

Ideological Flip-Flop: American Liberals Are Now the Primary Supporters of Tort Law

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This essay explores in ideological terms the transformation in who supports American tort law.¹ Traditionally structured to function to favor defendants, tort law around 1960 was a regime that conservatives defended and liberals² sought to replace or reform. Today, many on the left embrace tort law, and it is the right that is pushing for "tort reform." Along with this ideological somersault, American tort law has become much more politically prominent.

I. Tort Law Resonates with Conservative Values (while Liberal Values have an Uneasy Relationship with Tort Law)

At its core, tort law (at least in theory) comfortably resonates with conservative ideology.³ There are two basic points here.

First, in the U.S., as throughout the industrialized world, civil liability for accidental or intentional harms almost always requires proof of fault by the defendant. This means that tort law embraces the principle of personal responsibility for wrong-doing, and this is normally a core conservative value. This value is reflected, for example, in widespread conservative support for the criminal law and in the frequent desire by conservatives to impose punishment in response to misconduct. Moreover, some conservatives have emphasized that tort law serves to help weed out the "bad apples" – firms and professionals that might otherwise stain the repu-

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¹ To be clear at the outset, "tort law" means primarily the law governing personal injuries and property damage. In the U.S., this area of the law remains mostly judicially-created "common law," and although each of the 50 American states has its own tort law, their central features are the basically the same.

² We in the U.S. label "liberals" those who in Europe are frequently termed "social democrats."

³ Stephen D. Sugarman, *Personal Injury and Social Policy – Institutional and Ideological Alternatives*, in *Torts Tomorrow: A Tribute to John Fleming* (N. Mullany and A. Linden, eds.) 290 (1998).

tations of socially-responsible enterprises and professionals who work to promote everyone's well being.

By contrast, the ideology of the left is conflicted on the idea of fault. On the one hand, many on the left are reluctant to blame individuals for bad social outcomes and instead to attribute social woes to structural factors in the society. In turn, the left tends to be much less enamored with punishment as a response to social deviance (e.g., as illustrated by proposals for the decriminalization of drug use and prostitution). Yet, this rejection of individual blame tends to focus on the "have nots" in society. Others on the left – what might be termed the "populist" wing – have long been eager to blame both business and political leaders for abusing their power at the expense of the ordinary citizen. Hence, tort law resonates well with this sort of liberal populist thinking.

Note next that by saying that blameworthy conduct is to be punished, tort law simultaneously says that non-faulty conduct is (generally) not to be punished, even if it causes harm to another. This means, for example, that technological development can escape paying for the harm that it does when that harm is not readily avoidable. This result is consistent with views of many political conservatives who believe that "progress" brought about by business (and the "market") is inherently desirable.

By contrast, many on the left (especially the "Greens") have become much more skeptical about whether technological progress really is "progress" – as illustrated, for example, by the widespread opposition on the left to genetically modified crops. As a consequence, those on the left might be expected to much more quickly espouse a regime of tort liability without fault ("strict liability") as a social engineering mechanism deployed in pursuit of general social welfare values. One way to put this is that what is claimed to be "progress" should be forced to prove that it truly is progress by paying its way (i.e., by paying for the externalities it produces). Strict liability would achieve that objective more fully than does fault liability.

Second, as a system of behavior control, tort law relies upon privately-initiated litigation. Instead of public agencies or public prosecutors telling people how to behave, the threat of tort liability is meant to induce people to act reasonably without government intervention. To be sure, courts are there in reserve to deal with private disputes if a victim claims that an actor did not act properly and caused harm. But the principle underlying the system (as much elaborated by "law and economics" scholars)⁴ is that deterrence generally achieves socially desirable levels of accident prevention (safety) without regulation. This approach is highly attractive to conservatives who prefer "market" solutions and whose ideology generally favors "small" government.

Again, the left is divided on this matter. Many on the left would much prefer a system of direct governmental regulation to the indirect mechanism of tort law. Yet, the populist wing of the left is eager to play the David role in the fight with Goliath, and welcomes the spectacle of individual private heroes (lawyers in this case) battling, and sometimes defeating, the captains of industry.

⁴ Starting perhaps most importantly with Richard A Posner, *A Theory of Negligence*, 1 J. Legal Studies 29 (1972).

II. The Structure of Tort Litigation Historically Has Favored Enterprise Defendants (and Insurers of Defendants)

In practice, the typical tort claim pits an ordinary citizen against either an enterprise (a corporation or a governmental body) or an insurer who financially stands behind the defendant. This pattern traditionally has disadvantaged claimants in a number of respects.

First, the claimant must carry the burden of proof by demonstrating 1) that the defendant is at fault, 2) that the defendant's fault is that cause of the victim's loss, and 3) the extent of the loss suffered. Imposing this burden on the claimant is generally justified on the ground that tort law should not hold someone responsible unless the judicial system is convinced this is the correct outcome (and the corollary principle that defendants should not be hauled into court and then ordered to demonstrate their innocence).

Indeed, when tort cases are brought to trial, the elaborate apparatus of the legal system is there for the purpose of trying to assure that "precise justice" is achieved.⁵ Fault-finding is highly individualized to the facts of each case. In this way, the outcome of the tort mechanism becomes a public declaration of the "truth" as to who was wronged by whom (if at all).

