \$200 can raise liability insurance premiums of someone with a clean prior record ten to thirty percent for three years.<sup>92</sup> For many drivers, however, this would mean a cumulative penalty of less than \$100. But a second claim in a short period can result in a further increase of ten to forty percent. Indeed, as so-called merit-rating plans have garnered increasing attention, many drivers probably have an exaggerated expectation that their rates will soar if they have an accident or receive a citation for a moving violation.<sup>93</sup>

Nevertheless, I am still unable to see how this heightened awareness can yield safer driving habits where moral qualms, self-preservation interests, and fear of fines or losing a license have not. This concern about higher rates does cause nonreporting and private settlement of small accident claims once crashes occur.<sup>94</sup> But this is hardly the same thing as driving safer in the first place.<sup>95</sup>

My views concerning professionals are similar. Experience rating at least partially reintroduces the economic threat of tort law.<sup>96</sup> Yet is it really plausible that experience rating will be effective where other control mechanisms have failed to overcome inhibitors such as discounting and incompetence?<sup>97</sup>

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90. Note that the personal liability insurance accompanying an ordinary homeowner's policy is not experience rated.

91. See Brown, *supra* note 12, at 119-20. A single claim is of little value in predicting future liability for pricing purposes, since it may well be an aberration. Ironically, from a deterrence standpoint, penalizing for *any* claim may be more effective regardless of the actuarial reliability of such pricing.

92. See *Auto Insurance: How It Works*, *supra* note 74, at 503.

93. A 1970 report said that only 2% of respondents thought their insurance premiums would increase if they were involved in an accident. UNITED STATES DEP'T OF TRANSP., PUBLIC ATTITUDE TOWARDS AUTO INSURANCE 67 (1970).

94. See UNITED STATES DEP'T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 63 (1971). People act, in short, as though their policy contained a deductible feature.

95. See generally Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421 (1969).

96. I say "partially" because, as Professors Zeckhauser and Nichols explain, past malpractice claims do not satisfactorily identify "bad" physicians. Presumably this applies to other professionals as well. See Zeckhauser & Nichols, *supra* note 68, at 22. Hence, as noted in Danzon's study, *supra* note 75, the pricing of most malpractice insurance policies is based almost entirely on the doctor's speciality and location, but not his personal record.

97. Though Calabresi agrees that medical malpractice law is a failure, he would like to pro-



*b. Nonrenewal Threats*

Even if a premium hike mattered little, the threat of cancellation might be more effective in promoting care. But, once again, given the realities of the insurance market, the risk that an insurer will drop a policy holder is small. Besides, most reasons why insurers decide not to renew are irrelevant to individual deterrence.<sup>98</sup> For example, nonrenewals occur because an insurer has decided to withdraw from a geographic market or to stop insuring a certain class of customers. These decisions, of course, are not made on an individual customer basis.

Occasionally, all standard insurers may suddenly adopt a broad nonrenewal stance toward a class of past customers. This happened in the 1970's, for example, both to physicians in certain geographic areas and to manufacturers of certain products. (A serious shortage of product liability insurance may well be developing again today.) While those disruptions can be exasperating, fear of them does not stimulate safer practices. This instability is largely unpredictable, and no single enterprise can do much to prevent it by improving its own safety record.

Any safety incentive must stem from the risk of nonrenewal that *particular* individuals and firms face because of their accident record. Even where this threat is real,<sup>99</sup> the insured can usually find an alternative comparable insurer. At worst, commercial customers will have to buy in the "surplus and excess" market<sup>100</sup> at higher rates and motorists will have to use the higher cost "assigned risk" pool.<sup>101</sup>

The prospect of having to buy in high-cost markets probably causes some firms to absorb small claims without involving their insurance companies. This behavior parallels the response of individual drivers to merit rating; they forego small claims to avoid possibly increased premiums. As already noted, this response is hardly the same as modifying conduct to avoid harm in the first place.

*c. Safety Requirements*

Insurance companies themselves can take safety measures such as

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mote better behavior by assigning to doctors the costs of certain accidents. Yet he remains skeptical that any practical reform strategies can succeed. See Calabresi, *supra* note 36, at 236.

98. Occasionally insurers cancel a policy pursuant to the terms of the contract. As these clauses are generally directed at misrepresentations and gross wrongdoing, they are largely irrelevant here.

99. A recent *Consumer Reports* survey found that only a tiny proportion of auto insureds—one percent—faced nonrenewal for any reason in the year of the survey. Admittedly, the respondents to CU's 1983 Annual Questionnaire probably face nonrenewal less frequently than the public at large. See *Auto Insurance: How It Works*, *supra* note 74, at 505.

100. Those who provide coverage for high-risk or otherwise hard-to-place commercial customers often are called "surplus and excess" carriers.

101. In most states every auto insurer is required to take on its proportionate share of high-risk drivers through what is usually called an assigned-risk plan.

inspecting premises. More importantly, they can *demand safety measures of insureds*. For example, they can require employee training courses and fire-control systems. Here, too, I am skeptical whether tort law significantly increases accident avoidance.

Apart from driver education, insurance companies rarely make safety-related demands before providing individual liability insurance. Doctors, for example, aren't regulated by their insurers.<sup>102</sup> Likewise, insurers require enterprises to adopt few significant safety measures. Indeed, the Interagency Task Force on Product Liability found that while the majority of insureds received some loss-prevention services from their insurers, most felt that the changes suggested were of "quite limited utility."<sup>103</sup> Eads and Reuter asked the firms whether they "received help from insurance companies in spotting underlying product safety problems. The universal responses were that they did not."<sup>104</sup> The most common examples in the literature come, not from liability insurance, but from first-party casualty (fire) insurance—sprinklers and fireproofing<sup>105</sup>—or from workers' compensation—plant safety.<sup>106</sup>

One explanation for insurer inaction is that individual insurance companies fear free riders. After determining how an insured could lower its tort exposure, a company might lose the business to a competitor who takes advantage of the results of such a study but can offer lower rates because it didn't make the initial outlay. It is not easy for companies to legally protect the results of such surveys. In addition, insurers may conclude that government agencies have already uncovered most safety opportunities. Indeed, there is reason to believe that insurance inspectors rely on government safety standards rather than create their own.<sup>107</sup> Finally, for product design problems, the firm is usually far more expert than the insurer. Insurers may sometimes have better data,

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102. As for the responses of ophthalmologists to this issue, see Wiley, *The Impact of Judicial Decisions on Professional Conduct: An Empirical Study*, 55 S. CAL. L. REV. 345, 369 (1981). Wiley concludes that insurers do not play an important role in making doctors comply with the law.

103. G. EADS & P. REUTER, *supra* note 16, at 28; see also J. O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES 22-24* (1975).

104. G. EADS & P. REUTER, *supra* note 16, at 111; see also 9A HEARINGS OF THE NATIONAL COMMISSION ON PRODUCT SAFETY 311 (1970) (statement of H. Denenberg).

105. *E.g.*, E. BARDACH & R. KAGAN, *GOING BY THE BOOK* 110 (1981); see also James & Thornton, *supra* note 66, at 441 (referring to "elevators, boilers and machinery," "industrial facilities," and "aviation"). Professor, now Judge, Linden gives two amusing examples: one involves dangerous ketchup bottles; the other concerns a composer who wrote music while driving and failed to concentrate. In the latter instance, the insurer proposed a chauffeur. A. LINDEN, *supra* note 12, at 9.

106. Workers' compensation carriers routinely impose safety requirements. However, firms might well make the same safety efforts in response to pressure from unions and regulatory agencies, such as OSHA.

107. Interview with Dennis Connolly, Senior Counsel, American Insurance Association, in New York City (May 14, 1984).

or earlier warning, than do individual firms about the accidents that competitors are experiencing with similar products or activities. But in view of widespread industry publications and conferences, this information advantage is most likely to arise only with small clients where the account size rarely warrants individualized safety attention.<sup>108</sup>

This is not to say that insurers do not review safety practices before they decide to underwrite new business, at least when the enterprise is large. For example, insurers usually investigate quality control practices, past recalls, and safety units.<sup>109</sup> Nevertheless, no good evidence suggests that insureds take precautions in anticipation of these reports, or that rates depend on them. Recently, now that the big rate increases of the last decade have been absorbed, there has been much less panic about product liability.<sup>110</sup> Many competitive insurers have entered the market. A common complaint is that many are primarily interested in reaping the benefits of investment income that high interest rates offer and are less concerned about underwriting losses.<sup>111</sup> And, since sales forces usually work on a commission basis, underwriters come under enormous internal pressure to write any business—without requiring customers to incur extra safety expenses.

##### 5. *Socially Undesirable Responses to Tort Law*

I turn now to a discussion of why the pressures the tort system creates also have a socially negative impact, first focusing on the behavior of injurers. One concern about tort law is *over-deterrence*: people may not enter into socially desirable activities that risk injury to others.<sup>112</sup> For example, during the so called “malpractice crisis” in the mid-1970’s, some competent doctors may have chosen to not enter undersubscribed but dangerous specialties.<sup>113</sup> Similar reports regarding obstetrics have

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108. Eads and Reuter conclude: “As one firm put it, product safety practices in insurance companies are years behind those in effect in this company . . . . [W]e doubt that insurance companies will ever come to play the catalytic role ascribed to them in the workplace safety area.” G. EADS & P. REUTER, *supra* note 16, at 111-12.

109. See PRODUCT LIABILITY INSURANCE, *supra* note 82, at 30-33, 77-116.

110. For further evidence, see Page & Stephens, *supra* note 85.

111. It is by no means clear that the insurance industry benefits over the long run from a lower level of claims. After all, lower premiums mean less investment income. To be sure, an individual firm might profit more in the short run from clients with unexpectedly low claims. Ultimately, insurers may worry that escalating rates could lead to state takeovers or, at least, resistance to rate increases.

112. “Safety at any cost” is an empty slogan. Avoiding all accidents would restrict our behavior and lower our standard of living in unacceptable ways. For example, who would advocate doing away with automobiles and airplanes?

113. See J. O’CONNELL, *supra* note 103, at 42-43. *But see* Burghardt, *Medical Malpractice and the Supply of Physicians*, in THE ECONOMICS OF MEDICAL MALPRACTICE 109-23 (S. Rottenberg ed. 1978).

recently resurfaced.<sup>114</sup> There are also persistent reports of companies holding back new consumer products or attempting to restrict the use of industrial or component products, not because anyone thought the products would be unreasonably dangerous, but because the firm chose to minimize the risk of getting caught up in what was perceived to be the tort lottery.<sup>115</sup> The uncertainty of tort liability seems a likely culprit here.

A second serious problem is that tort stimulates defendants and would-be defendants to take *perverse* action. Doctors are again a good example. They engage in an enormous amount of *defensive medicine* in the form of ordering tests and making records with a view toward creating ironclad defenses in the event of later malpractice suits. This probably wastes billions of taxpayer and insurance dollars annually.<sup>116</sup> Our third-party payment system for financing medical care facilitates such abuse by giving neither patient nor doctor an incentive to curb costs. Although some "defensive" medicine may be desirable, conduct motivated solely by fear of lawsuits is not.<sup>117</sup> A parallel phenomenon is exces-

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114. A recent report of the AMA claims that a substantial portion of physicians are now turning away high-risk patients and are refusing to do high-risk procedures. The Florida Medical Association reported that 25% of the state's obstetrician-gynecologists no longer deliver babies for fear of malpractice claims. According to one survey, 60% of all obstetrician-gynecologists in the country have been sued at least once, 20% of them more than three times. See *The 'Crisis' in Medical Malpractice Suits*, San Francisco Chron., Jan. 18, 1985, at 46, col. 3; see also Shavell, *Theoretical Issues in Medical Malpractice*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 35, 52 (S. Rottenberg ed. 1978) (referring to the problem of patient selection bias); Zeckhauser & Nichols, *supra* note 68, at 25 (explaining the phenomenon of doctors who do not perform certain treatment).

115. G. EADS & P. REUTER, *supra* note 16, at 4, 107; see also INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT 9-10 (1977) (prepared under the direction of the United States Department of Commerce).

According to the New York Times, a major manufacturer of whooping cough vaccine recently withdrew from the market, thereby contributing to a potentially serious national shortage, because of its skyrocketing and unpredictable tort liability arising from lawsuits by victims of what are probably unavoidable side-effects of the vaccine. Taylor, *Product Liability: The New Morass*, N.Y. Times, March 10, 1985, § 3, at 1, col. 2; Lewin, *Pharmaceutical Companies Are the Hardest Hit*, N.Y. Times, March 10, 1985, § 3, at 1, col. 3.

For Fleming's comments, set in a comparative law context, on the problem of overdeterrence in the drug industry, see Fleming, *Drug Injury Compensation Plans*, 30 AM. J. COMP. L. 297, 311 (1982).

116. See, e.g., Rottenberg, *Introduction*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 1, 11 (S. Rottenberg ed. 1978); Shavell, *supra* note 114, at 49 (for economists' explanations of this phenomenon). For an empirical description see Greenwald & Mueller, *Medical Malpractice and Medical Costs*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 65, 83 (S. Rottenberg ed. 1978). See generally Wiley, *supra* note 102, at 347-48. A recent American Medical Association report puts the cost of defensive medicine at between \$15 and \$40 billion annually. *The 'Crisis' in Medical Malpractice Suits*, *supra* note 114, at 46, col. 3. For the American Medical Association's Committee on Professional Liability's estimates of the costs of defensive medicine, see *STUDY OF PROFESSIONAL LIABILITY COSTS* (1983) and *STUDY OF PROFESSIONAL LIABILITY PROBLEMS* (1984) (on file with the author).

117. Professor Jerry Wiley conducted a study, Wiley, *supra* note 102, in which he sought to measure the impact of the Washington Supreme Court's decision in *Helling v. Carey*, 83 Wash. 2d

sive product warnings that probably serve only to confuse the user. Indeed, Eads and Reuter found some drug companies knew they were "overwarning" in ways that reduced effectiveness; but they also believed such practices would reduce their exposure to suit.<sup>118</sup>

Besides resource waste through "defensive medicine," insureds *conceal their bad conduct* after the fact.<sup>119</sup> Plaintiffs' lawyers tell many stories of conspiracies of silence, of shredding or hiding of crucial documents, and of dissembling in depositions.<sup>120</sup> I concede that all such cover-ups do not occur in response to tort threats; there are many reasons for hiding your errors. Still, to the extent that tort does represent an additional threat, it presents an additional incentive for cover-up.

A cover-up to avoid tort liability is not only morally objectionable; but it interferes with processes that correct behavior. Hence, a torts motivated cover-up can block internal efforts of the enterprise, as well as efforts by regulatory agencies, to avoid injuries in the future.

Tort law can also *discourage safety improvements in the face of pending liability*. In product liability cases, defendant's safety improvements are clearly admissible in many jurisdictions.<sup>121</sup> And proof of a safer

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514, 519 P.2d 981 (1974), *superseded by statute as stated in* Meeks v. Marx, 15 Wash. App. 571, 550 P.2d 1158 (1976). The Court had held that it was malpractice not to test for glaucoma in patients under 40 years of age, despite prevailing medical practice.

The case was celebrated both because it rejected medical custom as the standard for malpractice and because of a concurring opinion suggesting that the case was better seen as imposing strict liability on doctors. Wiley saw this as a good occasion to test whether a well-publicized, high court opinion aimed at a well-defined target group influenced conduct. However, the survey showed that, contrary to the Court's belief, the practice of testing patients under 40 for glaucoma was widespread in Washington before the *Helling* decision. This drastically reduced the potential for the case to influence behavior.

In any event, Wiley found that while testing for the under 40 group did increase somewhat in Washington after *Helling*, it also increased in states not governed by *Helling*. Indeed, after *Helling* Washington's testing rate was less than that of many states. And it seems clear from Wiley's findings that after *Helling*, under-40's in Washington and elsewhere, are still tested less often than are over-40's. Wiley further concluded that he could not show that *Helling* had caused an increased proportion of Washington ophthalmologists to test younger patients routinely for glaucoma. Wiley believes that *Helling* did increase the *amount of testing* that Washington ophthalmologists did, but only in quite minor ways. He concludes: "The survey data seem to cast doubt on the assumption that appellate court decisions are able to change the standard of practice." Wiley, *supra* note 102, at 385. Moreover—and this is the key point here—it remains uncertain whether the minor increase in testing in fact was socially desirable or merely another defensive response.

118. G. EADS & P. REUTER, *supra* note 16, at 107-09. The impact of the *Tarasoff* decisions, discussed earlier, suggests this same overwarning problem in a professional setting. The authors of the study of the *Tarasoff* decisions conclude that as a result of *Tarasoff*, therapists now give warnings contraindicated by their clinical judgment. See Givelber, Bowers & Blitch, *supra* note 34, at 470.

119. See, e.g., Delgado & Vogel, *To Tell the Truth: Physicians' Duty to Disclose Medical Mistakes*, 28 U.C.L.A. L. REV. 52 (1980).

120. As with the "Watergate syndrome," wrongdoing can easily escalate through a cover up attempt.

121. For the two leading California decisions, see *Shelbauer v. Butler Mfg. Co.*, 35 Cal. 3d 442, 673 P.2d 743, 198 Cal. Rptr. 155 (1984) and *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528

alternative is probably sufficient for a plaintiff's verdict. In negligence cases, defendants fear that such efforts will suggest additional measures that could have been taken at the time of the accident. At a minimum, this fear breeds delay until old claims are disposed of.<sup>122</sup>

Furthermore, the defendant and its insurer have a strong financial interest in *fighting claims*, however meritorious.<sup>123</sup> Giant enterprises who are "repeat player" defendants may view aggressive litigation as a strategic investment aimed at avoiding a reputation of being an easy mark. Reviewing a broad survey of firm attitudes toward tort law, Eads and Reuter concluded that most firms "considered the product liability problem serious enough to have taken specific organizational steps to deal with it."<sup>124</sup> It turns out, however, that much of the effort was directed at litigation control.<sup>125</sup> Eads and Reuter report two additional litigation-driven strategies: keeping the firm's name off component parts to avoid identification, and producing wasteful internal documentation which engineers thought unnecessary—but lawyers insisted on.<sup>126</sup>

Yet another consequence of plaintiffs' right to sue in tort is that defendants often perceive litigation as unjustified. As a result managers and professionals become *demoralized* by participation in discovery and trial as well as by unfavorable outcomes. They often claim the tactics of plaintiffs' lawyers and the findings of uninformed jurors unjustly impugn their product or reputation.<sup>127</sup> To guard against this, "firms may choose to litigate for reasons of internal morale."<sup>128</sup>

Such demoralization occurs, for example, where workers are injured by machines whose safety features were disengaged at the workplace,

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P.2d 1148, 117 Cal. Rptr. 812 (1974). For Professor Lambert's discussion of the issue, see 27 ATLA L. REP. 104 (1984). Cf. Henderson, *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 773-76 (1983).

122. See T. ISON, *supra* note 12, at 85.

123. G. EADS & P. REUTER, *supra* note 16, at 4. Ison says that in Britain the unions have opposed the introduction of experience-rating, contending that it would make employers "more vigorous in the defence of claims than in the prevention of accidents." T. ISON, *supra* note 12, at 93. "Litigation consultant" Richard Miller advises plaintiffs' lawyers: "Despite the fact that this is the corporation's major immune system against damage suits, many corporations view this area as counterproductive, as a necessary evil." Miller, *Initial Processing in the Toxic Tort Case*, TRIAL, Jan. 1984, at 71, 73.

124. G. EADS & P. REUTER, *supra* note 16, at 74.

125. In 1978, the Conference Board received 300 responses to a survey on products liability and product safety. The respondents came from the 2000 largest companies in the country. The survey found that the trend noted by the MAPI study, *supra* note 16, continued: many big firms recently had set up formal product-safety programs. Once again, however, the programs' primary responsibilities were managing litigation and interacting with regulatory agencies. G. EADS & P. REUTER, *supra* note 16, at 107, 109.

126. *Id.*

127. *Id.* at 96, 98, 109. Furthermore, the chief executive officer may be unduly distracted by a belief that the firm has been sued unfairly.

128. *Id.* at 133.

often by the workers themselves. When the workers sue the machine manufacturers, it is easy to see why the defendant feels abused.<sup>129</sup> So, too, the demoralization problem is easy to appreciate when governmental agencies are liable for virtually all the damages in a case where they are a minor defendant. That happens to the FAA, for example, when the air controllers are held negligent but the prime fault clearly lies with a not adequately solvent pilot of a private plane.<sup>130</sup> To take another example, hospitals staffs are acutely aware that parents of children born with unexpected birth defects tend to claim the medical team was responsible.<sup>131</sup> From the hospital's perspective, for medical advances that have saved a great many babies, instead of thanks, the profession gets many unwarranted suits—products of exaggerated expectations. In general, malpractice law seems to have made cynics out of many doctors and has probably hurt doctor-patient trust relationships.<sup>132</sup>

To be sure, many would-be and actual defendants do not act in the undesirable ways I have described, and new measures might be taken to control some of this perverse behavior—such as an altered medical-expense reimbursement system to combat unnecessary testing. Nonetheless, a vigorous tort system seems inevitably to carry with it the sorts of negative consequences I have discussed.

Some might wonder why I confidently point to negative responses to tort law while dismissing the prospect of positive behavior. My reasons are of two sorts. First, the existence of these costs seems well-documented, even if their dimension is in considerable doubt. Second and perhaps more importantly, the incentive structure is different. For tort law to work positively, a very imperfect control mechanism vaguely threatening ambiguous extra costs some time in the future must achieve safety results beyond those already attained from many other forces working in the same direction. By contrast, the perverse conduct I have described largely occurs when someone is able to make a rather discretionary decision directly related to his job function that vividly promises the actor a clear gain in the short run.

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129. See, e.g., *Cepeda v. Cumberland Eng'g Co.*, 76 N.J. 152, 386 A.2d 816 (1978), *overruled by Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A. 2d 140 (1979) (creating even further obstacles to defendant-manufacturers in product liability cases by eliminating contributory negligence); *Reid v. Spadone Mach. Co.*, 119 N.H. 457, 404 A.2d 1094 (1979).

130. See, e.g., *Rudelson v. United States*, 431 F. Supp. 1101 (C.D. Cal. 1977), *aff'd*, 602 F.2d 1326 (9th Cir. 1979).

131. These are known as "bad baby" cases.

132. Not irrelevant are front page stories to the effect that New York's State Superintendent of Insurance has approved medical malpractice insurance increases that could mean annual costs to Long Island neurosurgeons of more than \$100,000. Sullivan, *Doctors' Insurers Win 52% Rate Rise*, N.Y. Times, Jan. 25, 1985, at 1, col. 1.

## 6. *Victims' Incentives: More Bad News*

From the deterrence perspective, tort law's use of fault principles is also meant to stimulate safer conduct by would-be plaintiffs. Although some economic models predict overly dangerous victim conduct would result from eliminating the contributory fault rule,<sup>133</sup> their assumptions fail to account for real-world factors. For example, these models ignore self-preservation instincts, which surely would have a far greater effect than a potentially reduced recovery.<sup>134</sup> Moreover, the factors of ignorance, incompetence, discounting, and high stakes<sup>135</sup> will affect victims' conduct just as they impact on injurer behavior.

Of even greater concern is that tort law creates perverse incentives for victims to exaggerate their injuries. In order to document such pretended harms, unscrupulous lawyers send clients to unethical doctors who run up large bills to certify phantom injuries. The victim may thus obtain a better wage-loss settlement. More importantly, such medical expenses may lead to substantially enhanced payments for pain and suffering. Even without prompting, victims malingering because they can charge the costs to defendants, and because they believe that a longer convalescence will increase their chances at trial.<sup>136</sup>

Finally, some victims simply lie to create liability against an innocent defendant. Indeed, the complete and apparent widespread fabrication of accidents is one of the unhappy products of the tort insurance industry.<sup>137</sup> Of course, fabrication is not a problem unique to tort law. Any compensation scheme is likely to encounter this problem.<sup>138</sup>

## 7. *Final Doubts: Empirical Evidence*

My arguments have shown that the behavioral model connecting tort law and private conduct is more complicated and far less promising than usually suggested by apologists for the tort system as a deterrent. Yet, these arguments are not definitive. I have already conceded that

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133. See Landes & Posner, *supra* note 5, at 876-77, 880-83; see also Schwartz, *Contributory and comparative Negligence: A Reappraisal*, 87 *YALE L.J.* 697 (1978).

134. A few people arrange to be injured in order to make an insurance or tort claim. However, as they have not been deterred by legal defenses, I doubt whether the rule of contributory negligence helps hold their numbers down.

135. See *supra* text accompanying notes 31-54.

136. See R. KEETON & J. O'CONNELL, *supra* note 25, at 31-32.

137. Eads and Reuter report that one important function of a firm's safety unit is to defend against "fraudulent or inflated claims, and stories are common of allegations that, upon investigation, proved unfounded." G. EADS & P. REUTER, *supra* note 16, at 67.

138. Nevertheless, when a tort claimant exaggerates an injury, the payoff is much greater than in other compensation systems since the tort claimant obtains higher replacement costs for lost income, in addition to pain and suffering. Moreover, a tort plaintiff need only maintain pretences until settlement or trial, whereas under other schemes later evidence of recovery can lead to termination of benefits.



existing regulatory, economic, moral, and self-preservation pressures fail to control all dangerous conduct that society would like to deter. Maybe in the end there are safety gains at the margin—small as I think they are—that outweigh the substantial negative consequences and the enormous administrative costs of the system.<sup>139</sup> Thus the impact tort has must be an empirical question. Unfortunately, it is enormously difficult to design and execute research to answer this question.

Based on a review of the literature, I conclude that theorists who defend torts on deterrence grounds have no convincing empirical support for their position.<sup>140</sup> As late as 1979, reviewing articles on the “impact” of tort law, Professor Robert Rabin discussed the *promise* of empirical work in terms indicating dissatisfaction with anything yet produced.<sup>141</sup> Writing in 1981, Professors Richard Posner and William Landes<sup>142</sup>—the leading defenders of the tort-as-deterrent position—surely would have cited at least all the available favorable evidence. As they admit, however, what they do offer is thin.<sup>143</sup>

Two recent survey research efforts involved large-scale investigations into the impact of specific, celebrated torts cases on professionals—

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139. Even if tort were desirable on this ground, one could still argue that increased regulation or a system of fines would be even better and therefore should replace tort. Nevertheless, the burden would clearly be on those who favored such methods.

140. I believe that the analysis of this issue in *A JURISPRUDENCE OF INJURY*, *supra* note 1, 9-1 to 9-15 confirms my conclusions. *But cf. id.* at 11-16, 11-17. I note also that legislatures enacted auto no-fault proposals without empirical data concerning their impact on deterrence. *See, e.g., Cramton, supra* note 95, at 445.

141. *See* Rabin, *Impact Analysis and Tort Law: A Comment*, 13 *LAW & SOC'Y REV.* 987 (1979). As Rabin ably shows in his review, much of the research on tort law's impact has little relevance to our question. One study, for example, compared states which abrogated the doctrine of tort immunity for charitable institutions with states in which the doctrine was retained. The finding that hospital room costs increased without the doctrine was predictable, and hardly empirical evidence justifying tort law as a deterrent. *See* Canon & Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 *LAW & SOC'Y REV.* 969 (1979).

142. Posner and Landes turned to this question in the course of restating their basic economic theory concerning negligence. Landes & Posner, *supra* note 5. As noted earlier, *supra* note 5, Posner and Landes make the remarkable assertion that their theory perhaps is best viewed as an indicator of how judges will develop tort doctrine, rather than as a predictor of human response to law. *See* Landes & Posner, *supra* note 5, at 851, 858. I find it amusing that at the end of their article they bemoan the fact that judges, especially in California, have recently been deciding things rather differently. *Id.* at 916-20. Does this mean that the point of their model is really to explain how judges, unconsciously, *used to* decide?