While conservatives have traditionally been happy to embrace the twin ideas that tort law metes out "precise justice" and that defendants are deemed innocent until proved otherwise, the left is again somewhat divided on this matter. On the one hand, those on the left are quick to support the idea that the moving party must carry the burden of proof when litigation pits the government against an ordinary citizen (e.g., in criminal cases) or when powerful economic actors, like employers or landlords, seek to take away critical assets, such as someone's job or home. Nevertheless, many people on the left are rather less concerned about the niceties of proving individual fault when, as in the typical tort case, the structure of the litigation is reversed – ordinary citizens claiming compensation from either impersonal enterprises or insurance companies. Not only are these defendants economic powers rather than people, but also the financial harm arising from the mistaken attribution of fault is viewed as far less serious than are the consequences of an erroneous determination against an individual.

In any event, a problem for victims with the way tort law assigns the burden of proof is that sometimes the judicial system simply cannot be certain whether the defendant was to blame. As a result, a lack of crucial evidence can create an insurmountable hurdle that may preclude deserving victims from recovery. This is especially unfair if, as sometimes happens, the relevant evidence actually exists and is in the possession of the defendant, but is not disclosed.

⁵ See generally, Stephen D. Sugarman, *Precise Justice and Rough Justice: Scientific Causation in Civil Litigation as Compared with Administrative Compensation Plans and Mass Tort Settlements*, in *Scienza e Diritto Nel Prisma del Diritto Comparato* (G. Comandè and G. Ponzanelli eds.) 139 (2004).

Second, rules concerning the payment of legal fees can raise the hurdle to recovery even further.⁶ In most nations, the loser of a torts case is responsible for both his legal fees and the fees of the other side. As a result, in cases of uncertain outcomes, the fear of losing the lawsuit and having to bear both sides' fees can preclude some injured parties from suing who actually would have won their case had they tried. In the U.S., by contrast, a victim who loses his case normally pays the fees of neither side. The defense side pays its own lawyer, since under the American rule each side bears his own legal fees; but a losing victim in a torts case also owes nothing to his own lawyer, since personal injury lawyers in the U.S. charge fees that are contingent on winning (i.e., the fee is a share of the recovery). Nonetheless, this fee arrangement presents would-be claimants with a different problem. Simply put, the better lawyers tend to screen out weaker cases, leaving deserving victims who have less certain claims with the risk of being stuck with inexperienced or less competent representation, if any.

Third, tort defendants are typically repeat players in the litigation process, and this may give them several advantages over claimants who tend to be bringing their once-in-a-lifetime lawsuit. Not only are defendants much more experienced with the pre-trial process, the settlement-negotiation process, and the trial process itself, but also they have usually developed a network of reliable lawyers and experts to handle their cases. By comparison, victims are often quite unsophisticated in these matters and have to seek out help only after they are in the midst of suffering from the injury upon which their claim rests.

Furthermore, as parties with financial strength and frequent claims experience, defendants (or their financial backers) generally do not face a "bet the company" sort of lawsuit. As a result, the defense side can typically be "risk neutral" as to many aspects of the tort litigation process – knowing that, over time, the odds will tend to balance out the consequences of various uncertainties. By contrast, the one-time claimant is typically risk averse and, comparatively speaking, a great deal more is likely to be at stake. This means that victims are likely to be more cautious. Among other things, this means that they are likely to compromise their claim by accepting a lower settlement than a risk neutral party would accept.

The upshot is that the regime of tort liability has traditionally been satisfactory both to those who accept the conservative ideology and the big business and insurance company interests with whom they are typically politically connected.

III. Traditionally It Has Been the Left that Has Wanted to Reform the Tort System

By the 1960s, liberals in the U.S. were beginning to voice a chorus of complaints about tort law. These were of three very different sorts, however.

First, the response of many on the left was to call for the replacement of tort with alternatives, an uprising that was especially vociferous in the late 1960s as automo-

⁶ John G. Fleming, *The American Tort Process* 187 (1988).

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bile no-fault plans begin being presented to state legislatures.⁷ The primary focus of this social-engineering oriented wing of tort reformers was on the failure of tort law to provide compensation to all of the accident victims who need it.

They pointed out that, by its own terms, tort law's fault system does not well serve the compensation needs of 1) those who cannot prove the other side to be at fault even if they actually are, 2) victims injured by those who are judgment proof, 3) people who are victims of no one's fault, as well as 4) those who the tort system deems to be at fault for their own injury. From a compassionate perspective, however, regardless of the explanation for the injury, a victim still needs health care services and sufficient income replacement to keep bread on the table, a roof over his and his family's head, and so on.

Once victim compensation became some critics' most important goal, it seemed only natural that many on the left would favor the adoption of a separate mechanism – a compensation plan – to deal squarely with victim needs. The historic precedent for this was the successful push for industrial injury compensation plans (called workers' compensation in the U.S.) in the early years of the 20th century. In the U.S., these plans are generally a complete substitute for tort recovery – at least with respect to claims against the victim's employer. As such, they represent a clear commitment to deal with work injuries through collectively-provided social insurance instead of via the hit-and-miss process of individual litigation. And even though industrial injury victims in many other countries may still sue their employer under tort law, those victims also turn first and primarily to the social insurance mechanism to deal with their compensation needs.

Today, this progressive strategy is well-reflected, for example, in Quebec's auto no-plan, adopted in 1977, which has since spread to other Canadian provinces.⁸ Under the Quebec scheme, auto accident victims no longer make tort claims. Instead they receive compensation from a specialized governmental agency, which collects auto insurance premiums from all motorists and promptly pays out benefits to victims regardless of fault. In the last third of 20th century, scholars in common law nations proposed additional compensation plans of this same general sort that would deal with more classes of accidents, like airplane crashes, medical accidents, and drug side-effects.⁹ Within the U.S., Jeffrey O'Connell has been the most persistent and innovative advocate of no-fault substitutes for tort.¹⁰

Moreover, other scholars developed even broader schemes to replace much more of tort law with administrative compensation plans. In the U.S., for example, both

⁷ For a very early call, see Jeremiah Smith, *Sequel to Workmen's Compensation*, 27 *Harv. L. Rev.* 235 (1913).

⁸ See generally, Stephen D. Sugarman, *Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow*, (1998) *Les Cahiers de Droit* 109.

⁹ See, e.g., Stephen D. Sugarman, *Right and Wrong Ways of Doing Away with Commercial Air Crash Litigation*, 52 *J. Air L. & Com.* 681 (1987); John G. Fleming, *Drug Injury Compensation Plans*, 30 *Am. J. Comp. L.* 297 (1982); and Clark Havighurst, "Medical Adversity Insurance" – Has Its Time Come?, 1975 *Duke L. J.* 1233.

¹⁰ See, e.g., Jeffrey O'Connell, *The Injury Industry and the Remedy of No-Fault Insurance* (1971); Jeffrey O'Connell, *Ending Insult to Injury: No-Fault Insurance for Products and Services* (1975); Jeffrey O'Connell, *The Lawsuit Lottery: Only the Lawyers Win* (1980); and Jeffrey O'Connell, *The Blame Game: Injuries, Insurance and Injustice* (with Kelly) (1986).

Marc Franklin¹¹ and later Richard Pierce¹² developed sweeping accident compensation schemes of a sort also proposed by Canadian scholar Terrence Ison for British Commonwealth nations.¹³ A group at England's Oxford University, headed by Donald Harris, called for an even wider plan that would, for example, cover those with disabilities caused, not only by accidents, but also by illness and birth defects.¹⁴ Twenty years ago, I proposed an even more radical plan.¹⁵

And, New Zealand actually moved in this more sweeping direction. In the early 1970s a broad accident compensation scheme was adopted there as a nearly complete substitute for tort. Much amended over the years (especially at times when more conservative governments have been in power), the core features of the plan remain in place.¹⁶

Second, during this same period, a different tort reform group on the left sought, not to replace tort law, but rather to substitute strict liability for fault liability. These reformers concluded that the compensation goal that so many on the left held dear could actually be attained (or at least much more fully realized) through tort law itself. Simply put, for them, the objective was to dramatically widen tort law's reach, and "enterprise liability" became their rallying cry. Berkeley's Albert Ehrenzweig and Yale's duo of Fleming James and Guido Calabresi are now widely viewed as early exemplars of this perspective.¹⁷

Third, still other reformers were content with the basic idea of fault-based tort law. To them, the main problem was that the formal doctrine then in place provided too many instances of legal protection for defendants who were actually at fault. The most important academic scholar with this view was Berkeley's Dean William Prosser, the author of the most important American torts treatise of the twentieth century and the Reporter for the American Law Institute's Restatement of Torts (Second) during the 1950s and 1960s. Prosser was hardly a left winger. Yet, most of the important doctrinal changes he championed (and frequently achieved) were decidedly pro-victim.

Prosser and other similarly-minded tort law critics objected to decisions of courts, some rooted in the 19th century, that had used fears of crushing liability, or

¹¹ Marc Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 774 (1967).

¹² Richard Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 Vand. L. Rev. 1281 (1980).

¹³ Terrence Ison, *The Forensic Lottery* (1967).

¹⁴ Donald Harris, et al, *Compensation and Support for Illness and Injury* (1984).

¹⁵ Stephen D. Sugarman, *Doing Away With Personal Injury Law* (1989). See also, Patrick S. Atiyah, *Accidents, Compensation and the Law* (3d ed. 1980) and Jane Stapleton, *Disease and the Compensation Debate* (1986).

¹⁶ For the proposal leading to the New Zealand plan, see Woodhouse Report, *Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand* (1967). More generally, see Geoffrey Palmer, *Compensation for Incapacity* (1979) and Geoffrey Palmer, *The Design of Compensation Systems: Tort Principles Rule, OK?*, 29 Val. U. L. Rev. 1115 (1995).

¹⁷ See, e.g., Albert Ehrenzweig, *Negligence Without Fault*, 54 Cal. L. Rev. 1422 (1966); Fleming James, Jr., *Some Reflections on the Bases of Strict Liability*, 18 Louisiana L. Rev. 293 (1958) and Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L. J. 549 (1948); and Guido Calabresi, *The Costs of Accidents* (1970). See also, Virginia E. Nolan and Edmund Ursin, *Understanding Enterprise Liability* (1995).

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a flood of litigation, or the squelching of socially valuable activities as arguments for limiting the scope of tort law's reach. These critics made specific doctrinal objections, just to illustrate a few, to limited duties owed 1) to those on the premises of others, 2) by charities to their victims, and 3) to those who were emotionally harmed by the defendant's fault. An additional doctrinal target was the common law rule that the victim's fault, regardless of how modest in comparison to the defendant's, normally altogether barred recovery. Other objections emphasized procedural roadblocks to victim recovery. Examples in this category included 1) having to find a home town doctor to testify in a medical malpractice case, 2) having to sue defendants endlessly (i.e., one victim at a time) for what were essentially identical harms caused by the same product or activity, and 3) being unable to access damning evidence of fault that defendants hid and refused to divulge.

Note well that each of these three groups of tort reformers was led by leaders from academia. By contrast, certainly in the early 1960s, most of the actual lawyers who represented plaintiffs in torts cases had little by way of an important voice in the call for tort reform. (If asked, they most likely would have sided with the Prosser view of things.) Indeed, many in academia looked down upon these lawyers as "ambulance chasers," and within the legal profession they generally were at or near the bottom in terms of prestige.