143. *Id.* at 857-58. Posner and Landes refer to two “unpublished” studies, one by R. Grayson (sic), *Deterrence in Automobile Liability Insurance* (1971) (unpublished Ph.D. thesis, University of Chicago Graduate School of Business), one by E. Landes, *Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault on Accidents* (1980) (University of Chicago Center for the Study of the Economy and the State). *Id.* at 858 n.30. The author of the first study is actually Richard Grayston. Both studies have now been published. *See infra* notes 148, 149. For a discussion of these articles, see *infra* notes 147-53 and accompanying text.

eye doctors and therapists.<sup>144</sup> On balance, however, these studies are inconclusive. Eads and Reuter claim their research showed that “the product liability system is probably the most fundamental determinant of the incentives for product safety.” Yet, they found that “product safety officers were unable to identify more than a few relative minor legal decisions that had directly impinged on design and production criteria for the firm.”<sup>145</sup> Even more striking, Eads and Reuter found that “[a]ll the firms viewed product liability litigation as essentially a random influence, generating no clear signals as to how to adjust design behavior.”<sup>146</sup> If big firms respond to the risk of product liability in this manner, one should despair over tort law as a deterrent since this is the very context where tort is most promising.

Of course, with many business leaders now engaged in a campaign to modify products liability law in their favor, interviewees in the Eads and Reuter study had reason to downplay the role of tort in shaping their behavior. This problem plagues any research survey. Therefore, rather than relying on interviews, a few researchers have looked at external evidence of behavior.

Of greatest interest are the few empirical studies on the impact of tort law that have used econometric techniques.<sup>147</sup> Elizabeth Landes<sup>148</sup> and Richard Grayston<sup>149</sup> each authored studies which Landes and Posner referenced in their work.<sup>150</sup> Interestingly enough, both studies sought to demonstrate the impact of tort law in the auto accident area where I would predict the prospects for stimulating safer conduct are extremely weak.<sup>151</sup> Nonetheless, both claimed positive results. Landes

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144. See Givelber, Bowers & Blich, *supra* note 34 (therapists); Wiley, *supra* note 102 (ophthalmologists). For a discussion of such studies, see respectively *infra* notes 34 and 117.

145. G. EADS & P. REUTER, *supra* note 16, at ix. More precisely, Eads and Reuter say “we encountered only one case in which the loss of a major suit might have been the proximate cause for the firm’s establishing its product safety effort.” *Id.* at 106. Perhaps even more damning was their finding that no product safety officer “cited any instance in which a particular case caused a safety-enhancing change in design behavior.” *Id.* at 107.

146. *Id.*

147. All those I can find have been written by people associated with the University of Chicago or have appeared in journals associated with that institution. This is not surprising since the so-called “Chicago school” law and economics approach has adduced the main theoretical defense of tort law as a deterrent.

148. Landes, *Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49 (1982). Landes’s results were harshly criticized in O’Connell & Levmore, *A Reply to Landes: A Faulty Study of No-fault’s Effect on Fault?*, 48 MO. L. REV. 649 (1983). I find unconvincing their objection to Landes’s use of fatalities data rather than accident data. Their argument about missing variables is important but incomplete. See *infra* note 152.

149. Grayston, *Deterrence In Automobile Liability Insurance—The Empirical Evidence*, 40 INS. COUNS. J. 117 (1973).

150. See *infra* note 143.

151. See *supra* text accompanying note 25.

investigated whether driving behavior deteriorated in states where auto no-fault plans were enacted. Grayston probed the impact on drivers of auto-liability insurance-pricing practices.

Landes found that, holding other variables constant, auto fatality rates rise as no-fault plans do away with an increasingly large share of tort suits. Although the published version of this study raises many methodological problems,<sup>152</sup> I want to concentrate on the key question that remains apart from those problems: do people drive *worse* in no-fault states? No-fault proponents promised their schemes would promote lower insurance premiums and that insurance costs would continue to drop the more that tort was eliminated. So far as I can tell, therefore, Landes's results are equally or better explained by a competing theory: by cutting auto costs, no fault leads not to *worse*, but simply to *more*, driving, and, for that reason, more accidents. The same point applies to Grayston's work. He found that, other things equal, states with higher average liability insurance rates have fewer cars registered. This is hardly surprising, but it says nothing about the way people drive.<sup>153</sup>

In sum, these studies may at best show that when the price of driving decreases, people drive more and, in turn, have more accidents. Presumably, we already know this not only from common sense but from the two big OPEC-induced oil-price rises of the recent past. However, this is not what interests us here. After all, if we want to reduce auto

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152. Landes labels her dependent variable "fatalities," but its dimensions are confusing. Page 59 suggests it is a rate; table 4 shows it as an absolute value. See Landes, *supra* note 148. Elsewhere, the text suggests that this statistic was measured as fatalities per capita, but one then wonders why population size and population density were used as independent variables. Furthermore, there seem to be difficulties with multicollinearity. A strong association appears to exist between population density and the no-fault threshold variable. Thus, the correlation between fatalities and no-fault coverage could actually reflect differences in population density.

Moreover, Landes supplies inadequate information regarding her dummy variables. For example, one wonders how many dummy variables there are and how they were formulated. Indeed, Landes does not explain why she uses dummy variables, rather than actual data, to represent changes in factors like weather and gas prices. She uses the term D2 as a (binary) dummy variable which indicates whether a state has a no-fault plan at all. This information seemingly is already incorporated as zero in the value for the no-fault threshold variable in states without no-fault plans. Landes's equations, however, show higher fatality rates in no-fault states only when solved for the no-fault threshold variable and the D2 dummy variable *in combination*. Moreover, in the combined equation, D2 is negative, indicating that, by itself, a no-fault plan is associated with *fewer* accidents. As a result, one wonders whether D2 would remain negative if the equations were run without the threshold variable. This result would suggest serious irregularities.

As O'Connell and Levmore complain, see *supra* note 148, many other variables may be omitted. Although they do not really suggest alternative explanations for Landes's results, one possibility is that law enforcement patterns are associated with no-fault plan adoptions and would alter the results dramatically were they figured in.

153. Grayston, *supra* note 149, at 124 (Table 1). Grayston also found, albeit for only four of the eight years studied, that injury and death rates correlated strongly with the sophistication of the state's merit-rating plan. *Id.* at 125 (Table 2), 126 (Table 4). This, however, reveals little about the connections between individual driving conduct and price differentials.

accidents by discouraging driving, we could tax gasoline more or raise car registration fees.<sup>154</sup> The issue is whether tort causes people to drive more safely or selectively causes more dangerous drivers to drive less or not at all. Neither study has demonstrated this to be true.<sup>155</sup>

### 8. Conclusion

I have provided many explanations for why tort law is unlikely to promote more desirable behavior than that which would occur in its absence.<sup>156</sup> These impugn the usual economic models, since they indicate those models don't adequately take account of many important factors. I have also described various bad consequences of tort law. In the absence of convincing data on deterrence, there is no reason to conclude that tort law and its baggage yield a net social gain. Given its enormous administrative costs, it is reasonable to conclude that the system is operating in the "red". To be sure, the points I have made apply more to some areas than to others. Yet tort has its greatest potential where regulation is most concentrated. In short, I am not advocating that society abandon behavior control, but rather that new non-torts approaches be tried. For example, society might try trading five lawyers for a highway

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154. Of course, it is unclear whether we want less driving and the attendant social costs. See *infra* notes 258-69 and accompanying text. Regardless of the lives saved, who would suggest pricing driving at \$100 per mile, forcing off the road all but the very rich and emergency travelers?

155. Recently, an interesting exchange has occurred between Professors George Priest and William Whitford concerning consumer warranty theory, including its application to product injuries. Professor Priest began the exchange with Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981). Whitford responded to Priest's theory in Whitford, *Comment on A Theory of the Consumer Product Warranty*, 91 YALE L.J. 1371 (1982). Priest replied with Priest, *The Best Evidence of the Effect of Products Liability Law on the Accident Rate: Reply*, 91 Yale L.J. 1386 (1982) [hereinafter cited as Priest, *Best Evidence*]. In his reply, Priest argues, "[a]ccording to Professor Whitford, . . . the expansion of manufacturer liability . . . is likely to have reduced the rate of product defects. According to my . . . theory . . . the expansion of manufacturer liability is likely to have increased the rate of defects and the rate of consumer injuries." Priest, *Best Evidence, supra*, at 1386. Given the nature of Priest's empirical evidence, I consider this academically challenging theoretical debate, to be so far only that. As Priest concedes "[m]y data, while the best available, are admittedly incomplete and only of inferential value. . . . I am currently attempting to obtain more complete and direct data of the effects of modern products liability law, but to date no better data have been found." *Id.* at 1401. The data Priest analyzes pertain not to injuries or safety, but rather to warranty coverage accompanying common consumer products.

For a series of recent empirical studies of deterrence in the criminal law area, see DETERRENCE RECONSIDERED (J. Hagan ed. 1982).

156. One of the more interesting of Professor Lambert's examples, *supra* note 28, illustrates this point. He discusses a Parker Brothers' toy that included small rubber parts on which two children had choked to death. After the second death, Parker Brothers recalled the product. Lambert says:

The company was sensitive not only to the constraints of the law . . . but also to the imperatives of moral duty and social responsibility, and the commercial value of an untarnished public image . . . .

. . . The commendable conduct of Parker Brothers in this case is one of the most striking tributes we know to the deterrent value and efficacy of Tort Law . . . ."

*Id.* at 55. I find this a non sequitur. What proves tort law mattered at all in this case?

engineer and a dangerous-product public information officer. We would not only save money, but we might get better accident protection to boot.<sup>157</sup>

*B. Making Victims Whole: Tort as a Bizarre Compensation System*

*1. The Intoxication of Compensation*

Over the past few decades, it has become increasingly popular to view victim compensation as the central purpose of tort law.<sup>158</sup> This idea has particularly infected the courts,<sup>159</sup> and it is easy to appreciate why courts find "compensation" so appealing. Appellate judges typically must choose between a single plaintiff who may have suffered greatly and a defendant who is a giant enterprise or is backed by an insurance company. Judges and juries realize that such defendants can readily absorb and widely distribute this loss.<sup>160</sup> The phrase "enterprise liability" expresses the idea that tort law can relieve the suffering of individual victims by spreading those losses through the mechanism of the price system or through liability insurance.<sup>161</sup> At the same time, it often appears that the victim may not be able to absorb the loss very well; the financial burden of the accident may be crushing. Since courts usually do not have access to evidence of plaintiffs' collateral benefits, they play it safe and assume the worst—no health insurance, no sick leave, no Social Security, etc. The emphasis on compensation must rest on the belief that huge gaps exist in first-party protection even apart from pain and suffering.<sup>162</sup> Besides, even though a particular victim may be well off, courts formulate doctrine to protect other less fortunate victims.

In sum, given (a) the general compassion for accident victims, (b) the superior loss-spreading abilities of tort defendants, and (c) the activism of today's judiciary, tort law has become a dynamo for doling out compensation to meet a presumed need.

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157. I return to the role of agencies *infra* at pp. 651-59.

158. See A JURISPRUDENCE OF INJURY, *supra* note 1, 4-29 to 4-32, 4-85 to 4-111. See generally AUTOMOBILE ACCIDENT COSTS, *supra* note 12, at 75-86; A. LINDEN, *supra* note 12, at 3-5.

159. Good examples of liability-expanding opinions by the California Supreme Court with candid statements about the compensation goal are Sprecher v. Adamson Co., 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981) and Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Current legislative fights in California over the operation of the "joint and several" liability rule, especially as it applies in contributory negligence cases, result from the California Supreme Court's strong commitment to compensating victims. See Fairbanks & Deen, *Mining "Deep Pockets": Supreme Court decisions create controversy over damage awards*, 15 CAL. J. 183 (1984).

160. If a particular defendant does not have adequate insurance and is too small to self-insure, society probably assigns it some responsibility for not better protecting itself. Of course, this criticism cannot apply when the risk is uninsurable, unknown, or of unanticipated magnitude, as is perhaps the case in the current asbestos and DES litigation.

161. See T. ISON, *supra* note 12, at 37-41.

162. I show that this belief probably is often exaggerated *infra* in Part IV.

## 2. *The Failure to Compensate Sensibly*

There are, however, serious shortcomings to this approach.<sup>163</sup> No matter how passionately they wish to compensate victims, judges are stuck with the administrative apparatus of tort law, the rules of damages, and an obligation to maintain a modicum of fidelity to principles of private adjudication. Because of these constraints, tort law fails as a sensible general system for accident victim compensation.

Moreover, while some praise creative judicial expansions of the existing structure, one result is that tort law becomes harder to supplant. This is the familiar problem of the good being the enemy of the best. The need for a better approach to compensation becomes less urgent because at least some victims are helped. More important, vested interests entrench and multiply. As the system grows, the stakes increase, and these interests find more reasons to fight the displacement of tort.<sup>164</sup> At the same time liberalizing tort law takes time, talent, and attention away from work on superior compensation plans.

The deficiencies of tort as a benefit system can be put in four categories. Three have to do with benefit problems, while one has to do with costs.

### a. *Uncompensated and Undercompensated Victims*

Tort law can not provide compensation to enormous numbers of accident victims.<sup>165</sup> Our jurisprudence requires a causal link between the plaintiff and the defendant even where fault is no longer relevant. This problem is not limited to the "DES daughters" sort of litigation, where plaintiffs can not identify which of many manufacturers provided the drug to their mothers. At least a causal connection exists between the plaintiff group and a limited number of DES manufacturers. But in many accidents there is no plausible defendant.

For example, if a driver's mind wanders after a hard day at work, who can be held responsible if he loses control of the car for a minute and crashes into a tree? The object of his thoughts? The tree owner? The car manufacturer? The owner of the road? His boss? Many accidental injuries are essentially self-inflicted—not only one-car accidents, but also in home accidents and recreational mishaps.<sup>166</sup>

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163. For another recent attack on tort law as system of compensation, see E. BERNZWEIG, *supra* note 12, at 71-79; see also J. FLEMING, *THE LAW OF TORTS* 11-13 (6th ed. 1983).

164. See R. KEETON & J. O'CONNELL, *supra* note 25, at 227. The most important of these interests seems to be the plaintiff's personal injury bar.

165. See generally E. BERNZWEIG, *supra* note 12; R. KEETON & J. O'CONNELL, *supra* note 25.

166. Consumer Product Safety Commission (CPSC) studies showed that the most frequent injury-causing activities are: (1) using stairs, (2) bicycling, (3) playing baseball, (4) playing basketball, (5) playing football, (6) using cutlery, (7) non glass doors, (8) using chairs and sofas, (9) using tables, and (10) using nails. Though the list probably includes some defective products and some instances

Are supermarkets to be held liable for those who trip over their own feet in the parking lot? Are ladder, gutter, or patio makers to be liable for those who fall off ladders onto patios while cleaning gutters? Are beach operators to be liable for those who drown despite heroic efforts of lifeguards? And who is going to be liable for the thousands of injuries that occur every year when people are literally hit by lightning, to say nothing of the myriad of other accidents viewed figuratively as being hit by lightning? In short, there are many accidents where the plaintiff cannot identify a credible defendant with superior loss-spreading ability.

Besides, even after recent liberalizations, the circle of liability is narrower than it might be. Expansive strict liability is not the rule. Absent fault, airline and bus companies are not liable to passengers, doctors are not liable to their patients, and property owners are not liable to their guests. Although courts could have adopted stricter liability in the name of victim compensation, thus far they have not.<sup>167</sup> In short, both reality and current doctrine create a substantial *liability gap*.<sup>168</sup> In consequence, tort law bars compensation to victims who, from the perspective of their need, are as deserving as those who succeed through the system. In fact, a recent British survey found that no more than twelve percent of all British accident victims obtained tort damages.<sup>169</sup>

To further widen the compensation gap, many tort defendants are judgment-proof. Enterprises living on a financial shoestring often go without liability insurance. Many individuals have no funds to satisfy tort judgments. This group includes a distressingly large number of motorists who drive without liability insurance<sup>170</sup> or who carry a bare statutory minimum.

Finally, plaintiffs settle cases for less than full loss because of delay,

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of negligence, most of these injuries simply will not lead to tort claims. CPSC reports that the products producing the most severe injuries are: (1) cigarette lighters, (2) gasoline, (3) batteries, (4) drain and oven cleaners, (5) heating equipment, (6) stoves and ovens, (7) swimming pools, (8) power lawn equipment, (9) home chemicals, and (10) money. The frequency of mishaps involving these products is much lower than the frequency of accidents resulting from the activities noted above. Once again, however, injuries from these products are also dominated by careless usage rather than product defects. It is important to note that cigarettes, autos, drugs, and firearms fall outside the CPSC's jurisdiction. See *Study Shows Stairs Cause Most Injuries*, San Francisco Chron., May 18, 1984, at 6, col. 1.

167. Some, however, would argue that the reluctance of judges to direct verdicts for defendants, together with *res ipsa loquitur* and proplaintiff rules of evidence, make such defendants strictly liable in fact, if not in law. Based on my conversations with practitioners, I conclude that tort settlement practices show that, while both sides consider juries proplaintiff, the lawyers still predicate their negotiations on the fault requirement.

168. For more on the "liability gap," see R. KEETON & J. O'CONNELL, *supra* note 25, at 24-28, 65-67.

169. COMPENSATION AND SUPPORT, *supra* note 12, at 317. Less than one in three vehicle accident victims obtained damages, less than one in five work-related accident victims obtained damages, and less than one in fifty victims of all other accident types obtained damages. *Id.*

170. See generally R. KEETON & J. O'CONNELL, *supra* note 25, at 76-102.

lack of proof,<sup>171</sup> urgent financial need, contributory negligence, and limited insurance. Even then, legal fees and expenses must be deducted. Thus, can it be surprising that the tort system leaves a large proportion of seriously hurt victims uncompensated or substantially undercompensated? Many studies document this result, including even those restricted to cases where claims are actually filed, and then to actual economic loss.<sup>172</sup>

*b. Arbitrariness of Tort Compensation*

Tort compensates in an arbitrary, perhaps whimsical, way. People receive lump sums instead of payments as they need them. And, they often receive their money long after the accident. Moreover, lawyers' talents, plaintiffs' demeanor, defendants' grit, and the idiosyncrasies of jury composition combine to hand similar victims altogether dissimilar results.<sup>173</sup>

Geographical bias also pervades the system. In an empirical study of malpractice claims, Professor Patricia Danzon found that "[u]rbanization is the single most powerful predictor of both frequency and severity of claims, even after controlling for higher physician and lawyer density in urban states, more pro-plaintiff common law and the frequency and severity of claims in other liability lines."<sup>174</sup> Likewise, states have adopted dramatically different attitudes toward the currently gigantic problem of asbestos injuries, even though the the problem surely is national. Some states construe the statute of limitations so as to block nearly all claims while others cut off virtually no one.<sup>175</sup> It is no wonder, then, that many people view tort law as a lottery.<sup>176</sup>

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171. Professors Keeton and O'Connell have long given special emphasis to problems of delay and proof. *See, e.g., id.* at 13-24, 37.

172. Keeton and O'Connell discuss many such previous studies. *See id.*, at 34-69; *see also* P. MUNCH, *supra* note 56, at 13-15.

173. *See, e.g., R. KEETON & J. O'CONNELL, supra* note 25, at 22-24, 29-30, 225. Johns-Manville officials complain that juries in the same jurisdiction are returning verdicts based on the same evidence that range from "no liability" to "punitive damages." *See* Johns-Manville's national advertisement in, for example, *Wash. Post*, Aug. 27, 1982, at F12. A recent Rand study of Cook County, Illinois showed how similarly injured victims of auto, product, and work-place accidents received substantially different average awards. *See* Ranii, *What's a Leg Worth? To Juries, It Depends*, *Nat'l L.J.*, Nov. 12, 1984, at 3, col. 1.

174. Danzon, *The Frequency and Severity of Medical Malpractice Claims*, 27 *J.L. & ECON.* 115, 143 (1984).

175. J. KAKALIK, P. EBNER, W. FELSTINER & M. SHANLEY, *COSTS OF ASBESTOS LITIGATION* 5 (1983) (Rand Corporation study) [hereinafter cited as *COSTS OF ASBESTOS LITIGATION*].

176. It is sometimes argued that tort law serves (or should serve) the function of redistributing income from the rich to poor. *See generally* Epstein, *The Social Consequences of Common Law Rules*, 95 *HARV. L. REV.* 1717, 1717-44 (1982). Though ordinary people receive payments from rich corporations and insurance companies, these payors are not individuals but institutions. Indeed, the commitment to full income replacement disfavors the poor. In addition, the wealthier the victim, the higher the medical expenses for similar injuries. Furthermore, the rich have better



c. *Excessive Compensation*

Compared with other systems of compensation, tort law is too generous to many victims in both small- and large-injury cases. To be sure, many small-injury cases result in no claims at all. However, many others yield substantially more compensation than they warrant because injurers find buying off nuisance claims cheaper than litigation.<sup>177</sup> Studies regularly have shown that most tort claims are indeed small claims.<sup>178</sup> Similarly, some badly injured tort victims fare fabulously better than do others in our society who have similar needs, but claim against other compensation systems.

Basic compensation arrangements, such as the disability insurance program in Social Security, do not compensate for what tort law calls general damages—essentially pain and suffering.<sup>179</sup> Even though workers' compensation and first-party accidental injury policies often pay moderate sums for serious disfigurement, the judgment in a big torts case dwarfs the scale of these awards.<sup>180</sup> In addition, tort law aims to replace 100% of lost income loss, far more than typical compensation schemes provide.<sup>181</sup> Tort law is also unusual because it refuses to consider the victim's other sources of compensation. If we put fault aside and concentrate on the need for compensation alone, tort victims who obtain big recoveries are not more deserving than the sick, the congenitally disabled, the elderly, people injured at work, wounded soldiers, and the unemployed, all of whom are compensated through other social

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access to lawyers. To the extent that lawyers benefit from the system, this is hardly a progressive redistributive transfer. Even if torts disproportionately injure the poor, there would still be significant target inefficiency considering all the tort victims who aren't poor. Indeed, because such a large proportion of damages goes to only a few victims, the idea of tort as an engine for income redistribution seems rather inapt.

177. See P. MUNCH, *supra* note 56, at 14.

178. Danzon (Munch), using Insurance Service Office study data, reports that in 1976, 89% of product liability personal injury claims involved economic losses of \$5000 or less. Though these 89% of the cases involved 6% of economic loss they received 24% of the payments. *Id.* at 14. See also *id.* at 38-39 (for similar data on auto claims); *id.* at 76-81 (for similar malpractice data). See generally R. KEETON & J. O'CONNELL, *supra* note 25, at 34-69.

179. As to public opinions on pain and suffering damages, compare AUTOMOBILE ACCIDENT COSTS, *supra* note 12, at 265, with O'Connell & Simon, *Payment for Pain and Suffering: Who Wants What, When and Why?* 1972 U. ILL. L.F. 1.

180. In 1982, forty-five medical malpractice awards of at least a million dollars were reported as compared with three such awards in 1975. *The "Crisis" in Medical Malpractice Suits*, *supra* note 114, at 46, col. 3. Though victims often must pay enormous lawyer fees out of their recoveries, this is hardly a satisfactory defense of the system.

181. Economists have argued that, viewed as a matter of "optimal compensation," tort's goal of making a person whole is wrong. Given a choice, most fully informed people would not buy insurance designed to completely replace their losses in the event of a disabling accident, because the marginal benefit of money otherwise spent on premiums exceeds that of the insurance. Money is less useful to one who is disabled. See Shavell, *supra* note 114, at 38.

mechanisms.<sup>182</sup>

d. *Extravagant Administrative Costs*

Finally, the tort system is fabulously expensive to operate in comparison to modern compensation systems.<sup>183</sup> First, there are large insurance commissions and other marketing costs that come with privately marketed, often individualized insurance policies. Next, highly individualized and unpredictable rules promote exorbitant claims administration, including investigation costs and lawyer fees. As a result, usually well under half of liability insurance premiums go to paying benefits.<sup>184</sup> Finally, the tort system imposes a great deal of public expense in the form of judge, jury and administrative time.<sup>185</sup>

3. *"Mass Tort" Cases*

Another way to appreciate the weakness of tort law as a compensation mechanism is to examine some of the highly publicized "mass tort" cases with which American courts are now grappling. In these cases, a large number of victims claim to have been hurt in essentially the same way by the defendants' conduct. Sometimes they bring claims as class actions; other times defendants seek to consolidate suits against them. Judges often try to work out settlements that create a claim-processing agency to distribute a fixed sum among the victims. In operation, tort law serves as a grotesquely expensive compensation scheme providing unpredictable and uneven benefits. Moreover, its beneficiaries are people

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182. It is particularly troubling from this perspective that tort law increasingly awards benefits to workers injured on the job. By linking their harm to a defective product, these plaintiffs escape the usual rule making a workers' compensation claim the "exclusive remedy" against the employer. See Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641 (1983). From a compensation standpoint, it should not matter whether the machine was defective or carelessly operated by a fellow employee. But in today's world that difference is critical.

183. See R. KEETON & J. O'CONNELL, *supra* note 25, at 69-71, 228-29. Bernzweig discusses tort law's administrative costs in E. BERNZWEIG, *supra* note 12, at 85-89.

184. Danzon (Munch) estimates that products liability and medical malpractice plaintiffs who pay litigation expenses will only receive about 30% of the liability insurance premium dollar in tort payments. See P. MUNCH, *supra* note 56, at ix. Rand Corporation's 1984 study of asbestos cases found that in order to deliver \$236 million to victims, the system has had to expend \$770 million in litigation expenses. This included \$164 million in plaintiff expenses, \$420 million in defendant legal expenses, and \$186 million in other defendant expenses. COSTS OF ASBESTOS LITIGATION, *supra* note 175, at 39.

In testimony on products liability reform, after referring to the high administrative costs of tort law, Professor James Henderson said "[i]f I were a cynic, I would say that if this is a social insurance scheme, it is being run primarily to benefit the trial bar." *Product Liability Hearings*, *supra* note 35, at 25 (statement of J. Henderson).

185. See J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING VARIOUS TYPES OF CIVIL CASES (1983) (Rand Corporation Study).

who, although typically innocent, are no more deserving than other victims who are not fortuitous enough to have access to the mechanism.

*a. Agent Orange*

Vietnam veterans have brought a class action against seven chemical companies, foremost among them Dow Chemical, who produced the herbicide Agent Orange (AO).<sup>186</sup> The plaintiffs' numbers are quite uncertain. They claim a wide range of injuries arising from when the American military sprayed large amounts of Agent Orange contaminated with dioxins on suspected Viet Cong bases. Many U.S. troops were exposed, although the extent of exposure is hard to determine and virtually impossible to document in individual cases.

A grave weakness in the plaintiffs' case is a controversy over whether AO actually injured American soldiers. Although animal studies associate substantial doses of dioxins with numerous disorders and birth defects, rather little is known about the effects of dioxins in general, and Agent Orange in particular, on humans.<sup>187</sup> Indeed, Judge Weinstein, presiding over the matter, recently lent much support to the chemical companies' claims that, while the claimants may have injuries, there is little reason to think AO is responsible.<sup>188</sup>

Even if AO were the culprit, is it equitable to allow these veterans to recover in tort but not allow tens of thousands of others killed and injured in the war—many surely because of someone else's fault? Our soldier-victims of a war effort are supposed to file claims under the veteran's disability compensation plan. Of course, here the government also rejects the plaintiff's statutory compensation claims on the ground that the injuries alleged are not caused by AO.<sup>189</sup> The vets in that respect, however, are like masses of other Americans who suffer partial, often severe, disabilities, but can't link them to their work. Were disability total, Social Security benefits would generally be available. However, the

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186. See *In Re "Agent Orange" Prod. Liab. Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984). As this issue went to press, the district court dismissed the chemical companies' claims for indemnity against the federal government. See *In re "Agent Orange" Prod. Liab. Litigation*, MDL No. 381 (E.D.N.Y. May 9, 1985).

187. See generally Fox, *Agent Orange Study Is Like a Chameleon*, SCIENCE, Mar. 16, 1984, at 1156; Lyons, *Study of Vietnam Veterans Finds No Increased Risk of Birth Defects*, N.Y. Times, Aug. 17, 1984, at 1, col. 4; Riley, *A Silver Bullet—Or Merely a Dud?*, Nat'l L.J., Aug. 23, 1984, at 1, col. 1.