IV. Changes in Lawyering and the Law Since 1960 Have Eroded Many of the Defense Side's Advantages in Tort Litigation

In trying to understand why many of those in the U.S. who are on the political left currently favor a robust tort law and are cool to alternatives, it should first be emphasized that a many changes have occurred over the past 40–50 years that have decidedly cut into the advantages the defense side historically has had in the operation of the tort system.¹⁸

First, plaintiff personal injury lawyers in America as a group appear to be more talented today than in the past, or, at least, there are more very effective lawyers doing this sort of work. Although it is difficult to trace the direction of causation here, several points can be made.

One, the status of the personal injury lawyer is now much higher than it was in days in which this part of the bar was routinely stigmatized as "ambulance chasers." Part of the status no doubt comes from the role of these lawyers in winning huge awards in high profile cases.¹⁹ This, of course, has meant more earnings for this class of lawyers, and presumably that, in turn, attracts more able lawyers to this sort of work. Also, while there continues to be a great deal of complaining about the tactics and antics of personal injury lawyers, at the same time they are, at least on some important occasions, grouped with other "public interest" lawyers who are seen to

¹⁸ See generally, Stephen D. Sugarman, A Century of Change in Personal Injury Law, 88 Cal. L. Rev. 2403 (2000).

¹⁹ John A. Jenkins, *The Litigators: Inside the Powerful World of America's High-Stakes Trial Lawyers* (1989).

help the ordinary citizen in exposing the wrongdoing of powerful interests in the society. Indeed, plaintiff personal injury lawyers often seek to portray themselves as analogous to civil rights lawyers who led the battle for the rights of racial minorities and women; and, of late, they have, at least in some places, re-labeled themselves as "consumer" attorneys instead of "trial lawyers." The enhanced reputation attached to the nature of their work probably serves to lure additional talent to this line of practice.

Two, along with greater numbers of plaintiff personal injury lawyers and the diversity of cases they bring (e.g., medical malpractice, product injuries, transportation injuries, injuries blamed on property owners and the like) has come increased specialization. Individual attorneys are able to focus their practice (at least for a while) in a fairly narrow way (e.g., airplane crash cases, machine tool injury cases, asbestos injury cases, auto design defect cases, pharmaceutical drug cases, serious birth injury cases, etc.). This specialization also brings with it both deeper experience and greater expertise.

Three, because (as already noted) plaintiff lawyers in the U.S. take a cases on a contingency fee basis, and because the successful lawyers in this field will typically have a substantial portfolio of broadly similar cases going at once, the defense side advantages of both experience and risk neutrality are by now substantially undermined. Once the defense side realizes that the lawyer for the victim is quite prepared to see the case through trial and take a chance of receiving no fee, the bargaining power of the defense in settlement negotiations is reduced. Moreover, although plaintiff personal injury lawyers continue largely to practice as individuals or with small firms, in very large cases it is now not uncommon to affiliate on a case-by-case basis with lawyers in other firms — lawyers who provide additional expertise, legwork, and perhaps the crucial financing necessary to keep the case going. This too makes for a more equal legal battle between victim and injurer.

Four, it is no longer so difficult for plaintiff side lawyers to gain access to expert witnesses who will testify on their side of the case. Gone are the days in which no physician could be found who would be willing to testify against a fellow doctor. This change is the result of many factors: more doctors and urbanization means that local doctors are less likely to be personal friends (golfing partners, for example); as malpractice litigation increases, more doctors realize that they can make a career of testifying in these sorts of cases; the nationalization of medical standards, combined with subtle changes in the legal rules governing malpractice cases, no longer require a plaintiff witness to come from the same town as the defendant doctor; and university-based doctors in particular seem increasingly willing to condemn very bad doctoring when that is what they believed occurred. Some of these points apply to other accident fields as well, where, for example, accident reconstruction experts, engineers, and the like are now eager to display their sophisticated knowledge (for a fee, of course) in furtherance of the plaintiff side of the case.

Five, class actions, although still atypical, are now possible in some torts cases. Alternatively, case aggregation (where many claims are simultaneously pursued before the same judge) is now often possible where a large number of victims are similarly situated. Both of these procedural developments allow some cases to be presented that simply would not have been brought before. In addition, where there are huge numbers of victims of a single event or a single product or course of

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action, the presentation of a package of claims all at once sharply raises the stakes for the defense side. Nowadays defendants may indeed confront a "bet the company" problem if they choose to litigate to the end rather than settling, regardless of what the defense believes to be the genuine merits of the case. This too shifts the balance in the structure of the tort system away from the defense side.

Second, in addition, both courts and legislatures have helped tort plaintiffs over the years through common law and statutory developments on various fronts. These include changes in substantive rules of tort law, rules of evidence, and rules of procedure that, in one way or the other, reduce the litigation burden the plaintiff faces. For example, some rules concerning the proof of "causation" have been relaxed when it has struck the courts as highly unfair to force the victim to prove something when the relevant evidence is very likely to be in the hands of the defense side. As another example, old rules that sharply restricted duties of injurers have been eroded and replaced with softer principles that require an inquiry into the reasonableness of the defendant's conduct in the specific case. Further, the rules of "discovery" that now govern civil litigation make it far more difficult for defendants to hide evidence they possess that is harmful to their case. In short, most of Prosser's agenda has been achieved and more.

Besides, and almost unique to the U.S., torts cases continue to be tried to juries. This wild card means that the defense side can never be sure that what it considers to be a clear winner of a case will, in the end, be so viewed by a group of local citizens who have been selected to serve on the jury, in significant respects, owing to their considerable ignorance of the issues at stake. And while it appears from research findings that juries usually decide cases the same way judges would have decided them had the judge tried the case without a jury, there is the off-chance of a very unexpected outcome, and especially of an exceptionally high monetary award. The latter seems to be especially true now that high level awards are frequently publicized in the media so that jurors are more likely to be aware of huge verdicts that other juries gave. This gives the talented plaintiff lawyer a weapon that can be effectively employed either to extract a more generous settlement or, in the end, to bring home a gigantic victory.

V. Enthusiasm on the Left for Alternative Compensation Plans has Largely Evaporated

Despite what many might see as the long-term success of the New Zealand approach to accident compensation, other developed countries have simply not followed this example. Early on, Australia came close, but since then no wealthy nation has even seriously considered the New Zealand solution. Why is that? After all, even though many industrialized nations have had some periods in which their governments have been in the hands of conservative parties, most have had years (often many years) of more progressive governments.

In trying to explain New Zealand's exceptional status, it is essential to recognize the social safety net that has been constructed in most of the developed world and that exists altogether apart from tort law. Throughout Western Europe for example, there are well-entrenched schemes of national health insurance and social secu-

rity income replacement covering death and both long and short term disability, to say nothing of a myriad of other social support mechanisms for those in need of assistance. In these countries, despite recent cutbacks of the social safety net in some of them, the core compensation goal that so strongly prompted advocates of industrial injury compensation plans a hundred years ago is largely being met – separate from either tort or any specific accident compensation scheme.

In the U.S. the picture is much more complex because there is no national health care plan and the thinner social safety net for income replacement has more holes in it. Nonetheless, even in the U.S., in practice, a vast share of citizens has reasonably good health insurance, assured death benefits, and at least some income protection for complete long-term disability. Moreover, a substantial share of the population has reasonable short-term disability income protection and more generous long-term disability coverage.²⁰

Hence, in important respects, so far as the compensation goal is concerned, the adoption of a New Zealand-like scheme would be largely redundant for a significant share of victims – as it indeed is in New Zealand itself. The same can be said for the Quebec auto no-fault plan. And when this fact is put together with the reality that in recent years many industrialized countries have been trimming, rather than expanding, their social welfare states, the failure of others to copy New Zealand may at first seem readily explained.

Yet, it remains the case that plans like those in New Zealand and Quebec fill in some important holes in the compensation web that otherwise would exist. Moreover, compensation plan advocates have pointed to additional benefits that such plans can bring.

One, it seems clear that auto insurance is markedly less expensive in Quebec under its no-fault plan than it would be under the tort system – even though more victims are covered; and in many cases their coverage is now superior to what it had been under tort law.²¹ This is achieved by a combination of savings on legal and other litigation-related expenses, the elimination of commissions, advertising and other costs associated with a private insurance regime, and the elimination of pain and suffering awards for those with minor temporary injuries. In sum, a wholly different ground on which some of those on the left might favor alternatives to tort is that such plans leave ordinary consumers with more money in their pockets to spend on something else they need or want.

Two, some on the left have long argued that safety is better promoted through mechanisms other than tort. For certain compensation plan advocates, this is a matter of the funding of the compensation mechanisms themselves. If, rather than paying for victim compensation through general or broad-based taxes, the compensation plan funding is targeted to those enterprises that cause claims, then, it is argued, the desire to save money will prompt firms to make sensible investments in accident prevention. This, of course, is the same “law and economics” argument that supports the claim that tort law efficiently promotes safety. Yet, some compen-

²⁰ Reporters' Study, *Enterprise Responsibility for Personal Injury* Volume 1 (American Law Institute 1991) and Stephen D. Sugarman, *A Restatement of Torts*, 44 *Stan. L. Rev.* 1163 (1992).

²¹ Daniel Gardner, *Comparer L'Incomparable: Les Indemnités Pour Préjudice Corporel en Droit Commun et dans la Loi sur L'assurance Automobile*, (1998) *Les Cahiers de Droit* 229.

sation plan devotees have argued that because the operation of those plans is more predictable, the safety-promoting signal they give is clearer and more effective than the one sent by the threat of tort liability.

To be sure, compensation plan advocates on the left appear to be divided over whether a society's accident prevention strategy should importantly rest on financial incentives created by plan funding rules. Skeptics would rather place safety policy more squarely in the hands of government agencies whose prime mission is accident prevention.

In all events, the fact remains that the adoption of a compensation plan as an alternative to tort has remained a relatively rare phenomenon throughout the economically developed world.

Indeed, it is important to notice that, in recent decades in the U.S., specialized plans of this sort that have actually come into effect are the result of pressure from business interests. For example, America's childhood vaccine compensation program²² was enacted in order to assure that drug companies would continue to make vital vaccines. The Florida and Virginia plans to compensate severely neurologically injured newborns were created to prevent obstetricians from curtailing their medical practice in those states.²³ Even the national compensation plan adopted in response to the World Trade Center and related terrorism of September 11, 2001 was motivated in significant respects by a desire to limit the potential legal exposure of the U.S. airlines whose planes were used by the terrorists.²⁴ This is not to say that those on the left opposed these schemes, but rather to emphasize that their adoption was not part of the agenda of the left.

In the end, for the U.S., perhaps the most important explanation for the near evaporation of support for alternative compensation plans by those on the left, is that the loudest voices speaking out in favor of tort law now come, not from academia, but from victims' rights advocates – the plaintiffs' lawyers and their allies.

VI. The Previously Political Roles Have Been Reversed with Prominent American Liberals Now Tort Law's Biggest Boosters

As already explained, around 1960, liberals in the U.S. were not generally enthused about the state of tort law, and many reformers on the left began to promote compensation plan alternatives.