188. See Fried, *Judge Tentatively Approves Pact to Settle Agent Orange Lawsuits*, N.Y. Times, Sept. 26, 1984, at 16, col. 1. Weinstein has been quoted as saying, "I have serious doubts about whether this case should have been brought at all . . . you have shown no factual connection of any substance between the diseases and the alleged cause." AMICUS J., Fall 1984, at 46 (statement to Plaintiffs' Management Committee, Sept. 26, 1984, reported in the editor's reply to a reader's letter). Of course, future studies might demonstrate this alleged link.

189. For a discussion of government funded research on the causation issue, see Lyons, *U.S. Embarks on \$100 Million Study of Agent Orange*, N.Y. Times, Sept. 25, 1984, at 21, col. 1.

U.S., unlike many other nations, does not have a broad-income protection scheme for partial disability that would cover nonwork-connected harms. Policy reasons suggest that we reform our compensation schemes to address the needs of all such partially disabled people rather than award tort benefits on an ad hoc basis to some of them.

A \$180 million settlement of the AO cases was reached on the eve of trial. Without deducting plaintiff legal fees and other costs, this would amount to an average of \$1500 per plaintiff when spread over an estimated 120,000 claims (to use a frequently employed figure). As *Newsweek* put it, "The defendants . . . continued to insist that [AO] . . . had not harmed anyone, but privately chortled that they had walked away after paying only '10 cents on the dollar.'"<sup>190</sup> On the other hand, in view of the apparent weakness of the lawsuit, one might wonder why the defendants settled. The explanation lies with the defendants' exorbitant legal costs—allegedly \$75 million with no end in sight<sup>191</sup>—together with the risk, however small, of losing more than a billion in court.<sup>192</sup>

It is tragic to spend such enormous sums in litigation in order to produce such a relatively puny compensation fund. One recent report suggested that the \$180 million could be used to create a fund that would support "legal, political and medical services to all those vets who might have been affected by the defoliant."<sup>193</sup> Tort law thus becomes a substitute social services agency. Of course, with the causation issue in doubt, it is clear that there will be controversy if the settlement distributes the money on other than a pro-rata basis; on the other hand, there will also be controversy if any vet who claims exposure to AO walks away with as much money as those vets who are clearly disabled, albeit for unclear reasons. As of January 1985, about 150,000 veterans and their families had filed claims with Judge Weinstein's court.<sup>194</sup>

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190. *A Fast Deal on Agent Orange*, NEWSWEEK, May 21, 1984, at 56. See generally Fox, *Tentative Agent Orange Settlement Reached*, SCIENCE, May 25, 1984, at 849; Flaherty and Lauter, *Inside Agent Orange*, Nat'l L.J., May 21, 1984, at 1, col. 1.

191. *A Fast Deal on Agent Orange*, supra note 190, at 56.

192. The defendants had hoped to recover their costs from the government, who, they say, knew what it was getting—exactly what it ordered. But the government appears to be immune. See supra note 186; see also Riley, *New Agent Orange Rulings*, Nat'l L.J., May 27, 1985, at 10, col. 3.

193. *Agent Orange: Trickle-Down Economics*, NEWSWEEK, Dec. 3, 1984, at 23.

194. *Agent Orange: The Final Hurdle*, NEWSWEEK, Jan. 21, 1985, at 68. The same report noted that Weinstein thus far had approved about \$9 million in legal fees for plaintiffs' attorneys. \$40 million had been requested.

As this issue went to press, a court-appointed special master has proposed a plan for the AO settlement fund that would pay benefits only to the most severely disabled veterans who have filed claims, with a maximum benefit payment of \$25,000. It is estimated that only five percent, or less than 10,000, of those who have claimed would currently qualify for anything. Riley, *Agent Orange: A \$25,000 Cap*, Nat'l L. J., March 11, 1985, at 3, col. 1.

b. *Bendectin*

The Bendectin litigation is analogous to the Agent Orange litigation. Dow Chemical, the defendant in this action as well, is the parent corporation of the recently acquired Richardson-Merrell, the maker of Bendectin.<sup>195</sup> Bendectin is an antinausea drug marketed in the U.S. between 1957 and 1983. It was commonly prescribed during pregnancy. Thirty million women worldwide have taken the drug, including as many as ten to twenty-five percent of pregnant American women during this twenty-five-year period. It is now claimed that Bendectin causes birth defects.

Since 1977 over 700 suits have been brought against Merrell. Most of them were consolidated,<sup>196</sup> and a \$120 million agreement was tentatively reached. It unraveled, however, when the Court of Appeals for the Sixth Circuit concluded that the supervising federal judge impermissibly created a class with no opt-out rights.<sup>197</sup> As a result, many cases are going to trial, and in early reports the defendant is winning outright.<sup>198</sup>

As with Agent Orange, there is great doubt as to defendants' liability. Existing evidence does not seem to prove Bendectin harmful—the birth defects probably resulted from other causes.<sup>199</sup> However, as with AO, defense costs and the potential for huge liability exhausting insurance coverage explain why the defendant would be willing to settle to get rid of the problem.

Once again, supposed victims demonstrated a weak connection to a product and nearly extracted a large settlement from an available defendant. Under the settlement, the Bendectin victims could have received

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195. See generally *Mekdeci v. Merrell Nat'l Laboratories*, 711 F.2d 1510 (11th Cir. 1983); Kolata, *How Safe is Bendectin?*, SCIENCE, Oct. 31, 1980, at 518. In the 1960's, Richardson-Merrell manufactured MER-29, a drug which lowered cholesterol but also caused cataracts. The company paid out \$200 million in damages in 500 lawsuits. In addition, it was fined for making false statements to the FDA. Richardson-Merrell also marketed Thalidomide in North America. About 200 Canadian and 20 American children with limb defects successfully sued the company. An FDA ban prevented worse results.

196. See *In re Richardson-Merrell Inc. "Bendectin" Prods. Liab. Litigation*, 533 F. Supp. 489 (J.P.M.D.L. 1982). Three cases earlier tried elsewhere are mired in additional controversy and appeal. However, the defendant won dismissal in the trial court. See *id.* at 490 n.1.

197. *In re Bendectin Prods. Liab. Litigation*, 749 F.2d 300 (6th Cir. 1984); see also Lauter, *Confusion Reigns Over Bendectin*, Nat'l L.J., Nov. 12, 1984, at 3, col. 1.

198. In the most celebrated case as of this writing the defendant won a jury verdict in a federal case involving some 1200 Bendectin claims, by convincing the jury that the drug had not caused birth defects. See Kaufman & Lauter, *Bendectin Verdict Doesn't End Suits*, Nat'l L.J., March 25, 1985, at 3, col. 2.

As this issue went to press, the Judicial Panel on Multidistrict Litigation remanded 83 cases to their original district courts. The plaintiffs in these cases had opted out of the consolidated causation trial. See *In re Richardson-Merrell Inc. "Bendectin" Prods. Liab. Litigation*, 606 F. Supp. 715 (J.P.M.D.L. 1985).

199. See generally Lauter, *Bendectin Pact Creating Furor*, Nat'l L.J., July 30, 1984, at 1, col. 1.

over \$150,000 each on a pro rata basis. At the same time other equally innocent children with birth defects go uncompensated by tort law.

c. *Asbestos*

About 25,000 personal injury claims have been made so far against companies in the asbestos industry.<sup>200</sup> The potential for additional claims is enormous. It has been predicted that as many as 350,000 Americans might eventually die from their past exposure to asbestos.<sup>201</sup> As opposed to AO and Bendectin, there seems little doubt that asbestos is dangerous. Still, an individual claimant may encounter considerable difficulty showing a health problem was caused by asbestos, rather than by, say, smoking. Moreover, the extent of harm is often speculative, as victims seek immediate compensation despite fears of future deterioration.

Asbestos injuries are essentially job-related. Under sensible workers' compensation schemes, those with serious claims should receive benefits for what is an occupational disease.<sup>202</sup> But unlike workers who lose limbs because of the conduct of fellow employees, or who contract occupational diseases but can point only to their employer, asbestos victims discovered a more generous recoupment in tort. Workers' compensation is no longer the exclusive remedy for job injuries, as had been envisioned. Indeed, for some it has become a war chest for a protracted tort case against a third party where one can be found. This trend is not unique to asbestos plaintiffs. Since a substantial share of all payments in product injury cases these days are for work-related claims,<sup>203</sup> this renders somewhat inapt the consumer-injury paradigm around which the doctrine of strict liability in tort doctrine developed. The current situation seems one of severe horizontal inequity among workers, with benefits depending upon the cause of workplace harm.<sup>204</sup>

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200. See generally Chen, *Asbestos Litigation Is A Growth Industry*, ATL. MONTHLY, July 1984, at 24.

201. *Id.*

202. For a discussion of the shortcomings of our existing workers' compensation system in dealing with occupational diseases, and some proposals for reform, see REPORT TO THE PRESIDENT AND THE CONGRESS, WORKERS' COMPENSATION: IS THERE A BETTER WAY? 11-13, 23-27 (1977) [hereinafter cited as IS THERE A BETTER WAY?]. For other critical reports of the existing workers' compensation system's handling of occupational disease and proposals for new compensation plans, see Solomons, *Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems*, 41 ALB. L. REV. 195 (1977); Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916 (1980).

203. For data suggesting that workplace injuries accounted in 1977 for 11% of product liability claims and 42% of payments for bodily injury, see *Product Liability Hearings*, supra note 35, at 106 (statement of E. McCarthy).

204. Many asbestos victims, however, also have trouble pursuing workers' compensation claims for a variety of reasons, including proof problems and the inadequacies of their state's workers' compensation law.

Administrative overhead alone makes the torts system a disgraceful forum for dealing with the asbestos problem. As of 1984, claimants received somewhat more than \$236 million. Their lawyers, however, earned \$164 million, and the defendants have incurred more than \$600 million in expenses.<sup>205</sup> Surely this expense to payout ratio is outrageous for a compensation mechanism.

The main defendant, Johns-Manville, has gone into bankruptcy even though its net worth is more than \$1 billion.<sup>206</sup> Reports suggest that Johns-Manville could put up \$700 million to escape from the burden of these suits, but that it is willing to pay only \$400 million.<sup>207</sup> Recent property damage cases, especially on behalf of school districts that must replace asbestos in their buildings, are proliferating. They could eventually involve a billion dollars, although their resolution is probably in the distant future.<sup>208</sup>

Some will contend that litigation teaches asbestos makers, and industry in general, a lesson. Evidence that Johns-Manville officials covered up early danger signals encourages such arguments.<sup>209</sup> But current shareholders and insurers—not bad actors from the distant past—will be the ones to suffer financially. As Archibald Cox puts it:

Does it really make sense to have the compensation awarded to those whose health was injured turn upon exhaustive investigation and trial of the question whether a particular manufacturer or user knew or should have learned about the dangers of working with asbestos twenty, thirty, and forty years ago? After exhaustive inquiries and protracted trials, will the verdict and judgment really turn upon careful, reasoned findings upon such questions? Is the method developed for the negligence of the nineteenth century suited to such cases? Have we done anything but make it more cumbersome and more expensive with the outcome more uncertain?<sup>210</sup>

d. *IUD*

The A.H. Robins company bought the rights to produce and market the “Dalkon Shield” in 1970 and eventually marketed 4.6 million of these birth control devices worldwide.<sup>211</sup> Although considerable evi-

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205. See COSTS OF ASBESTOS LITIGATION, *supra* note 175, at 39.

206. See Chen, *supra* note 200.

207. *Id.* at 30.

208. *Id.*

209. In one almost comic aspect of the case, Johns-Manville claimed that signatures on some incriminating letters written in 1935 could not be authenticated because the former official was dead. Plaintiff's detective work has shown that the writer is actually alive and living in Scotland.

210. Chen, *supra* note 200, at 32 (quoting Cox's statement to the American Bar Association Annual Meeting in Atlanta, Aug. 1983).

211. See generally *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); Kleinfeld, *Ongoing Problems for Robins*, N.Y. Times, Aug. 1, 1984, at D1, col. 3.

dence has linked the device to serious health consequences, Robins has denied any wrongdoing.<sup>212</sup> Some in the company argue that they never would have recklessly chanced liability with a product accounting for such a small part of their business; the Dalkon Shield generated only \$500,000 in profit<sup>213</sup>—a drop in the bucket compared to the company's litigation costs.

As in other mass tort cases, serious causation issues have arisen. Other factors cause the same injuries said to be caused by the Dalkon Shield, and Robins has won outright victories in about half of the fifty-odd cases that have actually gone to trial.<sup>214</sup> As of December 1984, it had settled about 7500 claims with nearly 3700 still pending. New claims are being filed at the rate of thirty per week.<sup>215</sup> Even settlements involve protracted negotiations. Robins claims many IUD wearers have actually contracted their problems from their "lifestyle." Much to the plaintiffs' annoyance, the defense often probes the claimant's sexual practices at considerable lengths.

The amount that victims obtain for similar injuries varies considerably. There are the same differences in circumstances, representation, and state law, as exist with the other mass torts. Also, the settlement value of the IUD cases has increased, due to accumulating evidence against Robins and a successful \$6 million punitive damages suit. In late 1984, therefore, plaintiffs who previously would have settled for \$15,000 were settling for \$100,000.<sup>216</sup> Moreover, as to the exemplary damages, since there is no reason to think that either the plaintiffs who received punitive damages, or their lawyers, played a remarkably distinctive role in the saga, the question arises why a few Dalkon Shield victims should receive several millions while others get nothing.

Torts as a compensation mechanism is once more highly uneven and terribly inefficient. By August 1984, Robins' insurers had paid out \$132 million. Presumably, less than \$100 million went to the victims themselves.<sup>217</sup> In addition, Robins had paid \$101 million in litigation

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212. Robins's officials insist that the Dalkon shield was the best IUD developed. A Dr. Owen dismissed as clinically undemonstrated plaintiffs' claims that the Dalkon Shield caused "wicking," which could transmit bacteria into a woman's uterus. "All Things Considered," National Public Radio (Jan. 16, 1985).

213. Kleinfeld, *supra* note 211.

214. Middleton, *Robins Mounts Drive to Settle Dalkon Suits*, Nat'l L.J., Dec. 24, 1984, at 1, col. 3, at 10, col. 2.

215. *Id.* at 10, col. 3.

216. "Morning Edition," National Public Radio (Nov. 15, 1984).

217. Kleinfeld, *supra* note 211, at D1, col. 4. This amounts to an average of only about \$13,000 per case if spread over 7500 victims. Another report refers to \$250,000,000 paid to 6300 plaintiffs. Middleton, *supra* note 214, at 9, col. 1. Allowing 25%-35% for attorneys fees and plaintiff's expenses, this comes to about \$25,000-\$30,000 per plaintiff.



expenses.<sup>218</sup>

#### 4. Conclusion

Compensation of accident victims is a proper social concern, but it should be furthered through means other than tort law. In Part IV, I discuss my own approach to the compensation goal.

##### C. Corrective Justice: The Mirage of Compensation of the Deserving

One traditional view of common law judges and juries is that they decide whether fairness dictates that the injurer or the victim should bear the loss.<sup>219</sup> With personal injuries, victims can not in actuality be made whole. Therefore, tort law has developed the device of monetary damages to serve the goal of corrective justice. This justification for tort law derives from moral values: when *X* negligently injures *Y*, it is only morally right that *X*, not *Y*, bear the loss. Oliver Wendell Holmes endorsed this view of tort law in his famous lectures on the common law.<sup>220</sup> Although the corrective justice theme receded from academic writing in the face of "modern" instrumentalist notions of deterrence and compensation, it has reappeared in recent scholarship.

Those who defend tort law on corrective-justice grounds emphasize the highly individualized justice of a traditional courtroom. But this is thoroughly unrealistic today. First, liability insurance and the doctrine of respondeat superior vitiate individualized corrective justice on the defendant side.<sup>221</sup> Plaintiffs are simply not compensated by their injurers. Instead, the burden is diffused.<sup>222</sup> Indeed, in the absence of insurance or deep pockets, victims usually do not sue.

Turning to the plaintiff, it is unrealistic to view the tort award as the basic source of compensation. Instead, the victim increasingly recovers his out-of-pocket loss from some other source before he sues. Does it serve corrective justice when the defendant's employer or insurer pay a second time? Considerations of fairness might suggest that the defend-

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218. Kleinfield, *supra* note 211, at D1, col. 4. In April, 1985, Robins announced the establishment of a \$615 million fund which it hopes will suffice to settle all current and future suits against it concerning the Dalkon Shield. *IUD Firm Sets Up Huge Claims Fund*, San Francisco Chron., April 3, 1985, at 26, col. 1.

219. See A JURISPRUDENCE OF INJURY, *supra* note 1, at 3-1, 3-16, 4-41 to 4-52, 4-71 to 4-81, 4-116 to 4-121, 4-153 to 4-166, and 4-176 to 4-200.

220. So too, when the head of the American Trial Lawyers Association writes that product liability law is "based on an altogether decent and straightforward principle—[that] the product supplier must stand behind its defective product when it causes injury," he is invoking the idea of corrective justice. Shrager, *Products Liability Law—A Legal Saga of Consumer Protection*, TRIAL, Nov. 1983, at 4.

221. To be sure, without these loss-spreading mechanisms, the damages would often be out of proportion to any sense of blame.

222. Experience rating of insureds hardly negates this point.

ant (or successful plaintiff) reimburse the collateral source. This now often happens. But it means that in practice tort law has become a process for having one insurer pay another, which is far removed from any meaningful sense of individual justice. In short, exponents of corrective justice often have a naive air about them. Like judges in the courtroom they are blind to the vast systems of insurance on both sides of the tort equation.

The corrective-justice vision compounds the unreality by imagining that people with legal claims naturally want legal redress,<sup>223</sup> and that they actually find real justice when they sue. To the contrary, in large numbers of cases, the current system functions whimsically and doesn't accord with anyone's sense of justice. The much-vaunted individualized attention to victims<sup>224</sup> in practice sanctions flagrant horizontal inequity because of settlement practices, trial theatrics, and other reasons already discussed. Professor James Henderson articulates a fallback defense of tort law as creating "the appearance, at least, of trying to reach individualized results that are fair to all concerned."<sup>225</sup> But where is this apparent? Not among the public, ordinary tort plaintiffs, or lawyers. Moreover, it is by no means clear that tort suits respond to a deeply felt need for redress. Aided by plaintiffs' attorneys, the legal remedy generates its use by virtue of its very existence.<sup>226</sup>

Even apart from these realities we have no clear and convincing *theory* of corrective justice.<sup>227</sup> No one argues for tort liability wherever the words "injurer" and "injured" describe the parties at bar. The problem comes in deciding when liability should attach.

According to Holmes' formulation of corrective justice, only a valid claim that he has been *wronged* may entitle plaintiff to damages.<sup>228</sup> Holmes, however, did not insist that the injury must be the result of the defendant's moral culpability. He did insist that a defendant be held to community standards of reasonable conduct even when he was incapable

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223. In a recent British study, only half of accident victims who blamed someone for their loss thought their injurer should provide compensation. See L. Lloyd-Bostock, *Common Sense Morality and Accident Compensation*, in *PSYCHOLOGY, LAW AND LEGAL PROCESSES* 99-100 (D. Farrington, K. Hawkins, & S. Lloyd-Bostock eds. 1979).

224. See A. LINDEN, *supra* note 12, at 13-14.

225. Henderson, *The New Zealand Accident Compensation Reform* (Book Review), 48 U. CHI. L. REV. 781, 797 (1981) (reviewing G. PALMER, *COMPENSATION FOR INCAPACITY* (1979)); see also A JURISPRUDENCE OF INJURY, *supra* note 1, 4-222 to 4-224.

226. In their recent study of tort law in Britain, Harris and his colleagues found that only half the victims filing claims attributed fault to the defendant. *COMPENSATION AND SUPPORT*, *supra* note 12, at 321. Two-thirds of those pursuing a tort claim filed only after being so advised by a third party. *Id.* at 318. I take this as further evidence that people do not see tort as a natural and necessary remedy.

227. See *AUTOMOBILE ACCIDENT COSTS*, *supra* note 12, at 105-06.

228. As Holmes saw it, it would be better for private enterprise or the state to set up an insurance scheme to compensate victims. O.W. HOLMES, *THE COMMON LAW* 94-96 (1881).

of meeting them owing to some personal shortcoming. To be sure, Holmes invoked administrative convenience in support of this view—he thought it would be too difficult to decide about the moral culpability of many defendants. But he emphasized even more strongly that victims were entitled to proper conduct, and that when they didn't get it, they deserved payment of damages *from their injurer*, regardless of his personal fault. Modern negligence law reflects this ideology.

The cogency of Holmes's theory of liability for what I'll call "objectively unreasonable conduct" is quite another question. The principle of objective unreasonableness fails to explain much of tort law—as it stood at Holmes's time and as it stands today. It cannot account for cases in which defendants are liable despite the reasonableness of their conduct nor for cases in which defendants escape liability notwithstanding their unreasonable conduct. Had Holmes rejected such decisions as "wrong," at least he would have formulated an elegantly simple normative theory, albeit one that had little predictive value (i.e., as a positive theory). As the Holmesian argument developed, however, the plaintiff in some cases seemed wronged even by reasonable conduct. In other cases, practical considerations, problems of proof, and other administrative reasons prevailed in determining outcome. Yet in others, either plaintiffs were seen to have invited harm or it seemed excessive or inappropriate for some other reason to make the defendant pay for the harm he unreasonably caused. The upshot is an approach to tort liability that sharply deviates from the simple principle of objective fault that Holmes had initially articulated and defended. As embodied today in the Restatement of Torts it has become a complex notion of corrective justice with justifications rendered into doctrinal lingo—"duty," "proximate cause," "assumption of risk," "immunity," and the like. No satisfactory overarching theoretical vision has yet emerged. Instead, we are told that it comes down to a matter of "expediency" or "experience" rather than "logic."

Professor George Fletcher advanced a new rights-based theory of tort liability in 1972. He was unhappy on moral grounds with the utilitarian flavor of the objective reasonableness paradigm and dissatisfied with its weak predictive powers. Fletcher advocated the principle of imposing liability for "nonreciprocal risk taking" as the basic norm of corrective justice.<sup>229</sup> Under Fletcher's approach, for example, a careful

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229. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Criticism of Fletcher can be found in Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 63-68 (1980), and Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973). The works of Professor Jules Coleman constitute an extended critical analysis of Fletcher's views by one who believes in corrective justice. See Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976); Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. ONT.

dynamite blaster subjects a nearby farmer to a nonreciprocal risk; two private plane pilots, however, subject each other to reciprocal risks unless one flies carelessly, thus making the risk nonreciprocal. These examples also illustrate how Fletcher tries to handle with one principle those problems, such as the dynamite case, that current tort law masters only by rejecting the normal negligence standard in favor of strict liability. To date, however, Fletcher's view has found few adherents.

Although the apparent simplicity of Fletcher's principle makes it initially attractive, in fact, the core concept is not easy to apply. First, what about risks makes them nonreciprocal? For example, what about crashes between bicyclists and motorcyclists? Or what about two adjacent landowners where one dusts crops and the other owns cattle that wander outside his proper territory? Second, like Holmes, Fletcher bases his theory on the decided cases. He devotes much effort to demonstrating that his is a powerful "positive" theory: he tries to show that a wide variety of decided cases would have the same outcome under his test as they do now under more complex rules. But Fletcher's theory, like Holmes's formulation, is incomplete. The nonreciprocal risk test leaves too much of torts unexplained. Cases involving preexisting relationships, such as nonnegligent auto/passenger and doctor/patient injuries, are clear examples. Both involve nonreciprocal risks even when the doctor and driver act carefully. Under current tort law, liability in those cases requires a finding of negligence.<sup>230</sup> Third, and most importantly for my purposes, as a "normative" matter Fletcher does not supply convincing reasons *why* the essence of justice is receiving money after having been the victim of nonreciprocal risk.<sup>231</sup>

Professor Richard Epstein, in turn, has offered a moral theory of

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L. REV. 105 (1975); Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974); Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161 (1974). See also Calabresi & Hirschoff, *Toward a Test For Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

230. Presumably, Fletcher's solution to these problems would lead him to the current result through devices like waiver or assumption of risk. But this, of course, complicates his principle. Moreover, why under this approach does the patient bear the risk of the nonnegligent doctor, but the neighbor does not bear the risk of the nonnegligent dynamiter? There might be a good reason, but Fletcher does not address the problem.

231. Fletcher argues that when one exposes another to a nonreciprocal risk "it seems fair to hold him liable for the results of his aberrant indulgence." Fletcher, *supra* note 229, at 548. Later he argues that "all individuals in society have the right to roughly the same degree of security from risk," analogizing to John Rawls's first principle of justice about liberty. *Id.* at 550. And still further on, Fletcher says in his attack on the notion of reasonableness that underlies modern negligence law, that an individual "can not fairly be expected to suffer . . . in the name of a utilitarian calculus." *Id.* at 568. To me these are descriptions or conclusions but not arguments. Fletcher does suggest that the unfairness he sees arises from the benefit that the actor gained at the victim's expense. See *id.* at 564. But this point is not developed, and I don't see what confines it to nonreciprocal risks rather than all risks.

liability for "causation."<sup>232</sup> Essentially, Epstein argues that all cases where *A* should be liable to *B* reduce to fact patterns corresponding to the causal paradigms of either *A* hit *B*, or *A* created a dangerous condition resulting in harm to *B*. This approach is meant to express the moral intuitions of ordinary people by relying on the plain meaning of the word "caused." Yet, he would also have this word resolve cases now clumsily addressed by tort doctrine.

Epstein too has earned considerable criticism. In many cases he falls back on more complex considerations when it is unclear how the layman would resolve the causation issue. In these more difficult cases, one must rely on one's own values. Other times he compromises the simplicity of his theory by introducing defenses in order to reach solutions he desires but that the causation principle would contradict. More importantly, Epstein too gives little explanation *why* corrective justice demands that the victim recover damages from the injurer whenever the injurer "caused" the harm.<sup>233</sup>

Perhaps the reader will imagine that the three theories of corrective justice I have considered—"unreasonable conduct," "nonreciprocal risk taking," and "causing harm"—only conflict at the boundaries of tort law. Perhaps Holmes, Fletcher, and Epstein would at least agree on ordinary cases, despite their differences in phrasing and their possible differences in opinion about exotic cases. Consider, for example, routine accidents such as careless drivers running down pedestrians, careless doctors injuring their patients, and careless manufacturers injuring their

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232. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter cited as Epstein, *Strict Liability*]. For critiques of Epstein, see articles cited *supra* note 230; Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979); Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). For a reply, see Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979) [hereinafter cited as Epstein, *A Reply*].

233. Epstein says, "[b]riefly put, the argument is that proof of the proposition *A* hit *B* should be sufficient to establish a prima facie case of liability." Epstein, *Strict Liability*, *supra* note 232 at 168. Epstein cites Leon Green's statement about "a deep sense of common law morality that one who hurts another should compensate him." *Id.* at n.48. These statements are far too "brief" or "deep" to count as arguments with me.

In a later article, Epstein says that his theory has implicit philosophical premises that are "tied to a preference for equal liberties among strangers in the original position. . . . [T]he limitation upon that freedom of action is that he cannot 'cause harm' to another. . . . The justification . . . is quite simply a belief in the autonomy and freedom of the individual." Epstein, *A Reply*, *supra* note 232, at 479. But merely invoking a dubious analogy to John Rawls does not demonstrate that such preferences and justifications can't equally be applied to other non strict-liability theories of tort like liability for unreasonably dangerous conduct.

Epstein also says "I attach a good deal of importance to the 'natural' set of entitlements that I think are generated by a concern with individual liberty and property rights." *Id.* at 488. But calling them "natural" avoids the problem. Indeed, Epstein seems to recognize this when he concedes "by defining property rights as I have done, I have foreordained a system of strict liability." *Id.* at 499.

consumers. Oddly enough, these commonplace examples provoke disharmony from our three moralists: Fletcher is ambivalent about the car injury case, especially when the pedestrian is himself a regular driver<sup>234</sup>; Epstein would relegate medical malpractice to contract law where patients would agree not to sue for ordinary negligence,<sup>235</sup> and Holmes wrote *The Common Law* when the privity doctrine protected negligent manufacturers.

Professor Glanville Williams has made a more severe attack on the use of tort law to serve "justice" goals. He distinguishes what he calls ethical retribution from ethical compensation.<sup>236</sup> The former rests on a punishment notion Williams rejects as "an ultimate value-judgment".<sup>237</sup> I will take up the punishment theme in the next section. Ethical compensation concerns what I have been calling corrective justice. Williams argues that although a tort victim deserves compensation, the tortfeasor ought to pay only if there is no other source, such as the state, an employer, or an insurance company. On this view, corrective justice shouldn't worry about whether the injurer does the compensating. The defendant should be liable only as a matter of last resort.

Professor Jules Coleman, a persistent and insightful critic, echoes these themes. He argues that two sorts of fact situations require careful separation.<sup>238</sup> The first class involves a restitutionary setting illustrated by my wrongfully taking your book or money. Since the law can compel the object's return, Coleman suggests that corrective justice requires restoring the status quo ante. Otherwise, the appropriator will be specially and personally enriched at the victim's expense.<sup>239</sup> However, most tort cases fall outside this category. The common auto accident is Coleman's best example. Though someone has been hurt, the injurer has nothing to return. Perhaps the injurer benefited (for example, by gaining a thrill or profiting financially from driving too fast), but this benefit is unrelated to the harm imposed. Where the injurer was clumsy or inattentive, he probably did not benefit at all from the offending act.

Professor Coleman's view would confine individual corrective justice—where injurer pays victim—to the restitutionary setting. He would require a specific defendant to disgorge a wrongful gain appropriated from a specific victim as in the stolen book example. Elsewhere, even if the victim deserves compensation, Coleman joins Williams in doubting whether the injurer alone should pay. Rather, he advocates a wider

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234. Fletcher, *supra* note 229, at 549 n.46.

235. Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RESEARCH J. 87.

236. Williams, *supra* note 4, at 140-44.

237. *Id.* at 141.

238. See Coleman's articles, *supra* note 230.

239. Williams also distinguishes unjust enrichment cases. Williams, *supra* note 4, at 170-71.

responsibility as might come about through an auto no-fault plan.<sup>240</sup> Thus, Coleman's theory could dispense with most of tort law without sacrificing his narrow restitutionary view of corrective justice.

I conclude that where most victims can obtain reasonable compensation from another source, cutting off access to defendants' insurers does little disservice to such corrective justice norms as we collectively hold. Adequate alternative sources of compensation would exist in the world without tort law that I envision. Therefore, I find the pursuit of corrective justice through ordinary torts cases is an extravagance primarily benefiting lawyers and the insurance industry.<sup>241</sup>

*D. Punishment, Vengeance, and Peacekeeping: Bungled Striving for Satisfaction and Accountability*

Somewhat akin to the notion of corrective justice are two interrelated justifications sometimes given for tort liability: punishment and vengeance.<sup>242</sup> The frequent cry of the plaintiffs' bar comes vividly to mind. Tort is necessary in order to strike back at and hurt wrongdoers. Whatever their theoretical appeal, these goals also are seldom achieved.

The point of *punishment* is that a wrongdoer should suffer. Yet in most accident cases, the tortfeasor simply doesn't pay.<sup>243</sup> Either the insurance company or the employer bears the loss. Usually, the actual bad actor suffers little consequence. In a great number of cases the active tortfeasor does not even know the outcome,<sup>244</sup> or learns that the insurance company paid up simply to close the books, whatever the insurer's real opinion of the insured's conduct. This hardly constitutes punishment. Moreover, since nearly all cases are settled, even individuals who know they've been at fault rarely receive an official reprimand.<sup>245</sup>

Although higher insurance rates and job penalties punish some tortfeasors, these unofficial punishments are uneven and unpredictable.

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240. Coleman's indifference to results is consistent as well with punishing attempted crime and fining speeders.

241. In another article on torts-as-justice, Professor Steven Smith has recently offered a view of torts from what he calls the inside. As I understand it, under his theory tort law's function is to resolve disputes to the satisfaction of actual litigants. He thus calls for "fairness-in-context" and lauds the role of "reasonableness" in serving that goal. See Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 290-99, 323 (1984).

242. See A JURISPRUDENCE OF INJURY, *supra* note 1, 4-170 to 4-175. Punishment also can be viewed instrumentally as a deterrent. Here, I wish to consider it in a different light.

243. Again, I put aside for now the question of intentional torts and punitive damages.

244. See T. ISON, *supra* note 12, at 83 (citing Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 292 (1964)).

245. Indeed, an individual's experience in settling an auto-crash case "may harden him in the self-righteous belief that he is a good driver and the 'other fellow' is to blame." Cramton, *supra* note 95, at 445.

Advocates of torts as a method of punishment can hardly be satisfied with such horizontal inequity.

Moreover, there are fundamental theoretical problems with viewing our tort system as a punishment scheme. For one thing, the system holds many people liable who do not seem deserving of punishment. Two examples are defendants whose conduct fell below community standards but could not have done better and defendants who are held strictly liable. Furthermore, because tort demands compensatory damages, the award is often a poor measure of the *wrongfulness* of the defendant's conduct. Some juries try to punish by adjusting pain and suffering awards to reflect wrongdoing. But this practice is unpredictable, and futile as well so long as insurance companies or shareholders pay.

*Vengeance* is the flip side of punishment. Although many consider revenge to be an inappropriate value,<sup>246</sup> some conclude that many victims have a psychological need for satisfaction.<sup>247</sup> However, the present system ill serves the vengeance goal.<sup>248</sup> First, it is hard to see how the plaintiff can get much satisfaction when his personal wrongdoer doesn't pay. Second, the victim who sues often finds more aggravation than satisfaction or revenge. Countless plaintiffs report that if they did experience any emotion, it was exasperation, hostility, and continual discomfort.<sup>249</sup> To be sure, there are occasional plaintiffs (and certainly some plaintiffs' lawyers) who derive satisfaction from the humiliation of an adversary at trial. But this kind of satisfaction comes to only a minute proportion of the people who actually file claims.

The related *peacekeeping* claim is that tort law is necessary in order to vent victims' steam and ensure they don't resort to violent self-help.<sup>250</sup> Tort law is unlikely to mollify victims of personal assault. Money won't

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246. For Lord Diplock's views, see *Cassell & Co. v. Broome*, [1972] 2 W.L.R. 645, 721.

247. See generally A. EHRENZWEIG, *PSYCHOANALYTICAL JURISPRUDENCE* §§ 205-209 (1971); Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U.L. REV. 855 (1953). See also A. LINDEN, *supra* note 12, at 14; Keeton, *Is There a Place for Negligence in Modern Tort Law?* 53 VA. L. REV. 886, 888 (1967).

248. Fleming, *supra* note 12, at 133.

249. See *AUTOMOBILE ACCIDENT COSTS*, *supra* note 12, at 105-06; R. KEETON & J. O'CONNELL, *supra* note 25, at 47. These reactions can be attributed in part to the anxiety that comes simply from being involved in a lawsuit; part arises from counterclaims or perceived harsh treatment by the other side; and a large part all too often is brought about by plaintiffs' lawyers. Frequent complaints include professional arrogance, endless delays for lawyer convenience, failure to keep clients informed, and inattention to the client's psychological needs. See *AUTOMOBILE ACCIDENT COSTS*, *supra* note 12, at 277-81; *COMPENSATION AND SUPPORT*, *supra* note 12, at 320. Robert Chick, who runs a large lawyers' malpractice insurance company, told me that many of the cases they see do not really involve what we think of as legal malpractice, but rather poor personal relations between lawyer and client. Interview with the Author (Dec. 31, 1984).

250. See A. LINDEN, *supra* note 12, at 15; Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970); Williams, *supra* note 4, at 138-40; see also A. JURISPRUDENCE OF INJURY, *supra* note 1, at 3-17, 3-18.



soothe those victims who have a strong urge to retaliate and are physically able. Moreover, when the defendant is plainly judgment proof, as is the case in many bodily assault cases, tort can have little peace-keeping potential. In such instances, only swift action by the criminal authorities can assuage plaintiff anger.

The realistic case for torts on this rationale must rest on the belief that tort suits keep people from acting in socially undesirable ways towards accident-causing corporations, professionals, and motorists. However, such reasoning flies in the face of a general awareness by those who know anything about the tort system that the road to legal victory is often long and treacherous. It also suggests that we would regularly hear about victims beating up uninsured and careless motorists involved in accidents. Surely, a more powerful peacekeeping force is that most people realize that they would risk criminal liability if they deliberately inflicted harm on a tortfeasor.

If, indeed, the victim's need to retaliate is an important problem, then a better social strategy is to provide other outlets for such revenge. For example, if well-handled, appearances before traffic courts, medical review boards and regulatory agencies promise more psychological benefit to victims. Many such appearance rights now exist, and this is an avenue I will further develop in Part IV.

#### *E. Signaling: Setting Meaningless Standards*

Tort law can perhaps be justified as an important signaling device. This constitutes the moralizing or educating function of torts.<sup>251</sup> A number of notions comprise this function. The common law, it has been argued, uses the tort process to establish community standards for reasonable conduct. In turn, people learn what is expected of them. Moreover, some say, society uses tort law to insist on proper conduct by holding responsible those who fail to conform. Under this view, without tort penalties, people might become disillusioned and angry if they conformed to proper standards while others who did not went unpunished. The emphasis here is on how the rest of us—not the parties to torts suits—would respond to the absence of tort law.

Alas, despite a certain theoretical appeal, once again these arguments are unconvincing in the face of modern realities. Apart from a few publicized cases and an amorphous notion of reasonable conduct, tort law transmits few clear signals about what it expects from us.<sup>252</sup> The

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251. See A JURISPRUDENCE OF INJURY, *supra* note 1, 4-122 to 4-152. This goal, too, often is linked to the deterrence objective. See A. LINDEN, *supra* note 12, at 12-14.

252. On the empirical side, Eads and Reuter report that "firms learned little from the results of particular litigation about either specific design decisions or the process of design decisionmaking." G. EADS & P. REUTER, *supra* note 16, at vii-viii. As a consequence of the tenuous link between good

image of judge and jury somehow collaborating to establish what specific conduct is unacceptable is a poor description of present law. Holmes had hopes for such interaction years ago, but in America they have not materialized.<sup>253</sup> Thus, the arguments surrounding the "signaling" goal largely collapse.

In our society children are socialized by school and family to act reasonably toward others long before they acquire any conception of tort law. This is not to say that everyone learns and acts on such moral teaching. But it is farfetched to imagine that this socializing mechanism will break down in a society like New Zealand that has abandoned tort liability, or that it would in America were we to abolish tort claims for accidents.

Since the broad norm of reasonable conduct is already entrenched in our culture, the role for tort must be to define that norm for individual circumstances. It should specify exactly what is the appropriate behavior for drivers, doctors, dog owners, deodorant makers, dynamiters, and so on. For many reasons, however, tort fails to impart clear and specific norms. Jury decisions are secretly reached, unexplained, and inconsistent in result. Most claims in any event are settled.<sup>254</sup> Indeed, the worst offenders have the greatest incentives to come to terms. As a result, conduct "denounced" by actual decisions is typically surrounded in controversy over what really happened, or whether the harm really should have been avoided. Besides, most cases get little publicity. Moreover, tort doctrine is exceedingly complex. Indeed, with the growth of strict liability, much of tort law no longer even purports to set standards of good conduct—rather only standards of when one should pay. Since torts awards money rather than injunctions, it can be argued that its true lesson is that those who are willing to pay for the harm done are largely free to cause accidents. The upshot is that if people get any message at all from tort law, it is likely to be a cynical one.<sup>255</sup>

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design and liability exposure, "[t]he signal says only: 'Be careful or you will be sued.' Unfortunately, it does not say *how* to be careful, or, more important, *how careful* to be." *Id.* at *viii-ix* (emphasis in original). In a similar vein, Cramton points out that tort law tells people only to "drive safely", noting that this is "advice which is not specific enough to inculcate good driving habits and weed out bad ones." *Cramton, supra* note 95, at 445. Occasionally tort appears to send a clear message, but, as in the *Tarasoff* saga, *see supra* note 34, the message received may not be the one intended.

253. Compare *Baltimore & O. Ry. v. Goodman*, 275 U.S. 66, 69, with *Pokora v. Wabash Ry.*, 292 U.S. 98, 102, 104 (1934).

254. See H.L. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 237-40 (1970). Ross explains that insurance adjusters use traffic regulations rather than negligence standards in settling cases.

255. Not only does tort law promote cynicism about the law, it also teaches people to be cynical about lawyers. When, in the aftermath of the Union Carbide disaster in Bhopal, India, American lawyers flew to India, filed huge lawsuits, and said they were acting for the benefit of the third world, even other plaintiffs' lawyers reacted negatively. Both the Board of Governors of the California

Conversely those who would act reasonably regardless of tort law may well feel better without it. There would then be less room to impugn their integrity. No one could argue that tort law, rather than a moral compass, dictates proper conduct.<sup>256</sup> This satisfaction for many who do “what’s right” may overcome any resentment towards the lack of civil consequences attending others who deviate. Finally, in most serious cases our society does not rely on tort to serve the signaling function.<sup>257</sup> Rather, the criminal law and regulatory agencies fill this need.

*F. Cost Internalization: Proper Allocation of Resources to What?*

There has been much attention paid in recent years to the desirability of “internalizing” accident costs to the activities that cause them. Tort law reputedly serves this social goal.<sup>258</sup> There are a number of difficulties with this line of argument, however. First, considerable confusion exists as to the *purpose* of such internalization. Some see it as a matter of fairness, quite apart from any behavioral consequences: the cost of the product should reflect “the blood of the worker” and “the blood of the victim.” This argument is no more than another way of articulating the corrective justice ideas presented previously.

For example, the contention that an enterprise benefiting from a voluntary activity should bear its accident costs is similar to Epstein’s proposition that whoever “caused” the harm should pay. Of course, people espousing this version of cost internalization will recognize limits to the principle in the same way that Epstein and other “fairness” devotees do. They do not claim the harm to the victim who uses a chain saw to cut his finger nails should be a cost included in the price of the product. Cost internalization on “fairness” grounds is only as convincing as arguments in favor of corrective justice generally.<sup>259</sup>

Under a second view, cost internalization is a mechanism providing economic incentives for taking cost-effective safety measures. This, of course, is a restatement of the deterrence theory already discussed at length.<sup>260</sup>

Yet a third notion of cost internalization is “allocative efficiency,”

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Trial Lawyers Association and the Executive Committee of the American Board of Trial Advocates voted resolutions of condemnation. See *CTLA Board Denounces Tactics of Lawyers in Bhopal Death Suits*, L.A. Daily J., Jan. 18, 1985, at 20, col. 5. But cf. *ATLA Board Rejects Bhopal Censure*, Nat’l L.J., Jan. 28, 1985, at 3, col. 1 (Association of Trial Lawyers considered, but overwhelmingly voted down a censure of lawyers who flew to India to pursue claims).

256. See Williams, *supra* note 4, at 143.

257. Cf. A. LINDEN, *supra* note 12, at 16. Linden defends the “mystery and ritual” of tort as satisfying psychological needs during a time of declining religious belief.

258. See A JURISPRUDENCE OF INJURY, *supra* note 1, 4-13. See generally AUTOMOBILE ACCIDENT COSTS, *supra* note 12, at 92-97, 122-26.

259. See *supra* text accompanying notes 220-41.

260. See *supra* Part I, Section A.

meaning the socially desirable (or "efficient") allocation of goods and services. This goal is independent of a specific focus on accident avoidance. Professor Calabresi and others in the "law and economics" school emphasize this goal. The basic idea is that the price of a good will rise to its "proper" level if it reflects accident costs. Absent such internalization, society in effect subsidizes the good.<sup>261</sup> Such a subsidy entices people to purchase more of those "cheaper" goods and services than is socially optimal. For example, if driving automobiles, dynamiting new roads, and manufacturing lawn mowers do not include in their prices the full cost of the accidents they generate, then "too many" of these activities will occur. Someone always bears the accident costs. But, according to this argument, when they are "externalized," distorted patterns of consumption decrease aggregate social welfare.

Some transportation examples will illustrate this claim in more detail. Assume that ignoring accident costs, truck transport is slightly cheaper than rail transport, but that counting accident costs trains are cheaper. The point is that unless accident costs are internalized, people will ship by truck when they "should be" using railroads. Put differently, along with labor and materials, speed and reliability of service, a proper basis of interindustry competition between trucks and railroads is safety.

The same considerations apply to interproduct competition. If Company *A*'s airplanes are cheaper than those of Company *B* and Company *C*, but on the other hand they pollute more, sales of Company *A*'s planes may be less socially desirable. However, externalizing the costs of pollution enables customers to ignore this factor.

At the broadest level, allowing activities to externalize their accident costs yields society-wide misallocations. For example, suppose that previously airlines were not responsible for ground damage in unavoidable crashes, but now those costs attach to air travel by allowing victims to sue in tort. Assuming that as a result the price of air travel increased, people would fly less and shift to other activities. Some people would stay at home and work in the garden; others would drive. Some businesses will communicate by other means instead of sending people to meetings. Although the reduction in air travel might result in fewer crashes, the increase in the other activities may yield new accidents. The point, however, is that ripples throughout the economy are supposed to lead to a "better" allocation of resources.<sup>262</sup> Thus, advocates of cost

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261. For an interesting discussion of this idea, see Atiyah, *Accident Prevention and Variable Rates for Work-Connected Accidents* (pt. 1), 4 *INDUS. L.J.* 1, 11 (1975).

262. To the extent that accident costs are externalized to users, they are not externalized at all, since these costs are then reflected in the total cost. On the other hand, if people are not aware of these costs, they will mistakenly underestimate the true cost and continue to buy "too much."

internalization would use tort law to achieve what I call proper "activity levels."

One can criticize this claim in various ways. To the extent that there are accidents that are no one's fault, to which party should costs be assigned? Which is to be discouraged?<sup>263</sup> This is a considerable problem. If, for example, unexpected lightning hurls an airplane against a farm house, is that a cost of farming or air travel? Plainly we need the existence of both for the harm to come about. Returning to the example of truck/train rivalry, if we allocate the accident costs of road congestion to trucks for the purpose of improving the competition between trucks and trains, these costs will no longer be imposed on cars with which the trucks crash. Does this not then distort the competition between transportation by car and transportation by bicycle? Perhaps assigning accident costs to both (or all) participants would avoid this problem.<sup>264</sup> Whatever the merits of this suggestion, it is not how the tort system functions. Thus, while we might charge administratively the defendant's activity and not compensate the plaintiff, that is hardly what tort law does.

Second, it is not clear that accident cost internalization would lead to a more efficient allocation of resources given the great number of market imperfections in our economy. Suppose the amount of airline travel today is already at the "efficient" level because of other offsetting market imperfections, such as excise taxes on air travel or motoring subsidies from the national road-building program. If so, then adding in (extra) airline accident costs may upset the balance. Economists call this problem, the "theory of the second best."<sup>265</sup> It warns that piecemeal solutions will not necessarily move society towards overall allocative efficiency.<sup>266</sup>

A third problem with the goal of cost internalization is that liability insurance pricing practices once again intercede. Because of actuarial requirements and administrative reasons, insurance classification systems frequently group enterprises in ways that externalize costs to other activi-

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263. See generally W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 57-61 (1965); Fleming, *supra* note 12, at 136.

264. See generally Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

265. For a discussion of the theory of the second best and its application to torts problems, see Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980). See generally L. FRIEDMAN, *supra* note 40, at 410-24.

266. It has recently been alleged that the price of cars in America has increased by perhaps \$600 due to restrictions on Japanese imports. *Study Says Japan's Car Curbs Cost Buyers Billions*, San Francisco Chron., Feb. 18, 1985, at 53, col. 3. Economists rightfully complain that while the import quotas may increase the jobs available for American auto workers, the resulting price increase distorts consumer preferences and discourages auto sales. Thus if we eliminate tort liability and the need for liability insurance, the decreased price of driving might bring us back to a more efficient level of auto purchases after all.

ties that the torts system would seem to internalize.<sup>267</sup> Moreover, victims avoid internalization by passing the costs on to collateral sources such as health insurance and Social Security.

Fourth, even if desirable social consequences would flow from cost internalizing, tort law does not produce them effectively. As previously discussed, given the way damages are determined, tort allocates costs arbitrarily and inefficiently.<sup>268</sup>

Finally, accident costs are hardly the only "externalities" that allow people to benefit from others without paying for them. My enjoyment of your garden is a common example. Your playing loud music after dark that bothers me is another. These market imperfections riddle our economy. Given our failure to achieve a perfect market economy in so many areas, cost internalization is simply too thin a reed to support tort law's continuation.<sup>269</sup>

### G. Conclusion to Part I

There is widespread social consensus in favor of deterring wrongdoing and compensating accident victims. But in the face of current realities it is difficult to argue that tort law well serves these or other more controversial goals. By trying to do many different things, I have argued, tort law ends up doing none of them well.

This is not to say that tort never deters, never properly punishes, or never properly promotes the efficient allocations of resources. And plainly it does a great deal of compensating—as well as overcompensating. At issue, however, is whether, on balance, a wise form of governmental activity is to continue to give accident victims the right to sue in tort.

My judgment is that the mammoth social costs of ordinary tort law,

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267. The ability of insurers to fine tune premiums is limited by the availability of information regarding the insured's future conduct, as well as the cost of gathering such information. In addition, such information, once collected, can not be easily protected. Free riders could simply copy the classification systems of others. The result might be industry-wide underinvestment in the acquisition of information. The casualty insurance industry has responded to this latter problem by creating a national cooperative rating bureau, the Insurance Services Office. Still, there is reason to think that present classifications are less exact than information costs would warrant.

268. For some empirical findings on the limited role that both tort and workers' compensation now play in imposing injury-based wage losses on injurers and employers respectively—in an article that is skeptical about whether workers' compensation has improved on negligence law—see Ashford and Johnson, *Negligence vs. No-Fault Liability: An Analysis of the Workers' Compensation Example*, 12 SETON HALL L. REV. 725 (1982).

269. Professor Conard states:

[I]t is tempting to conclude that small departures from optimal resource allocation, and small distortions in the distribution of wealth and income resulting from accidents, might well be ignored on the grounds that their social cost is probably small, and certainly small relative to the costs of a reparation system to determine and offset them.

AUTOMOBILE ACCIDENT COSTS, *supra* note 12, at 127.

importantly including the socially undesirable behavior prompted by tort law, outweigh its benefits. Thus, were tort law for accidents repealed, society as a whole would gain. This seems especially so if one reasonably assumes that absent tort law new private compensation arrangements would emerge so as to alter considerably the background context against which tort law so operates. Of course, maintenance of the status quo and outright repeal are not the only choices.<sup>270</sup>

## II TORT REFORM

### A. *Doctrine, Damages, and Process Reform*

In the fall of 1984, it looked as though Florida voters would vote on a ballot measure to limit pain and suffering damages in tort cases to \$100,000. The Florida judiciary, however, struck the initiative from the ballot. The measure was promoted by the doctors' lobby, and contested by the plaintiffs' bar.<sup>271</sup> While I favor this change, other things being equal, it is hardly the dramatic revision of tort law some had suggested it was. Rather, it was typical of the "band-aid" approach that has characterized tort reform for years.<sup>272</sup> Reducing pain and suffering damages awarded in serious injury cases may ease the insurance crunch that some now feel. It may make compensation more uniform as well. But it hardly answers the critique of the tort system offered in Part I.

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270. Nearly ten years ago Professor Jeffrey O'Connell argued that "given the relatively worthless nature of tort liability insurance as an insurance mechanism, one forced to choose between retaining the present system and simply abolishing it, (at least as applied to personal injury for products liability and medical malpractice), would probably more sensibly abolish it than retain it." O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 517 (1978). But for "political, practical, and constitutional reasons," *id.* at 519, O'Connell proposed instead a third course that he calls "elective no-fault." I discuss this below.

As for the constitutional issue, while it is quite unpredictable just what individual state courts would do, I have long been unimpressed with the claim that states cannot simply repeal tort law for personal injuries without thereby depriving people of due process rights. Such thinking reflects a long-past era of judicial intrusion into legislative policymaking in the area of economics and social welfare on substantive due process grounds. From this perspective, I fail to see why the enormous destruction of defendant "rights" in recent years, through the expansion of tort liability, wouldn't also be violative of due process. I side with former Harvard Dean Erwin N. Griswold who has said that even Congress could abolish tort law. *Id.* at 515.

271. See *How the Doctors Spell Relief*, NEWSWEEK, Sept. 17, 1984, at 73. The AMERICAN MEDICAL ASS'N SPECIAL TASK FORCE ON PROFESSIONAL LIAB. & INS., PROFESSIONAL LIABILITY IN THE '80s: REPORT 3, at 12 (1985), adopts an "action plan" aimed at limiting pain and suffering damages. For the reaction of the President of the American Trial Lawyers' Ass'n to the Florida initiative, see Baldwin, *Who Shall Decide the Value of a Human Life?*, TRIAL, Oct. 1984, at 4. Baldwin says "[t]his is not a lawyers v. doctors fight, but a battle for the rights of every citizen in the state of Florida, and indeed of this nation." *Id.*

272. For a long list of "band aid" reforms, many quite sensible given the sights of the reformers, see CALIFORNIA CITIZEN'S COMM'N ON TORT REFORM, RIGHTING THE LIABILITY BALANCE (1977).

Similarly, many states made modest efforts in earlier rounds of the medical malpractice crisis to alter the collateral source rule,<sup>273</sup> to reduce the magnitude of plaintiff's legal fees, and to facilitate settlement, through the introduction of mechanisms like screening panels and arbitration.<sup>274</sup>

Attempts at product liability reform are now very much alive in Congress.<sup>275</sup> The most prominent proposal would confine liability in design defect cases to negligence and restrict punitive damages. Admittedly, many products reach national markets. Nevertheless, aesthetics, practicality, and principle argue against this highly selective federalization of tort law, even if, other things equal, the substantive reform makes sense. Again, though, even if states uniformly were to adopt these provisions, this strategy is but another band-aid.<sup>276</sup>

The reform strategies I've just discussed accept the existing tort apparatus as the starting point for reform. These reforms, however, can only at best slightly improve the system. My strategy for reform rejects the existing tort system in accident cases. Band-aids will not do.<sup>277</sup> We need to rebuild from the bottom a new structure which separates entirely the compensatory and deterrence goals so that each is pursued through different social mechanisms.

Much of the recent academic literature has focused on doctrinal reform, pitting the forces for strict liability against devotees of negligence. So far as deterrence is concerned, I agree with Professors with as diverse outlooks as Epstein and Whitford that this distinction is of little moment.<sup>278</sup> However, my position is far stronger: I have argued in Part I why I believe that even a rule of no liability will have little negative impact on safety. As for compensation, nearly all of the present problems would remain even after as thoroughgoing a shift to strict lia-

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273. See generally Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966).

274. For descriptions of the changes in the medical malpractice area, see generally M. FRANKLIN & R. RABIN, *supra* note 65, at 122-23.

275. See Coccia, *Uniform Product Liability Legislation: A Proposed Federal Solution*, 51 INS. COUNS. J. 104 (1984). For recent developments, see *The Product-Liability Debate*, NEWSWEEK, Sept. 10, 1984, at 54.

For recent Congressional hearings on the product liability issue, see *Product Liability Hearings*, *supra* note 35; *Problems Associated with Product Liability: Hearings Before the Subcomm. on Consumer Protection and Finance, Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1979); *Product Liability: Legislative Hearings, Hearings Before the Subcomm. on Consumer Protection and Finance, Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1979); *Product Liability: Legislative Hearings, Supplemental Hearings Before the Subcommittee on Consumer Protection and Finance, Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980).