To be sure, as also noted above, others on the left toyed with the idea of expanding tort's doctrinal and operational reach so as to create an accident compensation scheme through tort the tort system itself. After all, great strides in this direction

²² The National Childhood Vaccine Injury Act of 1986.

²³ Birth Related Neurological Injury Compensation Plan, Fla. Stat. Ann. 766.301 (West1998); Birth Related Neurological Injury Compensation Act (Injured Infant Act) Va. Code Ann 38.2-5000 (Supp. 1987).

²⁴ See generally, Robert L. Rabin, The Quest for Fairness in Compensating Victims of September 11, 49 Cleveland State L. Rev. 573 (2001) and Robert L. Rabin, the September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?, 53 DePaul L. Rev. 769 (2003).

could be achieved through a combination of the substitution of strict liability for fault-based liability, the complete elimination of the defense of victim fault, and the assurance that those likely to cause injuries are adequately insured so as not to be judgment proof. Yet, none of those changes has been achieved.

Nevertheless, in the U.S. today those on left are the ones who are the main supporters of the fault-based tort system – calling it a crucial weapon in support of progressive causes.

In some respects, it is hardly surprising that victims (and their lawyers) today are more satisfied with tort law as compared with the past. As noted above, much of the structural advantage that the defense side previously had has been neutralized, and common law judges and legislatures have liberalized substantive tort doctrine itself. Moreover, widely publicized reports of jury verdicts have made it well known that personal injury lawyers increasingly win very large verdicts for their clients. For example, earlier on, it was a select few lawyers who had won \$1 million or more in an individual case. Nowadays, such awards are common. In 1961, the largest reported award for pain and suffering in a California personal injury case was \$134,000.²⁵ Even if that would come to more than \$600,000 in today's money, these days individual awards of more than \$1 million for pain and suffering are so frequent that they may well not even make the newspaper.

Perhaps most importantly, by defending fault-based tort law, today's leading voices from the left embrace the same values that seem naturally congenial to the right. Indeed, these liberal supporters today seem uninterested in converting tort law itself into an efficient victim compensation machine. They are not generally pushing to turn tort law from a fault system into a strict liability system. To the contrary, from the viewpoint of plaintiff-side personal injury lawyers, this is because, as a litigation strategy, they want to be able to allege and prove fault anyway as a way of achieving larger verdicts.

Basically, the business community is portrayed as all-too-often behaving badly – regularly cutting corners by sacrificing safety in order to increase profits. Rather than seeing the problem as one of a few “bad apples,” this perspective views business misconduct as rampant. Tort law, then, is depicted as *the* key barricade that prevents enterprises from simply rolling over consumers and workers on behalf of their owners. While this critique of business as being socially irresponsible was also voiced in the 1960s, it has, in more recent decades, become a mantra of the left.

Moreover, the private litigation feature of tort law is now more widely embraced by liberals. Here the argument is that government regulators – once seen as the solution to business misconduct – are too overworked, too lazy, or too easily captured by those they are meant to regulate. This reflects a general disenchantment by many on the left with “big government.” This does not mean that American liberals oppose government safety regulation, but rather that many are now unwilling to rely on government regulation to the exclusion of private litigation.

Joining with left wing populists, these liberals argue that it is crucial for independent outsider “private attorney general” sorts of public citizens (i.e., the plaintiff's lawyer) to be able to wield power against enterprises so as to expose, punish

²⁵ *Seffert v. Los Angeles Transit Lines*, 56 Cal.2d 498 (1961).

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and, one hopes, deter unreasonably dangerous activities that government is failing to control.

Liberal supporters of U.S. tort law also now praise it as providing the kind of moral satisfaction that ordinary people desperately need when victimized by powerful interests. The recapture of one's dignity is said to be achieved in the quintessentially American way of, not merely winning the litigation, but winning a lot of money.

It bears re-emphasizing that most of the important voices from the left that are raised in the U.S. today on behalf of tort law are not those of academics. Rather they are the voices of personal injury lawyers themselves, or of organizations they sponsor or run. These personal injury lawyers have a huge amount at stake, both economically and in terms of self-identity. Moreover, they are now well organized, and they now have lots more money to devote to their cause – money that, ironically, comes directly from the pockets of those they rail against. And they use their money strategically – seeking, among other things, to win the support of politicians (both legislators and judges) to whose election and re-election campaigns they make generous donations.

One special advantage that U.S. plaintiff personal injury lawyers have had for some time is the unreservedly whole-hearted endorsement of tort law by Ralph Nader – America's leading consumer advocate.²⁶ Although Nader's reputation in recent years is perhaps altered (and in some progressive quarters it is diminished) because of his two quixotic campaigns for the Presidency, nonetheless he continues to be viewed by many as an unselfish voice for consumers and for the public at large. And when he echoes what the personal injury lawyers are saying, this provides considerable weight for their claim that their position is not simply one of greed.

Especially because of Nader's voice, there seems lost in the U.S. today voices of consumer advocates on the left who continue to find tort 1) wasteful because of its enormous administrative costs (most importantly, legal fees), 2) lottery-like in its determination of who wins cases and the amount of their victory, 3) largely ineffectual in promoting safer conduct, 4) structurally inadequate to compensate needy victims, and so on.²⁷

Yet, even those consumer groups not under the personal sway of Nader are generally defenders of tort law these days. Perhaps one explanation is that their support has tended to come in the context of efforts by the other side simply to do away with victim rights without providing clear benefits to anyone other than shareholders and insurers.