276. G. EADS & P. REUTER, *supra* note 16, at 125-31.

277. See T. ISON, *supra* note 12, at 37-41.

278. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 160; Epstein, *supra* note 176, at 1724.



bility as is imaginable.<sup>279</sup>

A shift from negligence to strict liability is also unlikely to satisfy the other goals of tort law. Such a shift would actually undercut the aim of punishment and, in most instances, the idea that liability signals socially unacceptable behavior.<sup>280</sup> Moreover, it is inappropriate to endorse vengeance against a nonnegligent injurer. Similarly, strict liability would, at least sometimes, poorly serve the cost-internalization objective since it invites the inappropriate allocation of costs away from victims. Furthermore, other problems of cost internalization noted earlier would remain. Finally, sweeping strict liability is calculated to please virtually none of the corrective justice theorists. Narrower liability might satisfy Epstein if couched one way or Fletcher if stated another way. But the absence of a consensus theory and the practical realities discussed earlier would continue to rob corrective justice of virtually all its real-world relevance.

Examination of two other reform strategies illustrates that even bold ideas fail to resolve tort law's basic dilemmas. The first is captured in a series of clever proposals by Professor Jeffrey O'Connell,<sup>281</sup> who envisions a gross sort of swap of the rights plaintiffs and defendants enjoy under current law. Specifically, he favors plaintiffs' abandoning pain and suffering damages and the collateral source rule in return for defendants' relinquishing the contributory negligence defense and assuming the obligation to pay reasonable attorney fees. O'Connell's changes would undercut cost internalization, and would not advance deterrence or corrective justice goals. The justification for the proposal is better compensation. Unfortunately, O'Connell's resulting compensation system is still one that most would find unacceptably undercomprehensive.

An attractive aspect of these changes is that, if adopted, they would bring tort damages into line with those awarded in other benefit systems. For example, workers' compensation too has abolished contributory fault, largely ignores pain and suffering, and coordinates benefits with health insurance and Social Security. Note, also, that O'Connell's strategy undermines tort from within. With the collateral source rule reversed, tort could continue to dissipate as collateral sources grow.<sup>282</sup> Thus, the O'Connell reforms represent a far better approach to compen-

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279. See *supra* text accompanying notes 165-69.

280. One would have to resort to the unsatisfactory claim that tort signals when the defendant should pay rather than when conduct is bad. See Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 401-09 (1959).

281. See 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;

282. For a British call to reverse the collateral source rule as a step toward the eventual replacement of tort by the social insurance system, see Davies, *State Benefits and Accident Compensation*, 1982 J. SOC. WELF. L. 152.

sation than our current system. However, accident victims presently outside tort's ambit will remain unassisted since these changes do not expand injurer responsibility.<sup>283</sup> Because they are not comprehensive, and because the costs of tort administration would remain high, O'Connell's horsetrading proposals are sensible only as a first step. Their primary appeal is that they could serve the useful transitional purpose of easing people away from the familiar expectation of large tort awards, especially for pain and suffering.<sup>284</sup> In the end, however, we need some other approach to collateral sources that will undermine altogether the need for tort damages.

Professor Guido Calabresi offers a second bold reform idea. While he recognizes the social desirability of compensation and acknowledges the constraints of justice, he views the central purpose of private law as deterrence and cost internalization. He calls his strategy "primary accident cost avoidance." His expression "general deterrence" describes the way proper allocation of costs should optimize both safety and activity levels.<sup>285</sup> He believes the fault system in practice is an ineffective mechanism for furthering general deterrence.

Unfortunately, although he offers a comprehensive and systematic approach to thinking about accident costs, Calabresi has never spelled out a comprehensive alternative *mechanism* to the fault system. He thinks society should impose accident costs on the "cheapest accident cost avoider." In the products liability area, he seems to envision that judges should do this through the technique of deciding what is a "defective product."<sup>286</sup> Elsewhere, however, he seems to favor "tort fines" or charges assessed by a centralized agency.<sup>287</sup> But, in general, he has not solved the institutional design problem: *who* is to identify and impose costs on the "cheapest cost avoider"? In short, despite Calabresi's attraction to traditional private-law solutions, he has not really given us a workable tort reform plan.

Inferentially, the solution closest to Calabresi's that lies within our

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283. O'Connell has advanced other nontort proposals to deal with that. I consider them below. See *infra* notes 300-01 and accompanying text. I should note, however, that these other strategies would do away with the need for his proposals considered here.

284. Great Britain's REPORT OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY (1978) [hereinafter cited as PEARSON REPORT], which explored whether the New Zealand approach should be adopted in Britain, shied away from doing away with tort law because of, in the words of Professor Fleming, "nothing more than a feeling that it would be unpopular to take away a remedy to which the public has become accustomed." Fleming, *The Pearson Report: Its "Strategy"*, 42 MOD. L. REV. 249, 255 (1979).

285. See generally G. CALABRESI, *supra* note 5, at 135-73.

286. See generally Calabresi & Hirschhoff, *supra* note 229.

287. Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 LAW & CONTEMP. PROBS. 429, 453-58 (1968); see also Calabresi, *supra* note 36, at 236-43; Calabresi, *The New York Plan, A Free Choice Modification*, 71 COLUM. L. REV. 267 (1971); Calabresi, *Views and Overviews*, 1967 U. ILL. L.F. 600, 610.

current conception of the tort system would be imposing sweepingly strict tort liability on those parties who appear to be the cheapest cost avoiders. But applying this principle is no easy feat. First, Calabresi has not formulated adequate criteria to specify the level of generality at which the inquiry is to occur. For example, if there is a plane crash in a storm, in deciding who is the cheapest cost avoider should the focus be on airline travel, airline manufacture, transport in general, bad weather accidents generally, or some other category? Calabresi seems to imagine fine tuning each issue to its optimal level of specificity, based upon the costs and benefits of more precise cost allocation. Taking an example that Calabresi has used, if someone has an allergic reaction to hair coloring, we might consider whether the problem should be seen merely as one of cosmetic injuries, by asking whether it is worth the effort to focus more narrowly on injuries from hair dyes, or even more narrowly on harms from hair dyes that come with patch tests. Unfortunately, if judges do this sort of fine tuning on an ad hoc basis as each accident problem comes up, the resulting pattern, taken as a whole, would look quite different from that envisioned by the "systems" approach with which Calabresi started. Moreover, in practice, surely juries would usually want to focus on the specific act rather than address the cheapest cost avoider question at the activity level that Calabresi would often favor. Even if judges were deciding, would they be likely to be especially astute at determining the "cheapest cost avoider?" I doubt it.

Moreover, Calabresi concedes that his strategy would inadequately compensate victims who were determined to be the cheapest cost avoiders. This outcome is troubling. On the other hand, when victims in response manage to reexternalize their costs, through insurance or similar facilities, they will defeat the very point of Calabresi's scheme.

To be sure, Calabresi's notions have actually influenced judges in individual cases.<sup>288</sup> This, however, is quite different from embracing his systematic approach, which, I believe, would be better served if mechanisms other than tort were employed to impose accident costs on those activities that cause them. I will shortly discuss some such mechanisms.

### *B. Insurance Reform*

A different reform strategy involves leaving tort law untouched, but changing the liability insurance system. The most interesting changes would serve two quite different goals. One set would assure that tort victims are compensated through mechanisms like compulsory insurance. For example, a state can require liability insurance as a condition

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288. See, e.g., *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 206-07, 447 A.2d 539, 548 (1982).

of car ownership and combine it with mandatory uninsured motorist coverage to fill in the cracks where the basic rule fails. Indeed, some states have enacted such provisions. However, the solvency gap such measures close is but one small part of the compensation problem.

The other type of insurance reform focuses on deterrence. Of course, even an insurance reform strategy that advanced the cause of deterrence would still not resolve tort law's continued failure as a compensation mechanism. Nonetheless, in the hopes of reducing accidents, one could urge liability insurers to change pricing practices through more experience rating and policy terms through the use of deductibles and coinsurance. However, the burden is on those who favor the principle of decentralized, market-driven pressures to explain why such additional safety-oriented measures, if they would be cost effective, are not in place already. The answer, I suspect, is that either there are no more *effective* deterrent measures to be adopted or that the failure to put such new measures in place arises from market failures which are not easily cured. Put differently, if, for example, some form of deductible or coinsurance "ought" to be more widespread, it will probably take government intervention and not just calls for voluntary insurer action. But demanding certain liability insurance policy terms must then be compared to other regulatory strategies. In any case, we will have moved on to centralized safety regimes and cost allocation mechanisms that take us out of what I would call "tort reform."

### C. *Conclusion to Part II*

Reforms of tort law and liability insurance that focus on compensation can move us towards a more socially desirable system of income protection and medical expense coverage. However, they are at best transitional. Reforms aimed at deterrence are not very promising. To improve on deterrence, we would do better to look outside of tort law.

## III

### TAILORED COMPENSATION PLANS, GENERAL ACCIDENT PLANS, AND COMPREHENSIVE DISABILITY COMPENSATION PLANS

#### A. *Traditional Strategies: Tailored Compensation Plans*

Over the years there have been numerous proposals for compensation plans that cover a specific category of accidents. In general, these tailored plans are meant to cover on a no-fault basis income loss, medical expenses, and rehabilitation costs. Some schemes seek to supplant tort law in their area of applicability. Others preserve a right to sue for tradi-

tional damages provided the victim has a conventional cause of action and remains partly uncompensated after receiving the plan's benefits.

In America, workers' compensation and automobile no-fault plans are the major tailored compensation schemes. Workers' compensation is the oldest and most important. Widely enacted at the beginning of this century, it is now a feature of every state's accident-compensation program. Workers' compensation covers injuries that arise out of and occur in the course of the job. In principle, workers' compensation was meant to replace a worker's tort right with assured compensation for basic economic loss, formally provided by the employer as part of the employment relationship.<sup>289</sup>

The second major scheme, no-fault automobile insurance, was enacted in about two dozen states during the late 1960's and 1970's to deal with road accidents. Although varied in design, the general goal is to assure compensation for basic economic loss to moderately injured victims of auto accidents. Unlike workers' compensation, auto no-fault plans extinguish tort rights, if at all, for moderate injuries only. Although at one time "auto no-fault" seemed likely to sweep the nation, its momentum appears to have dissipated.<sup>290</sup>

A wide range of other tailored accident-compensation schemes have been proposed and occasionally enacted. These schemes target accident categories such as nuclear accidents,<sup>291</sup> drug injuries,<sup>292</sup> toxic-chemical injuries and diseases,<sup>293</sup> accidents occurring during medical treatment,<sup>294</sup>

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289. In practice, as noted above, workers find ways to sue third parties in tort, especially in cases of construction-site injuries and product injuries.

290. *Consumer Reports*, a long supporter of no-fault, blames this on the trial lawyers. See *Auto Insurance: How It Works*, *supra* note 74, at 546.

291. See Estep, *Radiation Injuries and Statistics: The Need for a New Approach to Injury Litigation*, 59 MICH. L. REV. 259 (1960). For a proposal to internalize catastrophic losses arising from nuclear power plants and liquid natural gas terminals, see Meyer, *Regulating Catastrophes Through Financial Requirements: A Model State Statute*, 20 HARV. J. ON LEGIS. 441 (1983).

292. See Fleming, *Drug Injury Compensation Plans*, 30 AM. J. COMP. L. 297 (1982); Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1 (1973). For proposals restricted to DES injuries, see Note, *Bearing the Burden of DES Exposure*, 60 OR. L. REV. 309, 317-24 (1981); Comment, *Industry-Wide Liability*, 13 SUFFOLK U.L. REV. 980, 1015-22 (1979).

293. See Soble, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act*, 14 HARV. J. ON LEGIS. 683 (1977); Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 177 (1983); Treiger, *Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179 (1983); Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victims Compensation*, 35 STAN. L. REV. 575 (1983); Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy, Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1344-56 (1983). For a proposed no-fault solution to losses caused by hazardous waste, see INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, A REPORT TO CONGRESS BY THE "SUPERFUND SECTION 301(E) STUDY GROUP," 97th Cong. 2nd Sess. (Sept. 1982). For comments on the Superfund Study Group's proposals, see Freenan, *Toxic Torts, Hazardous*

passenger public-transportation accidents,<sup>295</sup> dangerous product injuries,<sup>296</sup> victims of human experimentation,<sup>297</sup> injured school children,<sup>298</sup> and victims of violent crimes.<sup>299</sup> As a variation on these plans, Professor O'Connell has advanced a series of inventive proposals for elections by individual enterprises to substitute no-fault plans for tort benefits.<sup>300</sup>

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*Waste and the Superfund*, 2 J. PROD. LIAB. 149 (1983); Grad, *Injuries from Exposure to Hazardous Waste: Can the Victim Recover?*, 2 J. PROD. LIAB. 133 (1983).

294. Carlson, *A Conceptualization of A No-Fault Compensation System for Medical Injuries*, 7 LAW & SOC'Y REV. 329 (1973); Havighurst, "Medical Adversity Insurance"—*Has Its Time Come?*, 1975 DUKE L.J. 1233; Havighurst & Tancredi, "Medical Adversity Insurance"—*A No-Fault Approach to Medical Malpractice and Quality Assurance*, 51 MILBANK MEMORIAL FUND Q. 125 (1973); see also Henderson, *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659 (1982); Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590 (1973). For an important earlier treatment, see Ehrenzweig, *Compulsory "Hospital-Accident" Insurance: A Needed First Step Toward the Displacement of Liability for "Medical Malpractice"*, 31 U. CHI. L. REV. 279 (1964). For a comparative perspective, see Cohen & Korper, *The Swedish No-Fault Patient Compensation Program: Provisions and Preliminary Findings*, 1976 INS. L.J. 70.

295. Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705 (1916); Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1 (1968); Milford, *A No-Fault Aviation Insurance Plan*, 41 J. AIR L. & COM. 211 (1975).

296. See generally J. O'CONNELL, *supra* note 103. For earlier proposals, see A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT: TRENDS TOWARD AN ENTERPRISE LIABILITY FOR INSURABLE LOSS* (1951); see also O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973) (where Professor O'Connell first published his sweeping proposals to replace tort law with no-fault enterprise liability).

297. See 1 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *COMPENSATING FOR RESEARCH INJURIES* (1982).

298. See Kimball, *Compulsion Without Protection or Recourse: The Case for No-Fault Accident Insurance for School Children*, 1975 UTAH L. REV. 925.

299. See, e.g., Geis & Edelhertz, *California's New Crime Victim Compensation Statute*, 11 SAN DIEGO L. REV. 880 (1974); Rothstein, *How the Uniform Crime Victims Reparation Act Works*, 60 A.B.A. J. 1531 (1974).

300. O'Connell's 1973 proposals for expanding no-fault coverage beyond auto insurance, *supra* note 296, envisioned both mandatory no-fault in extrahazardous activity settings and elective no-fault in other settings. Interestingly enough, O'Connell's ideas for both mandatory no-fault enterprise liability and elective no fault draw on earlier Ehrenzweig proposals. See Ehrenzweig, "Full Aid" *Insurance for the Traffic Victim—A Voluntary Compensation Plan*, 43 CALIF. L. REV. 1 (1955). Soon O'Connell began to concentrate on the elective strategy. See, e.g., O'Connell, *Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U.L.Q. 693; O'Connell, *supra* note 270; O'Connell, *Elective No-Fault Liability by Contract—With or Without an Enabling Statute*, 1975 U. ILL. L.F. 59; O'Connell, *No-Fault Liability by Contract for Doctors, Manufacturers, Retailers and Others*, 1975 INS. L.J. 531; O'Connell, *An Elective No-Fault Liability Statute*, 1975 INS. L.J. 261; O'Connell, *No-Fault Insurance for Injuries Arising from Medical Treatment: A Proposal for Elective Coverage*, 24 EMORY L.J. 21 (1975). See generally J. O'CONNELL, *THE LAWSUIT LOTTERY* (1979).

For comments on O'Connell's proposals, see, e.g., Ford, *supra* note 52; Freedman, *No-Fault and Products Liability: Can One Live Without the Other?*, 12 FORUM 100 (1976); Freedman, *No-Fault and Products Liability: An Answer to a Maiden's Prayer*, 1975 INS. L.J. 199; Schwartz, *Products Liability and No-Fault Insurance: Can One Live Without the Other?*, 12 FORUM 130 (1976); Schwartz, *Professor O'Connell's No-Fault Plan for Products and Services: Have New Problems Been Substituted for Old?* 70 NW. U.L. REV. 639 (1975); Keeton, Book Review, 13 HARV. J. ON LEGIS. 429 (1976) (reviewing J. O'CONNELL, *ENDING INSULT TO INJURY* (1975)).

Professor Franklin also ventured into the elective no-fault arena in connection with a specific

This election would allow an agreement between injurer and victim to address separately certain kinds of product, medical, or sports injuries.<sup>301</sup>

Advocates of these tailored compensation plans seem primarily motivated by a concern for uncompensated victims—those people for whom tort law fails to provide a satisfactory remedy. Sometimes tort law's shortfall arises for clear doctrinal reasons, such as when an injurer is not at fault and strict liability is unavailable. Medical accidents are in this category. Other times the problem is insolvency, as with crime victims. Still other times, the connection between the victim and his injurer may be overly speculative, as in toxic tort claims. In any case, we consider most of the victims for whom these compensation plans are tailored to be innocent, needy, and deserving.

The administrative inefficiencies and high costs attending the tort apparatus often appall reformers. These proposed compensation schemes are meant to be simpler, faster, and far cheaper to administer. They strive for administrative efficiency by reducing the need for lawyers, obviating proof of fault, and, in some cases, eliminating high marketing costs such as sales commissions on private insurance policies.

Many reformers further conclude that tort law now pays some victims too generously. Thus, reformers propose that benefits paid through compensations scheme be lower in some respects than what tort law provides. Lower compensation benefits conserve funds to allow coverage of more claimants. Also they may provide timelier payments. The four main sources of reduction are (1) sharply curtailing damages for pain and suffering, (2) eliminating payment for losses covered by at least some other sources, (3) imposing ceilings on recovery, for example, by limiting the percentage of monthly earnings to be replaced, and (4) introducing waiting periods or other deductibles that shift the cost of small injuries onto victims. Not all tailored schemes employ such strategies. And as noted above, some maintain victim tort rights.

These plans not only aim to compensate specific classes of victims. They also strive to internalize accident costs to activities responsible for them.<sup>302</sup> I later return to this feature.

Why have reformers proposed tailored compensation plans?

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problem in his *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439 (1972).

301. In some versions of O'Connell's plan the would-be injurer, by his election, forces his buyers to make the trade. Elsewhere, victims can make the election even after the injury has occurred. See O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985).

302. Compensation schemes for violent crimes have trouble pursuing this goal for obvious reasons.

Despite claims of fairness and deterrence,<sup>303</sup> politics and personal preferences also play a role. It is quite understandable, for example, that someone interested in the problem of plane crashes and disgusted by their treatment under current tort law would propose a plan specifically tailored to that subject. In short, people notice that tort law is not doing an adequate job on a particular issue which concerns them. They then seek various reforms without attempting to solve interrelated problems about which they may know and care little. The result, however, can be an overall pattern that looks like a crazy quilt. One steps back and asks, "why these victims and not others?"

Furthermore, the way social problems are defined often controls the perceived urgency of political action. For example, workers have always suffered a significant proportion of serious accidents, and at the turn of this century it was thought that tort law particularly ill-served them. During the Progressive Era, therefore, when workplace reforms were a general matter of high priority, the political climate was ripe for passage of workers' compensation rather than plans aimed at all injuries. Similarly, automobiles were early on seen as the other great source of serious accidents. Pressure for reform built up until around 1970 when, with consumer protection measures generally in vogue, the times seemed right for the enactment of auto no-fault plans. Auto insurance companies were then suffering losses despite rapidly escalating premiums. Thus, reformers could emphasize the unhappiness of both insured and insurers.

The push for tailored compensation plans reveals a pragmatic approach of dealing with specific problems as they command increased attention. Other problems packaged less attractively have less political cachet. For example, most Americans probably do not think about accidents in general because this is too abstract.<sup>304</sup> Interest in compensation plans for victims of crimes ebbs and flows with political concern over the "crime problem." Likewise, because toxic chemicals are currently in the public eye, compensation plans for these victims are now fashionable. This approach, while understandable, creates considerable problems. A

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303. Ison has argued that cost internalization is the only justification for tailored plans. T. ISON, *supra* note 12, at 35.

304. Cf. R. KEETON & J. O'CONNELL, *supra* note 25, at 4; see also *id.* at 232-33. Keeton and O'Connell first tried to justify their focus on auto accidents on the ground that, unlike bathtubs, autos are a social problem. I am baffled by this argument unless it merely restates their observation that auto problems are "in the public eye." Keeton and O'Connell contend that "a narrower focus than concern about all misfortune is the only hope for marshaling public opinion to support reform." *Id.* at 4. In short, they made a strategic decision to attempt the reform of only a large piece of the problem. Of course, the piece they chose is well understood by the legal profession and poorly managed by tort law.

One would think that people hurt in bathtub falls actually need more protection since tort law ignores them. Nevertheless, auto accidents are an inviting target in view of the resources they already command, while compensation for bathtub accidents implies new costs.



whole series of independent bureaucracies and uncoordinated arrangements can come into being and are difficult to dislodge to make way for more comprehensive reform.

Some argue that major reform will emerge only as the final product of a series of smaller steps. However, I have important doubts about tailored plans as stepping stones to wider reform. First, despite all the proposals that have been made, since state legislative agendas have not really advanced beyond automobile no-fault plans and workers' compensation, there is no good evidence that tailored plans are the right politics after all.

Second, the adoption of a tailored compensation plan does not assure the end of tort law even for the subject of the plans. Judicial decisions and legislative compromises surrounding auto no-fault and workers' compensation demonstrate the point. One of my greatest disappointments when Professors Keeton and O'Connell campaigned for auto no-fault was their willingness to compromise the theory behind no-fault in order to make the proposal politically more palatable. Although they well demonstrated that the tort system inadequately compensates many seriously injured motoring victims, for practical and political reasons their scheme limited no-fault damages to \$10,000. While understandable, this hardly solves the problem of the very seriously injured and undercompensated victims. Even in New York and Michigan, the only states to have adopted broad auto no-fault plans,<sup>305</sup> a large proportion of claims remain alive in the tort system, and the most seriously hurt are still undercompensated. In addition, having made an excellent case against general damages, Keeton and O'Connell advocated their elimination in only run-of-the-mill cases. If discouraging small cases was the only goal, raising nonrecoverable court filing fees for personal injury cases would have been a better solution. If Keeton and O'Connell had remained true to their own logic, they might have proposed a more drastic curtailment of pain and suffering awards as well as a modest waiting period before losses are payable so as to free up more funds to pay no-fault benefits for economic losses.

Politically, Keeton and O'Connell's proposals attempted to placate both lawyers, who could continue to look forward to the big cases, and potential plaintiffs in the mass of little cases, who would retain their ability to recover all their economic losses. These concessions were high prices to pay.<sup>306</sup> Indeed, with principles already compromised, it is perhaps not surprising (admittedly now with the benefit of hindsight) that

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305. See O'Connell & Beck, *An Update of the Surveys on the Operation of No-Fault Auto Laws*, 1979 *INS. L.J.* 129, 131-32.

306. For Bernzweig's comments about Keeton and O'Connell's "anticipatory capitulation," see E. BERNZWEIG, *supra* note 12, at 157.

many states adopted very modest no-fault plans that are merely add-ons to the tort system. In those states we have paternalism of a peculiar sort: people must insure themselves against their own minor auto injuries.

*B. Newer Strategies: Accident Compensation Plans*

Tailored compensation schemes fail to resolve the inadequacies of tort law as a compensation system. The primary defect lies in the lack of a principled explanation for picking out separate classes of accident victims for compensation on a nonfault basis.<sup>307</sup> Victim need is independent of cause or type of injury. Attacking "tailored" plans, Professor Marc Franklin said, "I see little reason to single out automobile victims for special treatment. I do not see why, as an initial proposition, today's law should care *how* a limb was broken, whether by an intentional wrongdoer, a negligent automobile driver, a nonnegligent driver, a wall toppled by an earthquake or a fall in the bathtub."<sup>308</sup> Reform-minded scholars opposed to tailored compensation schemes usually conceptualize the problem as one of *accidents* taken as a whole. These politically bold advocates propose general accident compensation plans to replace tort law.

General plans have been advocated by many, including Professor Franklin,<sup>309</sup> Dean Richard Pierce,<sup>310</sup> Professor Roger Henderson,<sup>311</sup> and Mr. Eli Bernzweig.<sup>312</sup> Additionally, New Zealand erected a plan of this sort in the 1970's. The New Zealand plan is indebted to the Royal Commission, which issued the Woodhouse Report of 1967,<sup>313</sup> and the singular efforts of Geoffrey Palmer, then professor, later member of parliament.<sup>314</sup>

307. See T. ISON, *supra* note 12, at 35.

308. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 777 (1967) (emphasis in original, footnotes omitted).

309. Franklin, *supra* note 308.

310. Pierce, *supra* note 64.

311. Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEX. L. REV. 117 (1969).

312. E. BERNZWEIG, *supra* note 12.

313. WOODHOUSE REPORT, *supra* note 17.

314. For early discussions of the New Zealand plan, see Franklin, *Personal Injury Accidents in New Zealand and the United States: Some Striking Similarities*, 27 STAN. L. REV. 653 (1975); Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MOD. L. REV. 361 (1974); Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand*, 21 AM. J. COM. L. 1 (1973) [hereinafter cited as Palmer, *A Requiem*]; Palmer, *Abolishing the Personal Injury Tort System: The New Zealand Experience*, 9 ALTA. L. REV. 169 (1971); Palmer & Lemons, *Toward the Disappearance of Tort Law—New Zealand's New Compensation Plan*, 1972 U. ILL. L.F. 693; Szakats, *Community Responsibility for Accident Injuries: The New Zealand Accident Compensation Act*, 8 U.B.C. L. REV. 1 (1973); Vennell, *The Scope of National No-Fault Accident Compensation in Australia and New Zealand*, 49 AUSTL. L.J. 22 (1975).

For appraisals of the New Zealand scheme after several years of operation, see T. ISON, *ACCIDENT COMPENSATION* (1980); G. PALMER, *COMPENSATION FOR INCAPACITY* (1979); Hodge, *No-*

These comprehensive compensation plans all replace tort damages with assured compensation for lost income, medical expenses, and rehabilitation costs without regard to type of accident or fault. The plans differ somewhat along basic design dimensions: (1) legal mechanisms;<sup>315</sup> (2) administration;<sup>316</sup> (3) level of benefits provided, such as the proportion of income to be replaced;<sup>317</sup> and lastly, (4) integration with other compensation schemes such as social insurance and employee benefits, including health insurance. I won't evaluate these policy choices here.

I will focus on financing, however, which is an important, controversial dimension of these proposals. Some, like me, argue that the plan's funding mechanism is not the place to pursue either the deterrence or cost internalizing goals. Professor Palmer is now in this camp, despite earlier views to the contrary.<sup>318</sup> Under this approach, the most attractive financial source would probably be a progressive general tax, like the national income tax. An alternative might be another broad-based mechanism like the payroll, sales or value-added tax.

At the opposite extreme are those advocates of comprehensive no-fault plans who would use the funding arrangements to serve deterrence and cost-internalization. Like many advocates of tailored plans, they generally agree that tort law does not well serve these goals. Nonetheless, they give such goals high priority and believe that a well-structured general accident compensation scheme will effectively and efficiently further them. The Franklin<sup>319</sup> and Pierce<sup>320</sup> plans are good examples of this approach.<sup>321</sup> They impose differential charges at the firm level so as to

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*Fault in New Zealand: It Works*, 50 INS. COUNS. J. 222 (1983); Palmer, *What Happened to the Woodhouse Report?*, 1981 N.Z.L.J. 561 [hereinafter cited as Palmer, *What Happened*]; Pfenningstorf, *Accident Compensation in New Zealand: How Does It Work?*, 1981 AM. B. FOUND. RESEARCH J. 1153; see also Henderson, *supra* note 225.

315. Henderson would broaden workers' compensation to cover nonwork injuries of both employees and their dependents. By contrast, the others would create new regimes as New Zealand did.

316. An important set of choices in this is whether to use regular public agencies, independent public corporations, or private claims handlers. There is also the delicate matter of whether the plan should be administered on the national or state level.

317. New Zealand's plan generously replaces income and, to a limited extent, compensates for serious disfigurement and long-term pain and suffering. Benefits under Franklin's plan would include all reasonable medical expenses and 85% of wage loss above a modest deductible. There would be a moderate weekly ceiling, however, above which high earners would provide their own protection. Franklin, *supra* note 308, at 799-800. No pain and suffering benefits would be paid, and victims guilty of "serious misconduct" would be limited to 75% of wage loss. *Id.* at 800-01. These benefits would be the first and primary source of compensation for an accidental loss. *Id.* at 802.

318. See Palmer, *What Happened*, *supra* note 314, at 571.

319. See Franklin, *supra* note 308.

320. See Pierce, *supra* note 64.

321. Both Franklin and Pierce draw on the Calabresian idea of general deterrence and share a distrust of other behavioral control devices. Pierce devotes considerable attention to the limits and shortcomings of regulation—what Calabresi calls "special deterrence." Pierce, *supra* note 64, at

emphasize strongly accident avoidance incentives. Indeed, I see them as a very logical conclusion to the arguments advanced by Professor Calabresi.

In Professor Franklin's proposal, the compensation fund would initially receive revenue from general taxes and license fees paid by automobile drivers. But in cases of "entrepreneurial activity," every accident leading to a payout would be charged back to the cause of the harm.<sup>322</sup> Franklin is confident that over the long run this financing method would be fair; but he recognizes that a run of bad luck could unfairly drive some firms out of business. Therefore, firms could insure against charges the fund would impose.<sup>323</sup> Very plainly, for Franklin, the point of the reimbursement funding strategy is deterrence. However, he is also interested in having industries pay their way, even where no safer behavior can efficiently be achieved. On the other hand, beyond business activity, Franklin finds the costs of individualizing contributions to outweigh the benefits of possible behavior change or social cost-accounting. He is also concerned that nonbusiness activities may face unfairly large charges which they could not then pass on. Motorist payments, therefore, would be based not on individual driving records, but rather on the sort of criteria that liability insurance uses today, such as age, miles driven, and car location. The aggregate sum collected from these license fees would equal approximately half of the benefits paid out to victims of private motoring accidents.<sup>324</sup> Under Franklin's plan, the same agency that disperses benefits also levies charges on the specific enterprises which reimburse the fund. However, this agency would not have other safety-promoting functions.<sup>325</sup>

In contrast, Dean Pierce advocates the creation of a "Safety Enhancement and Compensation Agency" which would compensate accident victims and regulate safety "in all areas of the economy."<sup>326</sup> Although this agency would regulate directly, its major technique of behavioral control would be to impose accident costs on those "entities in the best position to control those costs."<sup>327</sup>

More precisely, Pierce envisions that this agency would "accumulate data on accident costs by type of activity and, when possible, by the

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1308-19. Bernzweig proposes funding mechanisms that attend carefully to "social cost accounting" values. E. BERNZWEIG, *supra* note 12, at 178-82.

322. Franklin, *supra* note 308, at 806-07. He admits there will be some difficulty in determining the "cause" of the harm using criteria other than fault. *Id.* at 804. But he is hopeful that with experience it will be workable. *Id.* at 806-07 n.124.

323. *Id.* at 807.

324. *Id.* at 802-03. Later in his article, however, Franklin suggests the possibility that fines imposed on bad drivers be paid into the fund. *Id.* at 810.

325. See Pierce, *supra* note 64, at 1320 n.121.

326. Pierce, *supra* note 64, at 1320.

327. *Id.* at 1321.

firms whose products or services were involved in accidents.”<sup>328</sup> Payments to accident victims would not be the only source of data; the agency would use statistics to determine the relationships of activities to injuries and to identify the cheapest cost avoider.<sup>329</sup>

Unlike Franklin, Pierce proposes that when assigning costs to accidents, the agency use standardized damage amounts rather than figures used for compensation. A death would carry a fixed cost no matter who was killed, and wage losses would be treated the same regardless of prior wage of the victim.<sup>330</sup> Using this data the agency would then assess costs to the activity and the industry. Pierce would allocate costs to individual firms when firm level data was reliable and the firms could spread accident costs over time.<sup>331</sup> The central purpose in assigning costs would be to provide the proper market incentives for optimal investment in safety. Pierce is optimistic about changing injurer conduct through cost allocation strategies. However, he remains skeptical whether denying compensation for certain behavior would modify victim conduct.<sup>332</sup>

In an important sense, the Pierce and Franklin plans approximate a series of separately funded tailored compensation schemes that use merit-rating and cost-allocation principles wherever feasible. Compared to a series of tailored plans, however, their proposals have the decided advantage of uniform benefits across different types of accidents. Furthermore, the compensation administering agency would be the same. These plans also avoid large gaps and overlaps in compensation that would likely occur were equivalent tailored plans adopted serially.

Falling in between the fine-tuned approaches of Franklin and Pierce and the broad-based financing plans now favored by Palmer and me is an approach illustrated by Professor Ison’s proposal for Great Britain. This plan would vary costs at the industry or activity level, but not at the individual firm or act level. Employers’ rates would vary according to the severity and frequency of accidents and industrial disease occurring in each industry. The charge on motoring would vary for different categories of vehicles based upon “varying degrees of the risk created.”<sup>333</sup> Presumably this means that trucks and taxis would pay more than private cars. Other activities might also have to pay into the fund because of claims they generate. Ison suggests that cigarette smoking as an example.<sup>334</sup> Finally, general taxes would make up the difference.

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328. *Id.* at 1322.

329. *See* Pierce’s discussion, *id.* at 1324.

330. *Id.* at 1323.

331. *See id.* at 1322-23.

332. *Id.* at 1321 n.124. Pierce notes that the class of accidents falling within a narrow definition of assumption of risk might be such a conduct-influencing category.

333. T. ISON, *supra* note 12, at 57.

334. *Id.* at 58.

New Zealand's compensation system adopts a funding strategy similar to Ison's, but tempered by political realities. The New Zealand Royal Commission first proposed a broad-based financing mechanism.<sup>335</sup> It envisioned a flat levy on all employers of one-percent of wages and salaries because "[a]ll industrial activity is interdependent and there should be a general pooling of all the risks of accidents to workers."<sup>336</sup> As enacted, however, the legislation provided for both (1) "classifications and rates of levy" that vary by occupation or industry,<sup>337</sup> as well as (2) individual firm-level penalties and rebates.<sup>338</sup> Both of these devices, at least in principle, could further Professor Calabresi's cost internalization goals.<sup>339</sup> At the time, Professor Palmer shared these goals and expressed worry that "insufficient attention had been given to the economic implications of allocating accident costs under the scheme."<sup>340</sup> Even then, however, Palmer appreciated some practical problems. For example, many earners would be hurt away from the job and it would seem inappropriate to add these costs to the injured's work setting as the New Zealand plan envisioned.

What actually happened was that in 1973 a number of differential industrial classifications were established, and in 1976 more were added, bringing the total to twenty-one.<sup>341</sup> They have not been modified since. Remarkably, no one justifies this scheme by pointing to accident compensation costs under the new plan. Instead, these classifications seem largely based upon prior experience with workers' compensation costs. Neither the firm-level penalty nor the rebate provision had been used at all through 1979.<sup>342</sup> Professor Ison considers the individual-firm experience-rating provisions largely unworkable.<sup>343</sup> With regard to motor vehicles, the scheme at the start set different levies for cars, trucks, taxis and buses. The rates do not depend, however, upon one's driving record, the miles one drives, or the kind of driving one does.<sup>344</sup> In general, therefore, the auto and employer charges carry over the sorts of costs that

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335. See G. PALMER, *supra* note 314, at 378-80.

336. WOODHOUSE REPORT, *supra* note 17, ¶ 467, at 172.

337. G. PALMER, *supra* note 314, at 367.

338. *Id.* at 368.

339. See *id.* at 366.

340. Palmer, *A Requiem*, *supra* note 314, at 30.

341. G. PALMER, *supra* note 314, at 367.

342. For the situation as of 1977, see *id.* at 368. As of 1979 it was reported that although the Accident Compensation Commission had not yet levied extra costs on employers with "exceptionally poor accident records" the reason was that it was awaiting more detailed and reliable statistics before doing so. Holyoak, *Accident Compensation in New Zealand Today*, in ACCIDENT COMPENSATION AFTER PEARSON 191 (D. Allen, C. Bourn & J. Holyoak eds. 1979). Casual conversation with New Zealand officials suggests that a trivial amount of money has since been awarded to a handful of enterprises under the rebate provisions.

343. T. ISON, *supra* note 314, at 128-29.

344. G. PALMER, *supra* note 314, at 368-69. Palmer has suggested switching to a petrol tax. *Id.*

people were paying under the replaced plans. And these charges have simply been augmented as additional funds are needed.

### C. *Broader Horizons: Comprehensive Disability Compensation Plans*

The next step in the development of compensation systems may be to expand the New Zealand approach by erasing the line between victims of accident and victims of illness. In 1967 Professor Ison advanced a scheme for Great Britain that would cover both of these classes of the disabled.<sup>345</sup> The Woodhouse Report for New Zealand, probably influenced by Ison, discussed the idea that same year.<sup>346</sup> Indeed, the Woodhouse Report for Australia endorsed just such a broadened scheme in 1974,<sup>347</sup> as has Professor Palmer.<sup>348</sup> None of these recommendations has yet been adopted, although the Australian plan came close.

If compensation is the central purpose of the plan, there seems no principled reason to single out accident victims when victims of disease are equally deserving.<sup>349</sup> Both sorts of disabilities can come without warning and be equally disruptive. Both accidents and illnesses can incite their victims to anger, with the world in general and with specific individuals. Indeed, many might think the ill are a more innocent group than the injured.<sup>350</sup>

Additionally, as New Zealand has learned, administering a general accident compensation plan creates awkward boundary-drawing

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345. T. ISON, *supra* note 12, at 54-67. Professor Ison's Canadian version of his proposal can be found in Ison, *Tort Liability and Social Insurance*, 19 U. TORONTO L.J. 614 (1969).

346. WOODHOUSE REPORT, *supra* note 17, ¶ 17, at 26. For pragmatic reasons, the Woodhouse Report adopted the first step only, hoping to solve at the outset problems associated with the existing tort and workers' compensation plans. *Id.* As for his 1967 plan, Franklin noted, "disease presents a similar social problem to the extent it disables and causes serious medical expense and income loss. Disease is omitted for ease of discussion." Franklin, *supra* note 308, at 777 n.10. Nevertheless, Franklin offers no specifics on how a scheme covering disease would meet his concerns about resource allocation, nor does he confront the complicated collateral source issues raised by such an extension.

347. See G. PALMER, *supra* note 314, at 328-30.

348. See, e.g., Palmer, *What Happened*, *supra* note 314, at 568-69. For Professor Henderson's critique on the failure of New Zealand to cover illness in its scheme, see Henderson, *supra* note 225, at 792-94. Tempered by current sensitivities to our limited national wealth, Professor David Owen has also endorsed the adoption of a disability compensation plan in America—when we can afford it. See Owen, *Rethinking the Policies of Strict Liability*, 33 VAND. L. REV. 681, 705 (1980).

349. See P.S. ATIYAH, *supra* note 13, at 498-508; T. ISON, *supra* note 314, at 18-32; Palmer, *What Happened*, *supra* note 314, at 568-69. For a criticism in the British context of the favored treatment of victims of industrially caused disabilities as compared with others, see Lewis, *Tort and Social Security: The Importance Attached to the Cause of Disability with Special Reference to the Industrial Injuries Scheme*, 43 MOD. L. REV. 514 (1980). And for the argument that road accident victims should not receive better treatment than others of the disabled, see Lewis, *No-Fault Compensation for Victims of Road Accidents: Can It Be Justified?*, 10 J. SOC. POL. 161 (1981).

350. For example, they might be less often contributorily negligent. See T. ISON, *supra* note 314, at 21.

problems.<sup>351</sup> Defining an "accident" raises the same sort of difficulties as workers' compensation has continually faced determining whether the worker's harm arose "out of and in the course of" the job. While there will be some boundary-line problems in any scheme, the ones created by a general accident-compensation plan can be very thorny.<sup>352</sup>

Where there is a plan that compensates only accident victims, the ill might receive highly unequal treatment. New Zealand does have social welfare provisions for victims of disease, but they are less generous.<sup>353</sup> Since America guarantees the sick even less protection than New Zealand, the problem would be greater if the U.S. were to adopt an accident-compensation plan.

At a less lofty level, a general accident-compensation plan must cover occupational diseases if workers are not to be left worse off than they are today under workers' compensation. This creates another horizontal inequity problem: a worker's off-the-job accidents would be covered, but his nonoccupational sicknesses would not be.

Other arrangements for compensating accident victims, such as sick leave and disability insurance must be coordinated with the accident-compensation scheme. Indeed, American workers in "progressive" employment already are well protected against income losses and medical expenses from almost any accident.<sup>354</sup> While the problem of coordinating benefits exists for all compensation plans in general, the problem grows smaller the wider the net is cast.

Donald Harris and his colleagues at the Centre for Socio-Legal Studies at Oxford in England have taken the usual objections to both tailored and general accident-compensation plans to their logical conclusion. Their empirical examination of tort law's operation led to proposals bringing all the disabled together for common treatment in a single social welfare plan.<sup>355</sup> This plan would include the victims of accidents, illness, and birth defects.<sup>356</sup> These proposals bear a closer resemblance to

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351. See *id.* at 23-29; G. PALMER, *supra* note 314, at 248-70.

352. Henderson says,

[t]he distinctions that must be drawn under the Act sometimes border on the ridiculous. If a person drinks contaminated water and becomes ill, presumably he will not recover compensation; but if the same person contracts malaria from having been bitten by a mosquito that came into contact with the water, he can recover because the bite was an "accidental" injury.

Henderson, *supra* note 225, at 783 n.10. Similar problems plagued early U.S. workers' compensation programs, which covered accidents but not occupational disease.

353. Ison found that victims of disease in New Zealand sometimes feel demoralized because they are treated worse than accident victims (with whom they often come in contact in hospitals and rehabilitation centers). T. ISON, *supra* note 314, at 22.

354. See *infra* pp. 645-48.

355. See COMPENSATION AND SUPPORT, *supra* note 12, at 329-49.

356. Ison discusses disabled children under the heading of "other possible benefits." T. ISON, *supra* note 12, at 68.



proposed income maintenance reforms than to traditional tort reforms. For example, some aspects of Harris's plan parallel recent Thatcher government initiatives on mandatory sick leave.<sup>357</sup> Others resemble the agenda of Britain's Disability Alliance, which arose in the context of welfare reform and call for cash payments to all disabled regardless of means.<sup>358</sup>

Altering an accident-compensation plan to include the disabled entails a dramatic expansion of the scheme. Illnesses are a considerably larger economic problem than accidents, costing more workdays and medical expenses. Illnesses not only disable more people, but also lead on average to more debilitating medical consequences.<sup>359</sup> According to Ison's work in New Zealand, "it is clear that only a minority of disabilities and deaths result from injury by accident."<sup>360</sup>

From a national budgetary perspective, the proposed changes are not as sweeping as might be imagined, however. Countries like Britain, Australia and New Zealand already have strong social-welfare programs in place. These deal with both income losses and medical expenses associated with sickness. As Ison recognized nearly twenty years ago, such proposals contemplate the sensible integration of accident coverage into the basic social-welfare fabric of the country.<sup>361</sup> America, of course, must start from a more modest baseline of governmentally provided protection. In my judgment, therefore, our vast private employee benefit system must play an important role in any parallel proposals here.

Harris and his colleagues are to be commended for rethinking these problems from the ground up. They have focused their income-replacement proposals upon the duration of need—envisioning distinct treatment for short-term, temporary, and permanent disabilities.<sup>362</sup> This

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357. See COMPENSATION AND SUPPORT, *supra* note 12, at 343-46.

358. See generally DISABILITY ALLIANCE, DISABILITY RIGHTS HANDBOOK FOR 1980, at 48 (L. Loach, P. Townsend & A. Walker eds. 1980); DISABILITY ALLIANCE, MEMORANDUM TO THE DHSS ABOUT THE RECOMMENDATIONS OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY 1 (1978); Palmer, *What Happened*, *supra* note 314, at 568. Indeed, the Woodhouse Report for Australia also envisioned extending coverage in this way. See *supra* note 346 and accompanying text.

359. See COMPENSATION AND SUPPORT, *supra* note 12, at 325-27.

360. T. ISON, *supra* note 314, at 19. Ison has shown how longer initial waiting periods could mitigate cost increases stemming from an extension of the New Zealand plan to cover illness. This would also shift resources to the more severely injured. See *id.* at 188-89.

361. T. ISON, *supra* note 12, at 78-79.

362. In supporting the extension of New Zealand's plan to cover disease, Ison also distinguishes between long- and short-term problems. He proposes that the employer be responsible for the first month of coverage through mandatory minimum sick leave benefits. The national plan would take over after the first month. T. ISON, *supra* note 314, at 188. In his original plan, Ison too had divided responsibility between different mechanisms depending upon duration. See T. ISON, *supra* note 12, at 59-65. For another endorsement of the policy of providing separate treatment for short and long term injuries, see Atiyah, *What Now?*, in ACCIDENT COMPENSATION AFTER PEARSON 227, 247 (D. Allen, C. Bourn & J. Holyoak eds. 1979).

focus is similar to my own strategy, which I will discuss in Part IV. At that time, I will also criticize the Harris approach for still thinking too narrowly about the income-maintenance task.<sup>363</sup>

*D. Critique: Misconceived Reliance on Cost-Internalizing Strategies*

Before I discuss my proposals, I must clarify my opposition to financing mechanisms for compensation plans that incorporate social-cost-accounting features. In taking this position, I differ from Professor Calabresi and many reformers who propose tailored, general, or comprehensive disability-compensation plans. They believe that any substitute for tort should, in principle, allocate accident costs to their sources.

Arguments for tailored compensation plans often depend as much on who pays as who benefits. For example, where do you see proposals to compensate auto-accident victims with state personal income taxes? Indeed, advocates of tailored proposals such as Professors Merrill (drug injuries) and Havighurst (medical injuries) have clearly been influenced by Professor Calabresi's writings about general deterrence. They seek to link victim costs to charges imposed on their injurers.<sup>364</sup> Professor O'Connell too, despite his vehement and unrelenting attacks on tort law, has endorsed the cost-internalizing approach in his no-fault proposals—including his auto no-fault writings, his enterprise-liability plan, and his elective no-fault schemes.<sup>365</sup>

As I have noted, general accident compensation schemes reflect a greater diversity of opinion on this issue, ranging from the general-revenue approach of the Woodhouse Commission and Professor Palmer,<sup>366</sup> through New Zealand's effort to cost-internalize certain activities and industries, to the Franklin and Pierce proposals to allocate costs to individual enterprises.<sup>367</sup> Many reformers who advocate comprehensive disability compensation schemes, such as Harris and Ison, also want to pursue cost-internalization goals through the scheme's financing

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363. See *infra* pp. 642-44.

364. See *supra* notes 292 and 294.

365. See, e.g., O'Connell, *supra* note 270, at 514-20. For an earlier discussion by Professor O'Connell of the role of what he calls "no-fault enterprise liability" in promoting safety and the efficient allocation of resources, see O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, *supra* note 296, at 772-82, 815-21.

366. Although to many people, general revenue implies the use of an income tax, a combined payroll and gasoline tax could be used to avoid a sudden shift in cost structures that existed under tort law. Although the latter approach could be characterized as "internalizing costs to motoring and to employment," true advocates of cost internalization would find it quite unsatisfactory because charges were not to be imposed differentially.

367. Professor Roger Henderson also calls for experience rated financing of his plan—in the name of safety. Henderson, *supra* note 311, at 153. Bernzweig's financing proposals are set out in E. BERNZWEIG, *supra* note 12 at 178-82.

mechanism.<sup>368</sup>

In short, many reformers imagine that the funding arrangement for their compensation scheme could serve cost-internalization goals even though they agree that the existing tort system does not. I remain unconvinced because, in the end, the case for cost internalization is largely a rerun of deterrence, efficiency, and fairness claims I have already rejected.<sup>369</sup> I agree with Professor Izhak Englard who, in his review of Calabresi and cost internalization, said “[i]t is highly probable that accident law will eventually become a combination of social insurance (the extreme distributional method) and criminal sanction (the extreme method of deterrence). In the face of these expected developments, the tenacious attachment to the notion of market deterrence appears to be a desperate attempt to maintain an ideal of a free-market system in a strongly socializing world.”<sup>370</sup>

I divide this discussion of cost internalization into three parts. I deal with individual deterrence or accident prevention first, then activity-level deterrence or allocative efficiency, and finally fairness.<sup>371</sup> I see little likelihood that either the New Zealand plan or proposals from Ison and Harris will stimulate safer individual conduct. Under these plans, costs are allocated to industries and activities but not to firms. Thus, personal efforts at accident avoidance largely would go unrewarded.<sup>372</sup>

Proposals like those of Franklin<sup>373</sup> and Pierce<sup>374</sup> envision firm-level adjustments and thus offer the promise of individual behavior control. However, they present different problems. The administrative costs of this fine tuning would be much higher. For example, I assume that some mechanism would have to allow individuals to appeal from the assignment of costs to them. What could be gained from this expenditure? Little, I think. As both Franklin and Pierce seem to recognize, enterprises too small to self-insure would be at the mercy of bad luck unless the scheme were to permit some kind of insurance.<sup>375</sup> For most firms, therefore, the introduction of insurance would largely undo the initial

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368. In his review of the New Zealand plan, Ison says that “[t]he primary argument for classification is good social cost accounting.” T. ISON, *supra* note 314, at 126.

369. See *supra* text accompanying notes 258-69.

370. Englard, *supra* note 230, at 49.

371. One obvious point about cost-internalizing arguments as applied to tailored compensation schemes is that the goals of deterrence, allocative efficiency, and fairness could also be pursued through a general accident-compensation scheme that contained carefully tailored funding arrangements. For this reason and to avoid repetition, I will limit my comments to the use of cost-internalizing strategies in the funding of the broader plans.

372. A firm would have to adopt a new line of products with separately assigned costs before individual action could make a difference.

373. See *supra* text accompanying notes 324-27.

374. See *supra* text accompanying notes 328-32.

375. Indeed, Franklin and Pierce would not even attempt to apply fine-tuned charges to most individual conduct.

fine tuning in a way similar to insurance-pricing practices today.<sup>376</sup> Thus, at the level of individual incentive, these proposals differ little from the funding of today's tort system.<sup>377</sup> They might effect positive behavioral responses from some large enterprises. But, as with the present tort system, however, the factors of ignorance, incompetence, discounting, high stakes, small penalties, and perverse incentives will impede even this limited opportunity.<sup>378</sup>

In sum, I find the model of individual deterrence that underlies cost-internalizing proposals for compensation schemes as theoretically unsatisfying and as empirically unproven as the model underlying tort law.<sup>379</sup>

We now come to the activity-level argument. As we have seen most of the compensation plans seek to have broad categories of activities,

376. See *supra* text accompanying notes 67-97.

377. Assigning costs in comprehensive compensation plans will create vexing practical problems. For example, it might be argued that if auto manufacturers had to internalize the costs of car accidents, they would develop more effective seatbelts and/or air bags. But it is by no means certain that an agency in charge of cost internalization would actually impose these costs on car makers. These costs could also attach to liquor, driving, and designing highways. In other words, one can suggest many plausible candidates for behavior modification through the assignment of these costs.

378. The financial incentives would not be exactly the same under the Franklin/Pierce approach as it is under today's system. For example, enterprises would be able to avoid less of the costs allocated. On the other hand, liability would be more certain, with less opportunity to invest in litigation instead of accident prevention. But these differences seem small.

379. In 1967, Ison cited a lack of evidence that firm differentials actually yielded a reduction in accidents. T. ISON, *supra* note 12, at 93. I take this to be his assessment of empirical research at that time. In his 1980 book, Ison attacks the feasibility of the New Zealand statutory provision that allows linking firm level differentials with employee accident claims. See T. ISON, *supra* note 314, at 130-34.

Professor Palmer offers a relevant insight based on the New Zealand experience. Under the New Zealand plan, workers face a one-week waiting period for lost-income benefits, but when the injuries are work related, employers are required to cover that week's pay with a mandatory employee benefit. Since such a high proportion of all work injuries involve those who miss less than a week of work, employers clearly have money at stake that could be saved if workers were injured less. But there is little indication that anyone sees it that way, or that this provision has in any way increased safety efforts by employers. See G. PALMER, *supra* note 314, at 372-74.

I also think it worth special explanation of how Palmer, who has been intimately involved in this issue at both the theoretical and practical level, has over time come to oppose pursuing cost-internalization goals through the funding mechanisms of a compensation plan. In 1978 he said, "I began as a firm believer in the validity of the theory; I have ended up a skeptic as to whether any scheme capable of implementation will achieve much by the way of economic deterrence, at least so long as it is attached to a compensation scheme." *Id.* at 380. By 1981 he was even more negative:

There are many arguments heard as to why accident prevention is advanced by a system of differential premiums. It has never yet been empirically demonstrated. I am persuaded after years of trying to work through this issue in many different countries that it is better to finance the scheme by way of flat-rate levies. They are administratively simple.

Palmer, *What Happened*, *supra* note 314, at 571. Palmer recognizes that others, economists especially, cling to the ideal of cost internalization. *Id.* (referring to Monroe Berkowitz's recent New Zealand study calling for more accident prevention through cost allocation strategies). In the end, however, he concludes, "[t]he argument is one of the most fascinating in the accident compensation sphere. It can never be defeated in theory and never proved to work in practice. I doubt whether the debate will ever end." *Id.*

goods, and services bear their accident costs.<sup>380</sup> I conclude, however, that it is doubtful whether society can benefit from such an investment in allocative efficiency. "Second best" problems<sup>381</sup> continue to plague these strategies. The determination of where to allocate costs remains problematic.<sup>382</sup> Moreover, identifying and computing these costs is extremely difficult, as Pierce and Ison concede.<sup>383</sup>

A sensible cost-internalization strategy would make the benefits paid by a compensation scheme primary. Yet neither the New Zealand, Australian, nor British proposals do so for medical care or lost wages during the waiting period. Moreover, on cost-internalizing grounds, New Zealand is wrong to allocate the costs of nonwork-related injuries to the work place. These costs should be allocated to the activities that cause the harm.

Furthermore, it still seems odd to me to pay attention to accident-cost externalities while ignoring others such as dislocations caused by plant shutdowns. It also seems ill-advised to establish one centralized agency to pursue safety through efforts at social-cost allocation while leaving other agencies to implement different strategies to control the same accidents.<sup>384</sup>

Finally, it makes no sense to tie the amount of compensation to cost-internalization charges. A comprehensive plan will pay out some benefits not sensibly allocable to any specific activity. At the same time, just because the compensation program limits benefits to some monthly maximum, the principles of cost internalization should not limit the charges to the accident source. While it is possible that the two may balance, it is unlikely. In schemes that envision financing through cost internalization, this leaves the problem of where the extra money will come from (or where it will go). General revenues (or contributions to the Treasury) is an obvious answer, as many have recognized. But once this is admitted, and the two sides of the equation are disengaged, it is no longer

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380. See *supra* text accompanying notes 302, 318-44, and 367-68.

381. See *supra* note 265 and accompanying text.

382. Ison admits that cost-allocation classifications will inevitably be somewhat arbitrary. In addition, some firms will be misassigned. See T. ISON, *supra* note 314, at 126; see also *supra* note 263. Professor James Henderson discusses some of the difficulties one faces when trying to allocate accidents both to specific enterprises and to industries in the context of no-fault enterprise liability schemes, whether legislatively or judicially adopted, in Henderson, *supra* note 294.