²⁶ See generally, Stephen D. Sugarman, *Nader's Failures? The Struggle for Auto Safety*, 80 Cal. L. Rev. 289 (1992).

²⁷ An exception is Professor Jeffrey O'Connell, who has relentlessly carried on as America's leading scholar-advocate for replacing various parts of tort law with no-fault compensation schemes.

VII. In turn, Now it is Conservatives in the U.S. Who Complain About Tort Law

For the past two decades, defendants and their ideologically conservative allies have mounted a well-funded attack on U.S. tort law. Much of their legislative reform effort has been cloaked in anecdotes. Real or imagined cases are portrayed as having preposterous outcomes. This strategy is at the heart of the campaign to convince both the public and policy-makers that U.S. tort law is wildly reeling out of control.

When it comes to statutory specifics, conservatives have difficulty mounting a wholesale attack on tort law because of its continued formal reflection of values that are normally congenial to conservatives. This has forced American conservatives to object to tactics, procedures, uncertainties, "bet the company" risks, inconsistencies in case outcomes, etc. that they say characterize the tort system. This is not an objection so much to tort law on the books, but rather to what they claim is tort law in action (i.e., in practice). Put differently, they claim to have lost faith in the idea that tort law actually provides "precise" justice. Not surprisingly, then, they say they are for "tort reform" but not its replacement.

Put generally, conservative political entrepreneurs simultaneously seek both to reduce and stabilize the exposure faced by their business and insurer allies, while remaining committed to the basic idea of private law as society's core mechanism for accident regulation and victim compensation.

To be sure, one can point to a few examples of where political conservatives in the U.S. have sought to restrict the substantive reach of tort doctrine around the edges. Yet, their main efforts have been to reformulate the law of damages from that which common law courts have evolved over the years. A central target is the open-ended award by juries of pain and suffering damages (i.e., general damages for non-economic loss). Instead, defense interests have tried to win legislative limits on recovery (i.e., financial maxima such as \$250,000 per victim). Instead of having the tort system ignore other sources of compensation a victim might have as "collateral" (e.g., social or private insurance), defendant interests have lobbied to reverse that rule. Instead of holding multiple tortfeasors each fully liable for the entire amount of the damages they together have caused – with the risk of absent or insolvent defendants falling on the defense side – conservatives have sought statutory change that imposes liability on a defendant enterprise only to the extent of its share of the fault in bringing about the loss. And so on.²⁸

Over the past twenty years, punitive damages have also been seen to loom as a serious threat over the heads of defendant firms whose employees have misbehaved. In fact, punitive damages are awarded only in a small minority of cases, and, as a matter of legal doctrine, they are supposed to be imposed only for the worst sort of wrongdoing. Moreover, American jury verdicts granting punitive damages are often reduced or eliminated by the trial judge or by courts on appeal. Furthermore, the U.S. Supreme Court has now intervened into this controversy, concluding that it would normally be unconstitutional for punitive damages to be awarded in an

²⁸ See generally the web site of the American Tort Reform Association, at www.atra.org.

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amount that is ten or more times the amount of compensatory damages in the case.²⁹

Nonetheless, the risk of suffering the economic and public relations pain of large punitive awards in torts cases has embittered many who would have been defenders of the tort system of the past. They allege that the actual award of punitive damages is lottery-like and irrational in amount, and that frequently the risk of punitive damages is large enough to force defendants to settle cases for far more than they otherwise would be worth. This concern has caused defense interests to seek statutory reform of the law of punitive damages, at a minimum by tightening the criteria for their award and reining in the amount that can be awarded and, where possible, by eliminating punitive damages entirely.

Broadly speaking, the business community and its political friends long for the tort law of circa 1960. But the actual legislative fight over tort reform is carried out over the subtle details, as defense interests seek to roll back victims' rights in very specific ways that are aimed at reducing both the frequency of claims and the level of awards, while holding on to the basic norm of fault-based liability.

VII. As a Result, American Tort Law is Now a Highly Contentious and Politicized Issue

In the early 1960s, when Dean Prosser was completing the most important sections of the Restatement of Torts (Second), American tort law was the most traditional of common law subjects. Putting aside the academic social engineering visionaries, it seemed as if both claimants and defendants, as well as the actual lawyers for both sides, broadly shared the view that if tort law was going to change, it would do so largely through the opinions of common law judges. As if by implied agreement, neither side in actual litigation was to seek help from the legislative process.

During most of the 1960s, then, such "tort reform" as was achieved (as already discussed) meant pro-plaintiff doctrinal evolution brought about by common law judges. Often in response to Prosser's suggestions, many state courts did indeed liberalize many of tort law's traditionally restrictive rules, thereby significantly expanding victims' legal rights – albeit while retaining the fault principle for nearly all of tort law's coverage (defectively manufactured products being the main exception to which strict liability attached, starting in the mid-1960s).

But soon, most state legislatures stepped squarely into tort law's realm. At first, this seemed to be the result of coalition politics. For example, the most important initial wave of reform, starting in the late 1960s and spilling over into the 1970s, was the elimination of the old common law rule that victim fault (contributory negligence) was a complete bar to recovery. While this seemed to be a pro-victim change, it should be emphasized that the adoption of these statutory changes was often as much or more the product of defendant-side efforts as it was victim-side initiatives. Indeed, the comparative fault laws that were legislatively adopted often continued to bar recovery to victims who were half or more a fault. This is to be

²⁹ State Farm Mutual Automobile Insurance Co. v. Campbell, 123 S. Ct. 1513 (2003).

contrasted with the more pro-plaintiff rule adopted by common law judges who replaced the complete bar rule with a more pure form of comparative fault that provided victims with some compensation even if they were primarily at fault in causing their harm. Moreover, it seems that many auto insurers at the time saw a relaxation of the contributory negligence complete bar rule as a strategy for preventing the adoption of auto no-fault laws that those insurers then opposed.