383. Recall that Pierce envisions imposing charges that do not depend precisely upon the benefits actually paid. See *supra* text accompanying notes 328-32. Ison also imagines using estimates. See *supra* text accompanying notes 333-34.

384. I am not persuaded by Pierce's solution either—one superagency for all safety problems. See Pierce, *supra* note 64, at 1320-21. Such an agency would inevitably be balkanized into many different units, each addressing separate issues. Most probably, it would also split into regulatory and compensation divisions. An equally promising approach is to arm existing agencies with the power to impose various charges. This severs the ties between compensation and regulation—a result I favor. See *infra* Part IV, Section B.

necessary to fund the compensation side at all with a charge system. People can obtain benefits from traditional income maintenance sources; independently, regulatory agencies could experiment with new charge, fine or tax strategies to supplement more direct regulation. Thus, even if imposing externalities on injury-causing activities could increase allocative efficiency, this should be part of a regulatory apparatus that is completely divorced from the provisions for compensation.

One might argue that a complete separation of the compensation and regulatory schemes makes it more difficult politically to achieve either goal. Yet, this is a complex issue. Ison observes that those who control high-risk industries often hold political power. Therefore, these industries likely would support a compensation scheme dependent on flat-rate financing because it would be cheaper than experience rating.<sup>385</sup>

Many share my skepticism that cost internalization can make the economy significantly more efficient, but nonetheless would argue that cost allocation is needed for reasons of *fairness*. As Ison argues, it does not seem right to require "low risk occupations to subsidize those more hazardous."<sup>386</sup> Once more we are on familiar, and I think unpromising, turf.<sup>387</sup> First, we do not know who actually bears the incidence of such costs. Therefore, the usefulness of imposing these charges for fairness reasons is somewhat dubious. Second, our Social Security disability system employs a flat tax without claims that these costs should be allocated according to the cause of disability. To be sure, unemployment compensation in America is merit rated to some degree. Nonetheless, in many industries (like construction) employees make benefit claims that, according to the cost internalization view, should call for considerably higher charges than many employers now pay who are at the maximum rate. Moreover, in many other countries, both workers' compensation and unemployment insurance systems operate through flat-rate financing without outcries of unfairness.<sup>388</sup>

Moreover, attempts at cost-internalization raise fairness considerations on the other side. To illustrate my point, consider drivers and insurance rates today. Young men in most states pay high surcharges because, as a group, they are involved in more accidents. Many young men who are careful drivers naturally resent this practice. They claim that better categories for surcharge should probably reflect categories like

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385. T. ISON, *supra* note 314, at 126.

386. T. ISON, *supra* note 12, at 58.

387. I agree with a former New Zealand Commissioner who has argued that a uniform rating plan would be more just as well as administratively more economical. G. PALMER, *supra* note 314, at 368.

388. The Woodhouse Commission offered a strong fairness argument in support of flat-rate financing when it pointed out that all of modern industry is interdependent. See WOODHOUSE REPORT, *supra* note 17, ¶ 467, at 172.

immaturity, party going, and consumption of alcohol. They could be right. But since current age-based categories are developed in the private market, I think that people are willing to believe that administrative efficiency directed the decision. What would we think if the government levied such charges? Official categorization such as this—young men pay more—is troubling.

The same point applies when we examine Harris's and Ison's compensation plans that assign costs by industry. To be sure, insurance companies adjust premiums rates by industry for both liability and workers' compensation insurance. Indeed, some costs probably do vary by industry because of inherent risks. However, I would think that large firms with good records would complain loudly about a publicly run, industry-based cost-allocation plan that made no allowances for their records. Today, at least some firms can secure lower costs through experience rating. Maybe other factors, like age of plant, type of worker, and nature of machinery are more important determinants of accident rates. But there would be no competitive pressures on a state monopoly to shift off industry-based charges.

More broadly, when government begins differential treatment, due process values push toward very fine distinctions. The upshot is either complaints of unfairness, when highly individualized treatment is denied, or else high administrative costs, when it is granted. This is not to say that an industry-based differential charging strategy would be unfair, on balance, but rather that uniform charges also would be fair.

The concerns raised in this section generally pertain to both accident and disability compensation plans. But a disability compensation scheme raises yet additional cost-internalization problems. For example, to just what activities are the costs of illnesses and natural birth defects to be charged? Is recreation to be surcharged because of the colds it produces or perhaps subsidized because of its health benefits? Ison refers to possible surcharges on smoking. What of cholesterol, fat, and alcohol?

### *E. Conclusion to Part III*

If we abandon the idea of controlling behavior through the funding of compensation mechanisms, collective efforts to promote safety can focus on regulatory strategies. Once we disengage mechanisms for compensation and accident avoidance, we can address income protection and medical expense reimbursement in the broader context of protection for the population at large. In Part IV, I provide specific recommendations for these separate approaches to the compensation and safety goals.<sup>389</sup>

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389. Professor James Henderson acknowledges that the safety and compensation functions can be separated even where safety is pursued through cost internalization strategies. See Henderson, *supra* note 225, at 794-98.

#### IV PROPOSALS

In this Part, I first offer my approach to achieving the compensation objective of tort law. Second, I address the future of deterrence strategies, assuming that ordinary tort law will be repealed and that no compensation plan with a cost-internalization funding mechanism will take its place. Third, I consider whether tort suits are appropriate for other than personal injuries. The Article concludes with some remarks on broad and narrow strategies for the future.

##### *A. Compensation of Torts Victims Through Regular Income Protection Mechanisms*

I believe our regime of social insurance and employee benefits should address the income-replacement and medical-cost problems tort victims face. The arrangement I propose involves a division of responsibility between employers, employees, and society at large. Employers would cover short-term needs; government would assume basic obligations for long-term problems. Individuals would have both rights and responsibilities. The divisions I propose are primarily based upon administrative convenience, but fairness and a desire to provide proper incentives are also considerations.

Before describing my plan, I address two other matters. First, I explain why even advocates of comprehensive disability-compensation schemes have defined the issue too narrowly. Second, I briefly set out America's current regime of social insurance and employee benefits that is the focus of my proposed reform.

##### *1. The Proper Conception of the Compensation Problem*

Advocates of comprehensive disability plans are right to reject the accident victim as the focus of attention. However, they are wrong to focus policy on compensation for the disabled or the incapacitated. In fact, the Harris group argues that "we should move towards the abolition of every compensation scheme which is based on a particular category of causation",<sup>390</sup> but it has failed to adhere to that very dictum.

Americans who suffer personal injuries in circumstances now entitling them to tort damages incur two basic sorts of pecuniary loss: lost earnings<sup>391</sup> and medical expenses.<sup>392</sup> My position is that we should address these needs for income and medical care as such and as part of broad approaches to those needs.

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390. COMPENSATION AND SUPPORT, *supra* note 12, at 328.

391. This loss includes replacement services costs.

392. This loss includes rehabilitation expenses.



As for income, our real social concern is that people have a continued flow of cash during periods when they are not working. Under current compensation schemes, those who are ill claim through state temporary-disability schemes, employee sick-leave plans, and sickness and accident insurance; those who are injured at work claim through workers' compensation, veterans disability, and similar programs; and those who become totally disabled claim through Social Security's disability insurance provisions and employer-provided disability-benefit plans. However, we also provide income protection to the unemployed through unemployment insurance, and to both the retired and dependent survivors of deceased workers through Social Security, life insurance, and private-pension plans.

Once we understand the problem in terms of continued income during periods of nonwork, then plainly the category adopted by Harris's group is too narrow. Indeed, that concern extends as well to assuring the paid public holidays and paid vacations that most workers enjoy.

Thus, while I would prefer either the New Zealand plan or the Harris proposal to America's present arrangements, neither is ideal. Those reformers have cogently argued that accident victims should not be treated better than the sick. I believe further that support mechanisms for the disabled cannot be fairly evaluated until all provisions for periods of nonwork are considered. I do not claim that the disabled, the unemployed, and the retired must all be placed on an equal footing. Rather, I argue that the claims of other groups count in determining what the disabled should get. These claims all compete for society's resources. Thus policymakers must address our collective responsibility towards people who do not have income because they are not at work.<sup>393</sup>

Policymakers might well think it proper to provide more support to those who have worked recently. Similarly, they might prefer to provide more dollars to those who have earned more in the past. In addition, they may perceive varying levels of collective responsibility for different problems. These levels might depend on the problem's time frame, judgments about ability to work, concerns about incentives for rehabilitation and job searches, and ideas about the roles of the private and public sectors. These considerations underlie rational social-insurance and employee-benefit policy. But the point is that any differential treatment

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393. Note that advocates of the British, Australian, and New Zealand plans do not confront the question of medical expenses which are covered in those countries by national health schemes. Carrying Harris's proposal to the States, however, would imply disbursing not only income but also medical benefits. But once again it is wrong to conceive of this problem merely in terms of medical needs accompanying disability when it is actually part of a larger dilemma—how to ensure quality health care for all. My proposal on health care parallels my solution to the income-protection problem. See *infra* pp. 648-50.

we might adopt should be based on overarching considerations applicable to the general problem of people's need for income when not working.

Our existing Social Security program reflects my point of view, in that it covers in one broad design the retired, workers' survivors, and the totally disabled. Though there are different past-work requirements for each of the benefits, there is a common formula for determining benefits as well as a common financing mechanism. This program also reflects a policy view that the three groups have the same general need for long-term income replacement.<sup>394</sup>

In America, the social-insurance and employee-benefit arrangements need substantial reform in their own right.<sup>395</sup> This need stands apart from any impetus to do away with tort law and the attendant concern that tort victims would lose a source of compensation. Indeed, tort victims are only a small proportion of income-support claimants. This state of affairs leaves me in a potentially difficult position. Because of inadequacies in our existing income-support regimes, many would think it harsh to take away tort rights. They would suggest I advance a comprehensive scheme for the reform of our social insurance system before I dare argue for doing away with tort law.

Thus, I have made my reform proposal comprehensive in order to respond to this concern. At the same time, it is important not to overplay the shortcomings of the current arrangements; I address this point in the next subsection.

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394. On the other hand, the narrow breadth of our Social Security program is reflected in its failure to include the permanently partially disabled and the long-term unemployed—omissions my proposals would rectify.

395. The universal, first-line approach to income maintenance today employs social insurance and employee benefits. Societies resort to means testing only when these first-line measures fail to accommodate the truly needy. An alternative viewpoint is that our collective responsibility is simply to assure people a subsistence standard of living. A favorite mechanism for achieving that goal is the "negative income tax," but other governmental assistance programs would do equally well. The point is that government would address poverty, using means testing to supplement individual income but would do no more. Individuals could provide for additional income protection through savings, private insurance, and employee benefits.

No developed nation has opted for such a solution, however. Possible explanations include the stigma of means testing, paternalism, the electoral power of the middle class, opposition from unions and industry, and the influence of certain social reformers.

## 2. *The Current Status of Collateral Sources for Tort Victims*

### a. *Income Replacement*<sup>396</sup>

Most tort victims are not seriously hurt.<sup>397</sup> The great bulk of the injured miss few or no days of work. In short, most tort victims do not suffer substantial income loss.

However, a sizeable proportion of modestly injured tort victims are disabled for periods lasting as long as many weeks. The most important income-replacement mechanism in such circumstances is sick-leave benefits. Unlike many other nations, in America such benefits are neither publicly provided nor mandated of all employers. However, the development of private employee benefit plans has created a substantial sick-leave scheme. Formal plans cover around two-thirds of the workforce; a sizeable number are protected informally.<sup>398</sup> Nonetheless, there are gaps: some workers remain unprotected while others have protection only of inadequate duration. Appreciating this problem, five states (California, New York, New Jersey, Rhode Island and Hawaii) have adopted temporary-disability insurance schemes ("TDI") to help close the gaps in private voluntary arrangements. These TDI plans assure average- and lower-paid workers substantial income-replacement benefits for periods of up to six months after a brief waiting period, typically one week. For better paid workers, however, supplemental employee benefits or private arrangements must take over. Nevertheless, if all states had TDI plans or mandated that employers provide equivalent coverage, the income-loss problems of temporarily disabled tort victims would be fairly well resolved.

There is also a small proportion of tort victims, though by no means a small number, who suffer permanent and total disability or are killed.<sup>399</sup> For those in the work force at the time of their accident, existing collateral sources can fairly adequately replace lost wages.

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396. For a description of the many and uncoordinated public and private sources of compensation now available to the disabled, and their tendency both to overcompensate and undercompensate, see REPORT OF THE RESEARCH SUBCOMMITTEE OF THE DISABILITY INSURANCE COMMITTEE, HEALTH INSURANCE ASSOCIATION OF AMERICA, COMPENSATION SYSTEMS AVAILABLE TO DISABLED PERSONS IN THE UNITED STATES (1979) [hereinafter cited as COMPENSATION SYSTEMS]. For another description of existing benefit schemes for the disabled, see E. BERNZWEIG, *supra* note 12, at 29-40.

397. P. MUNCH, *supra* note 56, at 37 (table A-3), for example, shows that about 90% of auto accident tort claimants have less than \$1000 of economic losses. More than two-thirds of product-injury claimants have less than \$1000 of economic loss, *id.* at 14 (table A-7); more than half of medical malpractice claimants have less than \$1000 in economic loss. *Id.* at 81 (table M-64). These tables do not include victims with minor injuries who do not bother to sue.

398. See generally Price, *Income Replacement During Sickness, 1948-78*, SOC. SECURITY BULL., May 1981, at 18.

399. For example, Bernzweig's data show that in 1978 150,000 motor vehicle accident victims were permanently impaired, and over 50,000 were killed. E. BERNZWEIG, *supra* note 12, at 2.

Social Security benefits are available to the totally disabled after a five-month waiting period. They replace between forty-five and eighty percent of an average wage, depending upon the number of dependents the victim has.<sup>400</sup> Lower wage earners have a higher wage-replacement rate; higher earners have a lower rate. These benefits continue so long as the person is disabled and traditionally increase each year to reflect cost of living increases. In addition to Social Security, many workers have long-term disability employment benefits, typically funded through their employers' pension fund or through separate insurance. Such benefits are especially accessible to those with fairly high wages or who work for progressive employers, government, or in jobs with strong unions. Private total disability insurance is also available in the marketplace and is purchased by a modest proportion of Americans.<sup>401</sup>

Comparable sources exist for death benefits. Social Security again provides for workers' dependents, as do some employee benefits like life insurance or pension provisions. Life insurance is also widely available for private purchase, especially group insurance plans offered at the workplace. Thus, for workers fully disabled or killed by torts, existing collateral sources, although they rarely completely replace the lost income, are reasonably adequate.

There remains an important group of workers that our society treats poorly: the permanently, but only partially disabled. Workers disabled in this way on the job account for more than half the benefits paid by the workers' compensation system.<sup>402</sup> But if partially disabled off the job, unlike many other countries, compensation in America, apart from tort, is limited.

A serious problem is determining what wage loss, if any, these workers suffer. Though not totally disabled, many will be unable to get wages equal to those paid for their former job. Because of employer preferences or prejudices, some of the partly disabled may be unable to find work at all. On the other hand, many people with permanent partial disabilities return to their former job, an equivalent job, or even a better one. An intuitive way to treat their loss of income is simply to replace wage loss on an individual basis. However, it is often extremely difficult to determine how much the claimant would be earning if not for the disability. In addition, this approach creates disincentives to rehabilitation if bene-

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400. See generally FINAL REPORT OF THE NATIONAL COMMISSION ON SOCIAL SECURITY, SOCIAL SECURITY IN AMERICA'S FUTURE 157, 207 (1981).

401. See COMPENSATION SYSTEMS, *supra* note 396.

402. See J. BURTON & W. VROMAN, A REPORT ON PERMANENT PARTIAL DISABILITIES UNDER WORKERS' COMPENSATION 2 (1978) (prepared for the United States Department of Commerce for use by the Interdepartmental Workers' Compensation Task Force); see also Burton, *Compensation for Permanent Partial Disabilities*, in SAFETY AND THE WORK FORCE 18 (J. Worrall ed. 1983).

fits are decreased as wages increase. On the other hand, a one-time prediction of future wage loss (the torts approach) may result in inaccurate payment levels if the future unfolds differently than predicted.

Nevertheless, our workers' compensation systems have adopted various compromise solutions to this dilemma that we could duplicate for partial disabilities not currently covered.<sup>403</sup> Some expansion is needed. Existing private arrangements usually do not help, although some disability insurance policies with generous definitions of total disability pay full benefits to someone who can still hold a lesser job. Accident insurance may provide compensation for injuries such as loss of an eye or dismemberment. However, it is neither widespread in America nor well aimed at income replacement.

Existing collateral sources also treat would-be earners inadequately. Tort, by contrast, considers, even if inaccurately, the probable future earnings when compensating disabled children, students, homemakers, and other potential wage earners. When one's disability is permanent, this lack of equivalent protection in our social insurance becomes serious. For example, our social insurance system assumes that homemakers depend upon another breadwinner, even though the large number of women who move in and out of the labor force undermines this assumption.<sup>404</sup> Students, especially those in higher education, epitomize the poorly protected. Their earning prospects, though excellent, go unprotected against permanent accidental impairment. Similarly, Social Security expects disabled minors to be supported by their parents, providing benefits only upon the parent's death or retirement. Moreover, the benefits actually paid may fall well below the victim's probable earnings without the disability.<sup>405</sup>

#### *b. Medical Expenses*

About eighty-five percent of the American population<sup>406</sup> is reasonably well-protected against the risk of incurring substantial medical expenses, including expenses resulting from torts. Most people obtain group health-insurance benefits for themselves and their families through their jobs, although some of those plans are inadequate. Individual plans

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403. For a discussion of the problems the workers' compensation system faces in partial permanent disability cases, see, IS THERE A BETTER WAY?, *supra* note 202 at 14, 16, 27-30.

404. See, e.g., E. BERNZWEIG, *supra* note 12, at 39-40 (describing the recently implemented Israeli scheme for compensating partially disabled homemakers).

405. For a call to merge the New Zealand accident compensation plan with that nation's regular social security and retirement schemes, see Marks, *The Need for a Comprehensive Approach*, in THE WELFARE STATE TODAY 355 (G. Palmer ed. 1977). Marks is especially concerned about New Zealand's failure to deal well and consistently with the problems faced by what she calls "non-earning groups" like students and housewives.

406. See, e.g., Bovbjerg, *Competition Versus Regulation in Medical Care: An Overdrawn Dichotomy*, 34 VAND. L. REV. 965, 965 n.2 (1981).

are also available, although they tend to be more expensive and are often less generous. The elderly and the disabled on Social Security use Medicare, and the poor Medicaid.

The fifteen percent of the population left unprotected includes many of the unemployed and their families, since people usually lose their employment-based coverage when they lose their jobs. The laid-off worker may be able to transfer his coverage to an individual plan; however, the shock of a job loss and the concomitant income reduction make health insurance a low priority. Although this is a serious problem, it applies to only a small proportion of tort victims.

*c. Other Damages*

Rehabilitation expenses and the costs of household services are significant costs. They are by no means confined to tort victims alone. Various programs exist to provide rehabilitation services to the disabled in general, but few provide in-home services for the disabled or members of the family.

Finally, there are "general damages"—pain and suffering. Although "real," pain and suffering are generally not compensable from social-insurance, employee-benefit, or private-insurance schemes.<sup>407</sup>

*d. Summary*

Americans working for progressive employers are well protected for out-of-pocket losses, whether they are the victim of a tort or some other disabling cause. They also enjoy generous paid public holidays, paid vacations, good private pensions as well as Social Security, and adequate unemployment compensation (often supplemented by termination pay). Unfortunately, not all employers are so progressive, and many people have no employment at all to give them access to job related benefit schemes.

*3. Recommendations*

In general, I think that all Americans should be assured both income for periods of nonwork and medical-expense protection commensurate with that provided by progressive employers. There are many ways to reach this goal. The government could play an exclusive or minor role, depending upon the extent of mandated employee benefits. An enormous range of program design decisions are inevitable; the alternatives are too numerous to discuss here. Instead I will simply sketch

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407. Workers' compensation often provides modest sums for disfigurement through the method used to determine compensation for partial permanent disabilities.

the solution I prefer.<sup>408</sup>

a. *Income Support*

i. *Employer and government responsibilities: mandatory, uniform and simplified.* The government and employers would divide responsibility for replacing workers' income according to the duration of the need. Employers would take responsibility for short term income needs through a simple, uniform regime of compulsory employee benefits. Long-term needs would be a collective national responsibility. A single social-insurance plan would provide for them.<sup>409</sup>

ii. *Short term income protection.* Employee benefits would come in a new, simple form. Based on past work, employees would accrue earned days of paid leave. These days could be used at the employee's discretion. The philosophy of employee freedom and self-sufficiency underpinning this plan contrasts sharply with the existing system's reliance on categorical eligibility and insurance. The new regime would replace benefits now provided by vacation leave, public holiday leave, sick leave, temporary disability insurance, unemployment insurance, and severance pay, as well as the temporary disability benefits currently provided by workers' compensation and tort damages.

More precisely, the basic rule would allot a paid leave day for every five days of work. A full time worker would earn more than forty paid leave days per year to be used for short term needs and desires.

In addition, workers would be forced to accumulate some of their earned leave days each year until they had fifteen weeks worth in a "reserve account." The reserve would become available after a fortnight's worth of disability or unemployment. Beyond that, people could obtain modest advances against their long-term Social Security accounts in circumstances in which their reserve account is empty.<sup>410</sup>

My proposal, even in this abbreviated form, demonstrates how an income-replacement scheme can care for the temporary disabled as part of a larger group, rather than through a separate benefit as tort reformers usually imagine.

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408. The income support specifics are based upon a paper I delivered to the Association for Public Policy Analysis and Management (APPAM) meeting in New Orleans in October, 1984. A draft is available from the author.

409. For Professor O'Connell's arguments on practical and political grounds against the replacement of tort in America with a broad social insurance mechanism, see J. O'CONNELL, *supra* note 296, at 73-80. In my view, O'Connell overemphasizes the public costs of this approach by assuming a comprehensively governmental program rather than the mixed private employer-government plan I propose.

410. There remain, of course, many details, such as how to deal with the self-employed, transient workers, and part-timers. I take them up in my forthcoming article addressed specifically to this proposal.

*iii. Long-term income protection.* The provision for longer periods of nonwork would be an expanded version of our existing wage-related Social Security system. Minimum benefits would be increased for the totally disabled, the retired, and workers' survivors. Additional benefits would go to the permanently partially disabled, the long-term unemployed, and those who are disabled but who have no history of substantial prior earnings. This latter category would include children over 18, homemakers, students, and others with work records inadequate to qualify for the earnings-related portion of the plan. Other long-term disability schemes, such as workers' compensation, the "black lung" program, and tort law would be replaced by this single national program.

*iv. Financing.* Employers would finance employee benefits using current revenues. The social insurance system would depend upon the payroll taxes now used to finance Social Security. If the legislators approved, this might be supplemented by a tax on gasoline. But the system would not aim specifically to allocate costs to employers or others responsible for claims.

*b. Medical Expenses*

America has an inadequate as well as an extravagant health care system. Though certain patients receive the best health care in the world, dramatic reforms are clearly in order. I favor an approach in which all those attached to the workforce would obtain reasonably comprehensive medical-expense protection through their employment by having membership rights in a Health Maintenance Organization (HMO) or its equivalent. Employers could provide deluxe packages, but would be required by law to provide a minimum package.<sup>411</sup> Medical protection for employees with longer than, say, six months of service would extend for at least four months after the cessation of work. This would help plug the serious gap occurring when people lose health care protection by becoming unemployed. Those now on Medicare and Medicaid would receive health protection with similar HMO enrollment rights, as would those remaining poor Americans outside the scope of the combined package described above.<sup>412</sup>

These benefits would cover rehabilitation costs as well as traditional medical needs. They would also fund other special needs of the disabled, such as wheel chairs, attendants, and unusually expensive diets.

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411. Coverage of dependents could be worked out in various ways. Tension exists between the tradition of employers providing coverage for dependents and the increasing phenomenon of couples where both members earn a salary.

412. This would include, for example, those needy people out of work more than four months, but who fall outside the existing assistance programs.



c. *Other*

I would not oppose arrangements such as New Zealand's to provide cash compensation for both pain and suffering and disfigurement. This is not a priority for me, however. The key point is that, if available, such benefits should exist independent of tort law.

B. *Accident Prevention Through Regulatory Strategies, with the Increased Involvement of Citizens, Victims and Citizen Groups*

In 1951 Professor Williams predicted that administrative regulations would supersede tort law in the deterrence of accidents.<sup>413</sup> Professor Englard more recently took the same position.<sup>414</sup> In my view, administrative agencies have already become the dominant force in advancing safety. In the future, regulatory action must become even more effective, further eclipsing tort law.

1. *The Limited Nature of My Claim*

I take on two tasks in this section. First, I defend against the claim that eliminating tort law will seriously weaken existing regulatory efforts on behalf of safety. Second, I suggest ways in which agencies might more effectively promote safety, while at the same time providing more constructive outlets for people's unhappiness over unreasonable conduct by others. I conclude that we can best effectuate safety concerns by reforming existing agencies while doing away with tort suits<sup>415</sup>.

Greater efforts by regulatory agencies of course will not rid our society of unreasonably dangerous conduct and products. Indeed, many of

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413. Williams, *supra* note 4, at 172-76.

414. See *supra* text accompanying note 370.

415. Professor Calabresi has schematically identified the role for torts as lying in between those situations in which (a) either the collectivity is uncertain what behavior to demand of people or it costs too much to control behavior collectively and (b) contractual (market) solutions are either too expensive or not trustworthy. Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 526-27 (1978). What distinguishes torts from collective control in this scheme is that tort liability allows the actor, rather than the collectivity, to decide whether the injury-risking conduct warrants the costs. Calabresi's attraction to torts reflects his ideological position in favor of individual choice and against collective judgments. But, as I have already pointed out, the shortcomings of regulation in certain areas that argue against collective determinations of desirable behavior do not rule out the use of regulatory schemes that employ cost-imposition strategies on the injurer's side but are nonetheless divorced from the role of paying compensation on the victim's side. Indeed, Calabresi seems to concede this when he talks of the next century of "tort" law in terms that include regulatory strategies like pollution licenses or taxes which are not compensatory. *Id.* at 533. Moreover, as I have argued throughout, torts today does not well reflect the role assigned to it in Calabresi's schema. It is overbroad in its application to areas where regulation and contract would seem to suffice; at the same time it is ineffective in the areas where Calabresi's scheme would want it to function, because the factor of liability insurance and the nature of tort damage calculations mean that would-be injurers are not put to the economic choice envisioned.

the shortcomings of our tort system as a deterrent apply to administrative regulation as well. Moreover, regulation has its own special problems. Administrative agencies are subject to "capture" by those they regulate. They also tend to pursue their own bureaucratic objectives. Even when doggedly pursuing the public interest in safety, they face difficult policy choices and enforcement problems. In general, agencies may rely too heavily on regulation that tells actors specifically what to do rather than combining incentives with leeway for individual situations.<sup>416</sup>

But, even though less than starry-eyed over administrative-agency action, I cannot imagine doing away with agencies as the central protectors of our safety.<sup>417</sup> Our challenge lies in developing better techniques to make agencies more responsive and effective. Allowing them to focus on accident prevention, undistracted by concerns over compensation, is a good start.

## 2. *Global Perspectives on Agencies in a World Without Tort*

Some people view regulation as a menace. They fear that without tort law agencies could become too powerful. Thus, they see the existing tort regime as a buffer against undesirable, centralized decision-making.<sup>418</sup> This argument is not realistic. During the last two decades, when tort law thrived, there was also an explosion in the use of regulatory bodies concerned with safety—agencies such as CPSC, OSHA, and EPA. Hence, one could as easily argue that vigorous tort law spawns regulation. The better explanation is that courts and legislatures responded in parallel to the same public distrust of the market. Thus, I believe centralized regulation will expand or contract independently of whether one can sue in tort for accidental injury.