In the late 1960s and 1970s, and originally at the initiative of liberal academic reformers, a number of American state legislatures began adopting auto no-fault schemes – notwithstanding the opposition of some insurers, just noted, whose strategy of blocking auto no-fault with the embrace of comparative negligence thereby failed. As noted earlier, liberal advocates of auto no-fault tended to see themselves as inheritors of the workers' compensation tradition. Yet, on the ground, it took other insurers who favored auto no-fault joining with those academics to produce the political might necessary to achieve these changes. Furthermore, opponents of auto no-fault were not only other insurers, but also plaintiff lawyers. The latter did not want to lose business, especially the large cases. In the end, and reflecting the growing political muscle of lawyers who handled major injury cases, of the approximately twenty states that adopted auto no-fault plans, only two or three enacted schemes that substantially replaced tort with a compensation plan for auto injuries, and none acted as Quebec did to adopt a complete substitution.

Before long, however, cross-party and ideologically mixed political coalitions appeared to fade. As the voices on the left became more and more the voices of the plaintiff lawyers, and the voices on the right became more and more embittered with how "their" system was functioning, the battles over tort law became more strident and politically more partisan.

For example, in California in 1986, conservative interests successfully campaigned to have the voters recall from office Chief Justice Rose Bird and two other left-leaning members of the California Supreme Court. Although the public campaign against these three was waged on the ground that they were "soft on crime" (especially with respect to the death penalty), it is widely believed that defense interests in torts cases provided much of the money for the recall effort, hoping to have these judges replaced with those who would not be so quick to move the common law in a pro-plaintiff manner. And, they were successful. In the nearly twenty years since the ouster of Chief Justice Bird and her two colleagues, the California Supreme Court has become much more favorable towards defendants in its decisions than it had been in the prior two decades.³⁰

Furthermore in California, the defense side took to the legislative initiative route as well. Hiring specialized firms to solicit voter signatures, business and insurance interests were able to present a number of propositions directly to the voters, and they were twice successful. Both of these popularly adopted laws restrict the recov-

³⁰ Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts* 49 DePaul L. Rev. 455 (1999).

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ery of pain and suffering awards in certain special cases – where there are multiple defendants³¹ and where the plaintiff is an uninsured motorist or a drunk driver.³²

Waves of specialized defense interests also went directly to the California legislature for relief from tort law, and many were successful – including physicians, public utilities and other property owners, tobacco and gun and alcohol manufacturers, and so on. Many of these legal changes overturned specific pro-plaintiff decisions of the California Supreme Court, or else precluded the Court from moving in a direction that defendant interests feared the Court was going.

This partisan fight over tort law was by no means restricted to California. As already described above, throughout the U.S., the defense side has sought legislative protection especially with respect to the law of damages. And it has achieved at least some defense-oriented reform in most states.³³ “Tort reform” is now understood primarily to be legislative, not judicial, reform; and the direction of the reform is decidedly now pro-defendant, not pro-plaintiff. In short, trial lawyers on the victim side are now the ones who are most eager for tort law to remain as much a common law system as possible, with no further intrusion by the legislative process.

Where they are outgunned in the legislative process, plaintiff lawyers often turn to the forum they know best – the courts. In several states they have gone all the way to state supreme courts seeking to have many of the defense-oriented tort reform measures invalidated as incompatible with the state constitution. These lawsuits generally charge that the statutes improperly invade the authority of the jury and/or the judges.³⁴ And, in several states this legal attack has succeeded, especially, it seems, when former plaintiff lawyers have been in positions of prominence on the state high court.

That, in turn, has made the selection and election of state supreme court justices itself a much more politically contested matter. For example, in states where judges are routinely elected by the public (Alabama, for instance), huge sums are spent by both sides of the personal injury law divide trying to put their favored candidate on the bench.

The bottom line is that, in America, tort law is no longer something of a legal and political backwater that is shaped primarily by specialized experts from academia and both sides of the bar, whose disputes were almost always taken only to state court judges for resolution. Now, the last several U.S. Presidents have taken a stand on tort law, the U.S. Supreme Court has joined the fray, defense interests regularly pressure the U.S. Congress to adopt nation-wide changes (a few of which have so far been successful around the edges of the tort system), and at the state level charges and counter-charges about tort law are regularly in the news, and leg-

³¹ Proposition 51, adopted in 1986.

³² Proposition 213, adopted in 1996. Stephen D. Sugarman, Put a Limit on Uninsured Motorists' Right to Sue, *Sacramento Bee*, April 26, 1995; see generally Stephen D. Sugarman, *The Uninsured Motorist Puzzle*, (1998) Crossroads 1.

³³ Stephen D. Sugarman, United States Tort Reform Wars, 25 *UNSW L. J.* 849 (2002).

³⁴ See e.g., *Sofie v. Fibreboard Corp.* 771 P2d 711 (Wash. 1989), *Brannigan v. Usitalo*, 587 A2d 1232 (NH 1991), *Best v. Taylor Machine Works*, 689 NE2d 1057 (Ill. 1997), and *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 715 NE2d 1062 (Ohio 1999).

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islative reform proposals are regularly in play. All in all, American tort law has become a highly politically partisan matter.

Stepping back and comparing things today with the way they were around 1960, the most dramatic change is that the main warriors defending tort law now come from those on the left who support Democratic politicians; and it is the right and their Republican party allies who are squealing about the operation of a system whose formal principles continue to resonate with their conservative values.