Conversely, there are fears that budget-cutting and deregulation will attenuate the effectiveness of existing safety agencies. Although this is possible, it is no reason to keep tort law alive. To be sure, the existence of tort arguably deters some forces which would otherwise promote deregulation in order to be rid of all formal controls. Moreover, one could argue that the abolition of tort law would discourage the political alliances that sometimes form between plaintiffs' lawyers, insurance companies, and regulatory agencies. Nonetheless, the contention that tort law keeps these agencies alive is ultimately unconvincing. Indeed, the prime defenders of agencies are typically public-interest, consumer, and

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416. See generally, L. LAVE, *THE STRATEGY OF SOCIAL REGULATION* (1981) who criticizes many existing regulatory practices and offers recommendations for reform that focus on improved data collection and analysis.

417. Even adherents of cost internalization entrust some public agency to assign the costs.

418. Professor Calabresi, while skeptical of centralized regulation, has written of the public's need to sense control over dangerous medical practice—something that tort might provide. See Calabresi, *supra* note 36, at 243.

labor groups with little faith in tort law as a behavioral control device. In any case, even with deregulation now in vogue, most major changes of that sort have been aimed not at safety, but at increased access to closed markets and price competition, as illustrated by deregulation of airlines, trucking, and financial institutions.<sup>419</sup>

There remains the notion that tort serves as insurance against the risk that the opponents of regulation will sap administrative authority. While this argument holds some appeal in the abstract, upon closer scrutiny it is unpersuasive. First, it overlooks the high "insurance" costs. After all, unlike a weapon held in reserve, our tort system cannot be placed in a warehouse; enormous administrative costs continue to accumulate. Second, and more importantly, the deterrent power of tort even in a world without agencies is still highly suspect.<sup>420</sup>

### 3. *The Idea of "Torts as Partner"*

Some argue that the repeal of tort law could yield less effective safety regulation by government. To the extent that these arguments are valid, agencies may need more power and manpower in a world without tort. But as I suggested earlier, we could provide a large infusion by transferring a modest proportion of the people who administer the tort system to the regulatory agencies and still achieve a drastic net reduction in administrative costs. Let me now turn to some specific arguments.

*Tort suits can sometimes identify problems for agencies to pursue.* Even if agencies only occasionally rely on litigation for this purpose, new strategies may be needed to inform agencies of safety problems as they develop.

*By publicizing problems, tort actions can pressure agencies to act.* A few celebrated cases that demonstrate this point seem quite exceptional. Nevertheless, it might be desirable to give accident victims and citizen groups new powers to force agency action.

*Fear of tort liability may cause voluntary compliance with agency regulations.* This concern suggests that more powerful agency sanctions may be needed, or that agencies may have to deploy stronger sanctions that now go unused.

*Tort lawyers may function as public prosecutors.* Surely, most plaintiffs' lawyer hours are devoted to auto accident cases, where public regulation is already substantial. Nevertheless, perhaps we will need to add

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419. On the other hand, budget cuts imposed on agencies like the CPSC do lead to the curtailment of various consumer safety programs. See the Statement of CPSC Commissioner Stuart M. Statler before the Subcommittee on HUD—Independent Agencies, Committee on Appropriations, U.S. Senate (March 27, 1985) (on file with the author).

420. See *supra* Part I, Section A.

more agency lawyers. Many of these could be hired with the earnings of a few prominent personal-injury attorneys.

*Tort lawyers and their investigators can uncover dangerous practices.* Again, while this probably seldom occurs, perhaps new incentives are needed to encourage private citizens to identify dangerous conduct and safer alternatives.

*Even if it can't prevent dangerous conduct at the outset, tort law may be able to curtail certain existing dangers.* For example, fear of litigation could curtail further marketing. Hence, perhaps, agencies need augmented powers to block discovered dangers not initially deterred. Also, there may be a continuing role for private litigation seeking injunctions rather than damages.

#### 4. *Agency Techniques and Their Enhancement*

I have just noted a number of reasons why, if tort law is repealed, administrative agencies may need increased regulatory authority, manpower or initiative. Let me now discuss three strategies in some detail.

##### a. *Learning About Dangers*

Here I want to emphasize both the flexibility regulatory agencies already have and the potential for increasing the role ordinary citizens play in the exposure of dangerous conduct. The Consumer Product Safety Commission (CPSC) utilizes two noteworthy techniques. First, it has established an extensive system of accident reporting, triggered by the treatment of victims in selected hospital emergency rooms throughout the country.<sup>421</sup> Unlike tort law, which relies on the happenstance of privately initiated lawsuits often filed long after the fact, the CPSC reporting network supplies prompt, reliable data about accidents as they occur. This isn't a perfect system, of course. For one thing, although the agency learns about frequency and severity of harms from various products and activities, it learns little about possible preventive measures. Nonetheless, this reporting system has identified a list of products warranting investigation by other means. In addition, it has taught the CPSC and those concerned with consumer safety that administrative action simply will not eliminate the great mass of accidents. Rather, patterns of use must change, perhaps through consumer education.<sup>422</sup> The

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421. For a discussion of CPSC's NEISS data collection system, see Heiden and Pittaway, *Rebuttal to CPSC's Hazard Data System: Response to a Critique*, 6 J. PROD. LIAB. 217 (1983); Heiden and Pittaway, *Utility of the U.S. Consumer Product Safety Commission's Injury Data System as a Basis for Product Hazard Assessment*, 5 J. PROD. LIAB. 295 (1982); Waksberg, *CPSC's Hazard Data System: Response to Critique*, 6 J. PROD. LIAB. 201 (1983).

422. It has been said that more than two-thirds of consumer product injuries come from misuse or abuse of the product. See Owen, *supra* note 348, at 710 n.89.

alternative would be to banish or transform products we now consider essential parts of our everyday lives—products such as bicycles, knives and stoves.

In addition to emergency-room reporting, the CPSC has a second routine method for learning about dangers. The statute governing the agency imposes on individual firms the duty to inform the CPSC whenever it learns of a “substantial product hazard.”<sup>423</sup> With full compliance the agency would know almost as much as individual firms about product dangers. Alas, the CPSC has reported that of the 25 most serious hazards addressed in 1983, only 5 came to the agency’s attention in this manner.<sup>424</sup> As a result, the CPSC has announced clearer and stronger guidelines for reporting and has promised tougher enforcement.<sup>425</sup> Whether compliance will improve remains to be seen, but at least the CPSC’s response illustrates how an agency tracking a problem can attempt new initiatives where old ones fail.<sup>426</sup>

Moreover, there are means other than penalties and staff increases to remedy a substantial nonreporting problem. There are ways to encourage consumers to report more dangers. The NHTSA maintains an Auto Safety Hotline yielding more than 500 calls a day, and consumer complaints have initiated many auto-recall drives.<sup>427</sup> Giving informers cash and other rewards might further promote reporting. Of course, such a program could also enhance the deterrent effect of the agency’s regulations.

Finally, unlike courts, agencies can themselves engage in research and inspections to discover dangers. The tort system, in contrast, must rely upon incentives for private action, which are less likely to serve well the public interest in safety.

#### *b. Recalls*

It is important to contain a problem once it has been identified. Although market and other forces would remain potent, agencies might find this a bigger job without tort law. They may have to rely more on

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423. T. SCHWARTZ & R. ADLER, *PRODUCT RECALLS: A REMEDY IN NEED OF REPAIR* 35 (1983) (proposal for consideration by the Administrative Conference of the United States).

424. See Statler, *Reporting Guidelines Under Section 15 of the Consumer Product Safety Act*, 7 J. PROD. LIAB. 89 (1984); Barsky, *Abandoning Federal Sovereign Immunity: Public Compensation for Victims of Latently Defective Therapeutic Drugs*, 2 J. PROD. LIAB. 20 (1983).

425. United States Consumer Prod. Safety Comm’n, *News From CPSC*, 84-19.

426. It seems sensible for other agencies, such as the FDA, to mandate the reporting of defects firms discover in their own products, as recommended by T. SCHWARTZ & R. ADLER, *supra* note 423, at 56-57.

427. *Id.* at 8-9. The General Accounting Office also sponsors a toll-free hot line “designed to encourage tipsters to turn in workers, contractors and benefit recipients suspected of bilking the Federal Government.” *Money-Saving Phone Calls*, TIME, October 15, 1984, at 41. The GAO apparently considers this to be a great success. *Id.*

the "recall"—an important tool already used by many agencies that deal with products, including the CPSC, the FDA, and the NHTSA. Indeed, reports of auto, drug, and consumer-product recalls are commonplace. I want to make four points about recalls.

First, an agency has a decided advantage over courts in that it can evaluate different enforcement strategies. It can experiment and decide to chart a new course.<sup>428</sup> Courts, by contrast, have a single weapon in their arsenal—damage awards. There is little room for innovation. Thus, whereas tort law addresses the final product, agencies can intervene with process requirements before the undesirable results occur.

Second, any evaluation of the recall must pay attention to its deterrent potential.<sup>429</sup> Fear of a recall should provide the same leverage as does fear of tort liability when safety-conscious production people try to restrain eager marketing people. Moreover, unlike a tort suit managed by the legal department, a recall usually more directly involves the very marketing staff who orchestrated the product's distribution. The effectiveness of the recall threat is probably at least somewhat dependent on its likelihood and its potential cost to the firm. Unfortunately, I am aware of little investigation into this area. I concede that the costs of a recall probably do not correlate with probable harm or the costs of increasing safety.<sup>430</sup> Nevertheless, they are usually substantial enough to command the attention of decisionmakers.<sup>431</sup> In short, while the threat of a recall may not produce perfect economic tradeoffs, firms likely to respond to the threat of litigation will also probably respond to the threat of recall.

Put differently, though consumers may not fully respond to recalls, firms may nonetheless be deterred by the threatened expense for several reasons. The firm's reputation may suffer, retooling and remarketing may result in unpredictable costs, and the recall campaign itself may be expensive and time-consuming to negotiate and publicize. Thus, information about the level of recalls is susceptible to two interpretations. Rather than demonstrating administrative ineffectiveness, a stable or declining recall record may reflect the power of the recall threat to nip danger in the bud.<sup>432</sup>

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428. Schwartz and Adler suggest changes in the recall system. *See supra* note 423.

429. Schwartz and Adler ignore this crucial point.

430. Whereas tort damages are meant broadly to be compared with safety costs, recall costs are not.

431. Schwartz and Adler point out that the recall may cost more than the product liability claims. T. SCHWARTZ & R. ADLER, *supra* note 423.

432. The same point applies to data concerning the paucity of reports under the section calling for enterprise self-reporting of hazard. *See* T. SCHWARTZ & R. ADLER, *supra* note 423, at 34. The lack of reports may also indicate that the fear of effective enforcement has caused manufacturers to make products safer.

Third, torts and recall efforts sometimes work at cross purposes. Firms may be reluctant to negotiate voluntary recalls because they fear increasing their exposure to lawsuits.<sup>433</sup> Thus, eliminating tort liability may produce a greater willingness to recall what may be time bombs in the possession of consumers. On the other hand, I concede that to the extent that agencies such as the CPSC rely on the underlying fear of product liability suits in order to force negotiated recalls, settlements might become more elusive without the threat of private litigation.<sup>434</sup>

Fourth, giving consumers greater power and incentive to initiate recalls might enhance the deterrent value of this threat. These innovations require granting consumers various participation rights—such as the right to petition agencies—and/or rewards for bringing dangerous products and conditions to public attention. This, in turn, can help victims achieve a sense of satisfaction from protecting others from the harm they suffered.

*c. Priorities*

Agencies have an advantage over courts in that they can set priorities and attack problems in some sensible order. Courts encounter problems haphazardly. The CPSC, for example, announces “product hazards for priority status” and then accords such hazards special emphasis and funding. Presumably the agency thinks it can intervene effectively in these areas. In 1983, it selected 10 such hazards including chain saws, the smoldering ignition of furniture and bedding, children’s exposure to carcinogens, heating-equipment fires, smoke detectors, formaldehyde released from plywood and particle board, indoor air problems from fuel-fired appliances, and school laboratory chemicals.<sup>435</sup> Once again, citizens can play a role. Agencies can be made to publish proposed annual priorities and then to invite citizen groups to testify at open hearings.

Unlike the tort system, whose only flexibility lies in the possibility of settlement, agencies can choose from criminal sanctions, civil penalties, warnings, recalls, injunction-like remedies, negotiated solutions, and court orders. They can move by rulemaking or by individualized adjudication. They can selectively enforce regulations, putting resources where deterrence is most effective.<sup>436</sup> Torts cases plod along regardless of their

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433. *Id.* at 15-16.

434. *See id.* at 42.

435. United States Consumer Product Safety Commission, News from CPSC, 82-32.

436. For an interesting analysis of the advantages of cooperative regulatory enforcement strategies (emphasizing flexible or selective enforcement) as compared with traditional deterrence approaches, see Scholz, *Cooperation, Deterrence and the Ecology of Regulatory Enforcement*, 18 LAW & SOC’Y REV. 179 (1984). These advantages apply to centralized regulation and not to tort law.

deterrence potential. Thus, auto claims, though probably least important from a deterrence perspective, take up the most time and money.<sup>437</sup>

### 5. *Citizen Participation and Agencies Generally*

If there is indeed a need for vengeance, it is poorly served by tort law today. Perhaps agencies can serve this need in a constructive way. Citizen involvement in agency proceedings can provide an outlet for expressing anger.<sup>438</sup> It also can demonstrate official concern for a person's suffering. Citizen participation in specific cases may be especially meaningful. Thus, it may be important not only to place lay people on professional quality-assurance boards, but also to more effectively solicit complaints from ordinary people about their doctor or lawyer.

I admit that people often feel frustrated when they take their complaints to government officials. And directing more people to use this route will not solve this problem. Nonetheless, techniques already in place do show promise of increasing governmental responsiveness. Institutions like "the ombudsman" and police review boards are examples.

### 6. *Conclusion*

Society should promote safety with different instruments from those used to pay compensation. Even if cost internalization were desirable as a behavioral control device, safety agencies should employ it, not those bodies that pay benefits. To guard against agency "capture," individuals and consumer groups could have private rights of action against injurers — not for compensation, but for injunctions against clearly unreasonable

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437. Professor Howard Latin has proposed employing tort law only in those settings in which actors who are classified as high-attention problem-solvers either (1) injure low-attention actors or (2) negligently or intentionally injure other high-attention problem-solvers. See Latin, *supra* note 39, at 696-98. This reflects a "priorities" strategy—using tort where it is most promising from a deterrence perspective. It would mean the elimination of the tort remedy in some areas as well as its expansion elsewhere. His examples of where liability would lie include transportation carrier injuries of passengers regardless of fault, product injuries of consumers regardless of product defects, and injuries from ultrahazardous activities. But in lauding tort solutions over regulatory solutions, does Latin really mean to do away with the FAA, the FDA, the CPSC, and zoning ordinances? I rather doubt it. Assuming he doesn't, then he has failed to convince me that the extra social benefits (both behavioral controls and activity level changes), if any, arising from his proposed regime of liability would be worth their costs.

In addition, Latin's proposal, unless he also changed tort law's rules of damages, would exacerbate the horizontal inequality among claimants that now exists as between injured workers and tort victims.

And finally, even were Latin right that it would be socially worthwhile to target certain accident costs to certain high-attention problem-solving injurers, this could be done through a regulatory system. This system would employ accident-related charges that are divorced from the society's compensation arrangements for victims. Such a division of the behavioral control function from the compensation function is, of course, what I have proposed.

438. Citizen participation in legislative hearings, I might add, can often serve this same function.



dangerous conduct. Defendant liability for attorney fees in such cases would provide the needed grease for the smooth operation of the injunction remedy. This residual role for private litigation brings us to my final proposal.

*C. Abolition of Tort Actions for Accidental Personal Injuries*

*1. Supplanting Rather than Supplementing Tort*

Social insurance and employee-benefit arrangements should serve the compensation goal now supposedly promoted by tort law. These plans should focus broadly on the needs for income-maintenance and medical care. Once the tort victim's need for reasonable compensation is met by other systems, maintaining private rights of action involves greater social costs than benefits.<sup>439</sup> As I have argued, we should rely for behavior control on regulatory agencies, market pressures, moral inhibitions and self preservation instincts.

*2. Intentional Torts and Punitive Damages*

Elimination of tort suits for accidents plainly implies the end of personal-injury claims now sounding in negligence or strict liability. But what of intentional torts? I would oppose allowing such suits for compensatory damages. But they might be allowed for punitive damages.

There are many drawbacks to this strategy, given the way punitive damages law has developed of late.<sup>440</sup> For example, allowing such suits will create new borderline problems, pressuring courts to extend recovery to some negligent as well as intentional wrongdoing. In addition, although I realize that it is sometimes quite difficult to pinpoint individual responsibility in large organizations, I am skeptical about the value of imposing punitive damages on enterprises when the result is that shareholders and not the individual wrongdoers pay. Moreover, while tort law can punish the deliberate, white-collar wrongdoer, punitive damages won't touch many of society's worst actors—hardened criminals—because of their insolvency. Finally, pursuing punitive objectives through civil litigation involves problems of its own, including the absence of such constitutional protection as the “beyond a reasonable doubt” standard. Perhaps more importantly, our punitive damage sys-

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439. When Ison talked with New Zealander accident victims, he found no one embittered over the lost opportunity for retribution through a personal injury action. T. ISON, *supra* note 314, at 179-80.

440. See generally Ghiardi & Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 MARQ. L. REV. 1 (1981); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Owen, *Crashworthiness Litigation and Punitive Damages*, 4 J. PROD. LIAB. 221 (1981); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982); Note, *Punitive Damages in Mass-Marketed Product Litigation*, 14 LOY. L.A. L. REV. 405 (1981).

tem already has multiple policy problems. Excessive punitive damage awards, uneven application from jury to jury, and cascading penalties when there are multiple victims suggest a process out of control.<sup>441</sup>

Nonetheless, on balance, perhaps it would be wise to keep this part of tort law alive if certain conditions are met. Judges or legislatures should constrain the frequency and size of punitive damage awards. There should not be insurance against punitive damage awards. Finally, they should be reserved for egregious misconduct, including acts by corporate officials. Then, even if punitive damages did nothing for deterrence,<sup>442</sup> they might satisfy victim and society needs for retribution that the criminal justice system does not provide.

The New Zealand experience is instructive. Although the accident compensation legislation was silent on the matter, most thought that tort actions for punitive damages had been outlawed. A recent appellate decision has held to the contrary, however, reasoning that such damages are not compensatory but punitive.<sup>443</sup>

### 3. *Other Kinds of Tort Suits: Property Damage, Dignitary Injuries, Financial Loss, Contract Warranties, and Injunctions*

As Professor Ison long ago pointed out, it is possible to disallow personal-injury actions while leaving the rest of tort law intact. However, this might not be well-advised. In line with my previous comments, I would allow suits for punitive damages in the case of intentional wrongdoing to property, intentional defamation, and other intentional dignitary harms. However, property owners would use first-party insurance to protect themselves against compensatory losses. Other victims with medical expenses and provable income losses likewise would find suitable recompense through the compensation mechanisms set up for ordinary personal-injury victims.

Financial loss is a more complicated matter. Tort claims for such harm should be reevaluated in light of other parts of the commercial-law system, a task I put aside here. Contract law could continue to address consumer warranties, but no warranty would be construed to provide

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441. Professor Gary Schwartz offers some supportive questionnaire data from a survey of judges who clearly thought that jury handling of punitive damages was less sensible than is their handling of ordinary pain and suffering damages. Schwartz, *supra* note 440, at 146.

442. For Professor Gary Schwartz's perceptive comments on the failure of existing punitive damages law to conform to what one would expect were its purpose deterrence, see *id.* at 146.

443. *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97. Professor Palmer had earlier endorsed the idea that punitive damage remain available even after the abolition of actions for personal injury. G. PALMER, *supra* note 314, at 175. For a brief discussion of the New Zealand developments on punitive damages, see Hodge, *supra* note 314, at 228. For a lengthy analysis of how New Zealand wound up with punitive damages on top of its accident compensation scheme, and an endorsement of this result, see Love, *Punishment and Deterrence: A Comparative Study of Tort Liability for Punitive Damages Under No-Fault Compensation Legislation*, 16 U.C.D. L. REV. 231, 234-44 (1983).

compensation for personal injury unless this was explicitly stated. Such a warranty would become, in effect, a deliberate insurance contract.

Injunctive relief would remain available especially with respect to nuisances. Moreover, as noted earlier, injunction actions could backstop agencies where wrongdoing continues despite administrative attention to the problem. Like those who bring civil rights suits today, attorneys who litigate such cases would function as private attorneys general; and in appropriate cases, their fees would be paid by the defendant.

#### *D. Roads to Reform*

##### *1. Broad Strategy*

An aggressive approach would introduce unconditional state legislation doing away with tort law to the extent I have envisioned. Unfortunately, this bold measure would leave some victims undercompensated. States could close much of that gap through companion laws expanding employee benefits and state-run social insurance programs. However, shortcomings in the existing national Social Security system prevent states from effectively solving the compensation problem on their own. There is also a need for changes in federal agencies to promote efficient regulatory reforms on behalf of safety. Thus, so as at least to prompt debate on the future of tort law, I advocate state legislation abolishing ordinary tort actions contingent upon the adoption of the appropriate counterpart federal and state reforms I have outlined.

At the same time, I propose the introduction of federal legislation that would assure all Americans generous income protection and medical care benefits roughly comparable to what is now provided by progressive employers, including the federal government. Such legislation could expand Social Security in the ways I proposed. It could also offer states that adopt my mandatory employee-benefit proposal relief from the federal unemployment compensation tax.

Finally, federal and state agencies, through their own initiative or statutory reform, should encourage enhanced public participation in safety regulation. This encouragement should include a system of rewards for those who discover dangers and safer alternatives.

This package of changes will not be enacted soon.<sup>444</sup> But if intro-

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444. Professor Ison has written a perceptive essay on the political obstacles that confront a move away from the tort system in Canada, focusing on not only the personal injury bar and the private insurance industry, but also on organizations of the disabled and the unions. See Ison, *The Politics of Reform in Personal Injury Compensation*, 27 U. TORONTO L.J. 385 (1977). In the end he concludes that "retention of tort liability . . . in the long run . . . may not even be in the interests of the legal profession. To attempt the preservation of a system that is so utterly indefensible must surely be a negative influence on public confidence in the profession . . ." *Id.* at 402.

duced, it could provide a forum for the public, my fellow lawyers, and my fellow academics to return to the idea of doing away with tort law.

The attempt to repeal tort law would encounter huge political obstacles.<sup>445</sup> Some might think that the present national mood favors my proposals. However, advocates of “getting government off our backs” often see things differently when the role of government is the enforcement of the common law. Notwithstanding all the complaints by business, doctors, and the insurance industry, conservatives plainly won’t support my proposals in a block. Indeed, I think the only hope for repealing tort law lies in persuading enough liberals that tort law costs ordinary people far more than it benefits them.<sup>446</sup> Getting liberals to accept that proposition probably requires moving toward my goal in steps.<sup>447</sup>

## 2. *Narrower Strategy*

I will close, therefore, by proposing a series of interim state-law reforms that could facilitate a transition to a world without ordinary tort law.

### a. *Compensation*

(1) States should obligate employers to provide reasonable short-term sick-leave benefits for employees. These benefits would cover both occasional absences caused by injury or illness and the initial period of a longer disability leave. Sick leave might be earned at the rate of one or one-and-one-half days per month worked.<sup>448</sup> (2) States should enact temporary disability plans akin to those of California and New York.<sup>449</sup> These plans could have two-week (rather than one week) waiting periods, however, in view of the mandatory short-term sick-leave protection described above. They should cover about six months of disability. Firms could supplement the required minimum, and might want to do so—especially for higher salaried employees. (3) This temporary disability plan should be expanded to cover both nonwork- and work-related

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445. For comments on the political factors that contributed to the decision of Great Britain's *Pearson Report* to urge the maintenance of tort actions—even in areas where it is recommending no-fault schemes, see Ogus, Corfield & Harris, *Pearson: Principled Reform or Political Compromise*, 73 *INDUS. L. J.* 143, 152 (1978).

446. It is understandable that business would back tort law changes in order to avoid the financial uncertainty enterprises now face. But this does not mean that consumers, who pay for the tort system in the end, won't benefit from forging an alliance with business for their mutual advantage. This perspective is missing from *Consumer Reports'* recent position on product liability reform. See *Product Liability: The Consumer's Stake*, 49 *CONSUMER REP.* 336 (1984).

447. Professor Willard Pedrick predicts a slow change in tort law over the next many decades. By 2050, however, he foresees social insurance largely supplanting tort law's role in compensating for physical injuries. See Pedrick, *Does Tort Law Have a Future?*, 39 *OHIO ST. L.J.* 782, 788 (1978).

448. Progressive employers now provide similar benefits.

449. See *supra* text accompanying notes 398-99.

disabilities. Concomitantly, temporary disability benefits under workers' compensation would be eliminated. In other words, when an employee misses more than two weeks of work due to a job injury, an illness, or an accident, up to six months of income replacement would be available through the temporary disability scheme. (4) Employers who provide adequate health-insurance benefits would be relieved from providing short-term, and where possible, long-term medical benefits through workers' compensation. This would encourage employers to purchase health insurance for employees. (5) Thus far, I have removed from workers' compensation both its short-term income-replacement function and, on an elective basis, its function as selective medical insurance. I would, however, not only continue but augment its current role in long-term income replacement. Thus, workers' compensation also should cover all injuries occurring outside the work place, excepting motor vehicle accidents. Once again, employers and individuals could elect even more generous long-term disability protection. (6) To complete the circle of income protection, states should adopt no-fault auto accidents benefits similar to the New York or Michigan provisions. (7) All these benefits should be integrated with existing Social Security and Medicare benefits. To the extent feasible, these federal program benefits should be primary.

*b. Tort Law*

(1) The first six months of income loss should not be recoverable in tort. (2) The "collateral source rule" should be reversed at least with respect to health care costs and mandatory income protection benefits. This should eliminate awards for medical expenses in most tort cases. Furthermore, it would limit damages for long-term lost earnings to whatever is not already covered by Social Security and the expanded workers' compensation and auto no-fault schemes described above. (3) Awards for pain and suffering should be unavailable absent serious disability or disfigurement and limited to \$100,000 in any event. (4) Awards for punitive damages should be constrained along the lines described earlier.<sup>450</sup>

*c. Regulation*

Agency policy and behavior should change to provide a better outlet for individual frustrations and anger over dangerous conduct. They should also serve as a forum for individual ideas for enhanced public safety.

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450. See *supra* text accompanying notes 440-43.

*d. Transition*

While this interim package would not be tantamount to doing away with the tort system, it would focus tort law on the relatively few cases involving serious injury. These reforms, if enacted, would promote discussion of the further elimination of tort law and the desirability of my proposed comprehensive compensation package. That discussion would address, among other things: (1) whether we want to compensate at all for pain and suffering, and if so whether we should limit this compensation to those suffering as a result of a tort; (2) whether we want to provide 100% income protection, especially to high wage earners; (3) how to provide adequately for the needs of nonearners; and (4) whether we are finally willing to leave behavior control to agencies, economic forces, self-preservation instincts, and moral inhibitions.

## CONCLUSION

Tort law is failing—failing to promote better conduct, failing to compensate sensibly at acceptable costs, and failing to do meaningful justice to either plaintiffs or defendants.

I have argued that the key to reform is the complete uncoupling of compensation from deterrence. Benefits of tort victims could then be readdressed as part of the function of our regular social insurance and employee-benefit system. In the scheme I'd prefer, the government would radically simplify that system. With responsibility divided for lost income, medical expenses, and rehabilitation costs, employers would pay for short-term benefits using enterprise revenues. An expanded social security system, funded by payroll and income taxes, would provide long-term benefits. Deterrence would be the domain of administrative agencies concerned exclusively with safety, the market, self-protection, and private morality. The regulatory agencies would be bolstered by new citizen participation roles. Actions in tort might remain for cases of intentional wrongdoing, and private injunction remedies would still be available to stop unreasonably dangerous activities. But we would do away with the core of modern tort law.